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Presidential Documents

Title 3—

The President

Proclamation 8606 of November 23, 2010

Thanksgiving Day, 2010

By the President of the United States of America

A Proclamation

A beloved American tradition, Thanksgiving Day offers us the opportunity to focus our thoughts on the grace that has been extended to our people and our country. This spirit brought together the newly arrived Pilgrims and the Wampanoag tribe—who had been living and thriving around Plymouth, Massachusetts for thousands of years—in an autumn harvest feast centuries ago. This Thanksgiving Day, we reflect on the compassion and contributions of Native Americans, whose skill in agriculture helped the early colonists survive, and whose rich culture continues to add to our Nation's heritage. We also pause our normal pursuits on this day and join in a spirit of fellowship and gratitude for the year's bounties and blessings.

Thanksgiving Day is a time each year, dating back to our founding, when we lay aside the troubles and disagreements of the day and bow our heads in humble recognition of the providence bestowed upon our Nation. Amidst the uncertainty of a fledgling experiment in democracy, President George Washington declared the first Thanksgiving in America, recounting the blessings of tranquility, union, and plenty that shined upon our young country. In the dark days of the Civil War when the fate of our Union was in doubt, President Abraham Lincoln proclaimed a Thanksgiving Day, calling for "the Almighty hand" to heal and restore our Nation.

In confronting the challenges of our day, we must draw strength from the resolve of previous generations who faced their own struggles and take comfort in knowing a brighter day has always dawned on our great land. As we stand at the close of one year and look to the promise of the next, we lift up our hearts in gratitude to God for our many blessings, for one another, and for our Nation. This Thanksgiving Day, we remember that the freedoms and security we enjoy as Americans are protected by the brave men and women of the United States Armed Forces. These patriots are willing to lay down their lives in our defense, and they and their families deserve our profound gratitude for their service and sacrifice.

This harvest season, we are also reminded of those experiencing the pangs of hunger or the hardship of economic insecurity. Let us return the kindness and generosity we have seen throughout the year by helping our fellow citizens weather the storms of our day.

As Americans gather for the time-honored Thanksgiving Day meal, let us rejoice in the abundance that graces our tables, in the simple gifts that mark our days, in the loved ones who enrich our lives, and in the gifts of a gracious God. Let us recall that our forebears met their challenges with hope and an unfailing spirit, and let us resolve to do the same.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim Thursday, November 25, 2010, as a National Day of Thanksgiving. I encourage all the people of the United States to come together—whether in our homes, places of worship, community centers, or any place of fellowship for friends and neighbors—to give thanks for all we have received in the past year, to

express appreciation to those whose lives enrich our own, and to share our bounty with others.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of November, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–30299
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Rules and Regulations

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

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

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1605

Correction of Administrative Errors

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Federal Retirement Thrift Investment Board (Agency) is amending its regulations to provide a constructed share price for retired Lifecycle funds. The Agency will use the constructed share price to make error corrections after December 31st of the target year.

DATES: This final rule is effective January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Laurissa Stokes at (202) 942–1645.

SUPPLEMENTARY INFORMATION: The Agency administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401–79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

On October 14, 2010, the Agency published a proposed rule with request for comments in the **Federal Register** (75 FR 63106). The Agency received no comments on its proposed regulation. Therefore, the Agency is publishing the proposed rule as final without modification.

Constructed Share Price

The Agency currently offers five Lifecycle funds: L Income, L 2010, L 2020, L 2030, and L 2040. The Agency will retire the L 2010 Fund when it reaches its target date of December 31, 2010. Upon retiring the L 2010 Fund, the Agency will transfer all money invested in the L 2010 Fund to the L Income Fund. Participants will no longer be able to make contributions to the L 2010 Fund after December 31, 2010. In effect, the L 2010 Fund will no longer exist.

The Agency anticipates receiving late and makeup contributions that would have been invested in the L 2010 Fund had they been made on time. Likewise, the Agency anticipates needing to remove funds erroneously contributed to the L 2010 Fund prior to its retirement date. The Agency uses the current share price of the applicable investment fund when calculating the value of late contributions, makeup contributions, and negative adjustments. Because the L 2010 Fund will no longer exist, the Agency must construct an appropriate "current" share price in order to make error corrections involving the L 2010 Fund after December 31, 2010.

The Agency proposes to calculate the constructed share price for the L 2010 Fund as follows: The constructed share price is the L 2010 Fund share price on December 31, 2010, multiplied by the current L Income Fund share price, divided by the L Income Fund share price on December 31, 2010. This calculation reflects the impact of merging assets of the L 2010 Fund into the L Income Fund on December 31, 2010. The Agency will apply this calculation to retired Lifecycle funds in the future by substituting the specific Lifecycle fund and target retirement date as follows: The constructed share price is the retired Lifecycle fund share price on December 31 of the retirement year, multiplied by the current L Income Fund share price, divided by the L Income Fund share price on December 31 of the retirement year.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514, and which is administered by the Agency.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501–1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under section 1532 is not required.

Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 810(a)(1)(A), the Agency submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before publication of this rule in the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1605

Claims, Government employees, Pensions, Retirement.

Gregory T. Long,

Executive Director, Federal Retirement Thrift Investment Board.

■ For the reasons set forth in the preamble, the Agency amends 5 CFR chapter VI as follows:

PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS

■ 1. The authority citation for part 1605 continues to read as follows:

Authority: 5 U.S.C. 8351, 8432a, and 8474(b)(5) and (c)(1). Subpart B also issued under section 1043(b) of Pub. L. 104–106, 110 Stat. 186 and sec. 7202(m)(2) of Pub. L. 101–508, 104 Stat. 1388.

■ 2. Amend § 1605.2, by revising paragraph (b)(1)(iii) and adding paragraph (b)(1)(iv) to read as follows:

§ 1605.2 Calculating, posting, and charging breakage.

* * * * *

(b) * * *

(1) * * *

(iii) Determine the dollar value on the posting date of the number of shares the participant would have received had the contributions or loan payments been made on time. If the contributions or loan payments would have been invested in a Lifecycle fund that is retired on the posting date, the constructed share price shall equal the retired Lifecycle fund share price on December 31 of the retirement year, multiplied by the current L Income Fund share price, divided by the L Income Fund share price on December 31 of the retirement year. The dollar value shall be the number of shares the participant would have received had the contributions or loan payments been made on time multiplied by the constructed share price.

(iv) The difference between the dollar value of the contribution or loan payment on the posting date and the dollar value of the contribution or loan payment on the "as of" date is the breakage.

* * * * *

■ 3. Amend § 1605.12, by revising paragraph (c)(2)(ii) to read as follows:

§ 1605.12 Removal of erroneous contributions.

* * * * *

(c) * * *

(2) * * *

(ii) Multiply the price per share on the date the adjustment is posted by the number of shares calculated in paragraph (c)(2)(i) of this section. If the contribution was erroneously contributed to a Lifecycle fund that is retired on the date the adjustment is posted, the price per share shall equal the retired Lifecycle fund share price on December 31 of the retirement year, multiplied by current L Income Fund share price, divided by the L Income Fund share price on December 31 of the retirement year.

* * * * *

[FR Doc. 2010–29886 Filed 11–30–10; 8:45 am]

BILLING CODE 6760–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0735 Directorate Identifier 2010–CE–030–AD; Amendment 39–16529; AD 2010–24–10]

RIN 2120–AA64

Airworthiness Directives; CENTRAIR Models 101, 101A, 101P, and 101AP Gliders

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

ACTION: Final rule.

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

> Damages to the rudder bar locking adjustment tube of a non-reinforced version have been reported to Société Nouvelle (SN) Centrair. This tube had been reinforced in 1984 with a modification. Gliders produced before the introduction of this modification have not been systematically retrofitted.
>
> In case of rudder bar locking adjustment tube breaking in flight when adjusting the rudder pedals position, it might interfere with the rudder pedals which could lead to rudder jam or a restricted rudder movement and consequently, to reduced control of the sailplane.

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

DATES: This AD becomes effective January 5, 2011.

On January 5, 2011, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

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

For service information identified in this AD, contact Société Nouvelle CENTRAIR, Aerodome—36300 Le Blanc, France; *telephone:* +33 (0)254 370796; *fax:* +33 (0)54. 374864; *Internet: http://www.societe.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

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

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on July 23, 2010 (75 FR 43103). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI, issued on May 26, 2010, states:

> Damages to the rudder bar locking adjustment tube of a non-reinforced version have been reported to Société Nouvelle (SN) Centrair. This tube had been reinforced in 1984 with a modification. Gliders produced before the introduction of this modification have not been systematically retrofitted.
>
> In case of rudder bar locking adjustment tube breaking in flight when adjusting the rudder pedals position, it might interfere with the rudder pedals which could lead to rudder jam or a restricted rudder movement and consequently, to reduced control of the sailplane.
>
> For the reason described above, this AD requires inspecting the rudder bar locking adjustment tube and, if necessary, replacing it.

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

Comments

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

Conclusion

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

Differences Between This AD and the MCAI or Service Information

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

provided in the MCAI and related service information.

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

Costs of Compliance

We estimate that this AD will affect 52 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of this AD on U.S. operators to be $4,420 or $85 per product.

In addition, we estimate that any necessary follow-on actions will take about 1 work-hour and require parts costing $51, for a cost of $136 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–24–10 CENTRAIR: Amendment 39–16529; Docket No. FAA–2010–0735; Directorate Identifier 2010–CE–030–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 5, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to CENTRAIR Models 101, 101A, 101P, and 101AP gliders, all serial numbers, certificated in any category.

Subject

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

Reason

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

Damages to the rudder bar locking adjustment tube of a non-reinforced version have been reported to Société Nouvelle (SN) Centrair. This tube had been reinforced in 1984 with a modification. Gliders produced before the introduction of this modification have not been systematically retrofitted.

In case of rudder bar locking adjustment tube breaking in flight when adjusting the rudder pedals position, it might interfere with the rudder pedals which could lead to rudder jam or a restricted rudder movement and consequently, to reduced control of the sailplane.

For the reason described above, this AD requires inspecting the rudder bar locking adjustment tube and, if necessary, replacing it.

Actions and Compliance

(f) Unless already done, do the following actions in accordance with Société Nouvelle Centrair Service Bulletin No. 101–29, dated July 30, 2009:

(1) Within the next 30 days after January 5, 2011 (the effective date of this AD), inspect the rudder bar locking adjustment tube to determine if it has been reinforced and to determine if it has been damaged.

(2) If the results of the inspection required in paragraph (f)(1) of this AD show that the rudder bar locking adjustment tube has not been reinforced and is not damaged, replace it with a reinforced rudder bar locking adjustment tube, part number (P/N) $Y186A, at the next scheduled maintenance event after January 5, 2011 (the effective date of this AD) but no later than 12 months after January 5, 2011 (the effective date of this AD).

(3) If the results of the inspection required in paragraph (f)(1) of this AD show that the rudder bar locking adjustment tube has not been reinforced but is damaged, replace it with a reinforced rudder bar locking adjustment tube, P/N $Y186A, before further flight.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *ATTN:* Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4130; *fax:* (816) 329–4090. Before using any approved AMOC on any glider to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, *Attn:* Information Collection Clearance Officer, AES–200.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2010–0099, dated May 26, 2010; and Société Nouvelle Centrair Service Bulletin No. 101–29, dated July 30, 2009, for related information.

Material Incorporated by Reference

(i) You must use Société Nouvelle Centrair Service Bulletin No. 101–29, dated July 30, 2009, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Société Nouvelle CENTRAIR, Aerodome—36300 Le Blanc, France; *telephone:* +33 (0)254 370796; *fax:* +33 (0)54. 374864; *Internet: http://www.societe.com.*

(3) You may review copies of the service information incorporated by reference for this AD at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the Central Region, call (816) 329–3768.

(4) You may also review copies of the service information incorporated by reference for this AD at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on November 17, 2010.

Patrick R. Mullen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–29461 Filed 11–30–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1067; Directorate Identifier 2009–NM–071–AD; Amendment 39–16516; AD 2010–23–26]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 Airplanes; and Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R Airplanes

AGENCY: Federal Aviation Administration, Department of Transportation.

ACTION: Final rule.

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

Following the occurrence of cracks on the MLG [main landing gear] rib 5 RH [right-hand] and LH [left-hand] attachment fitting lower flanges, DGAC [Direction Générale de l'Aviation Civile] France AD 2003–318(B) [parallel to part of FAA AD 2006–12–13] was issued to require repetitive inspections and, as terminating action * * *[.]

Subsequently, new cases of cracks were discovered during scheduled maintenance checks by operators of A300B4 and A300–600 type aeroplanes on which the terminating action * * * [was] embodied. This condition, if not corrected, could affect the structural integrity of those aeroplanes.

* * * * *

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

DATES: This AD becomes effective January 5, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 5, 2011.

On July 18, 2006 (71 FR 33994, June 13, 2006), the Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD.

On April 12, 2000 (65 FR 12077, March 8, 2000), the Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD.

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

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on November 18, 2009 (74 FR 59483), and proposed to supersede AD 2006–12–13, Amendment 39–14639 (71 FR 33994, June 13, 2006). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Following the occurrence of cracks on the MLG [main landing gear] rib 5 RH [right-hand] and LH [left-hand] attachment fitting lower flanges, DGAC [Direction Générale de l'Aviation Civile] France AD 2003–318(B) [parallel to part of FAA AD 2006–12–13] was issued to require repetitive inspections and, as terminating action, the embodiment of Airbus Service Bulletins (SB) A300–57–0235 and A300–57–6088 * * *.

Subsequently, new cases of cracks were discovered during scheduled maintenance checks by operators of A300B4 and A300–600 type aeroplanes on which the terminating action SB's were embodied. This condition, if not corrected, could affect the structural integrity of those aeroplanes.

To address and correct this condition, Airbus developed an inspection programme for aeroplanes modified in accordance with SB A300–57–0235 or A300–57–6088. This inspection programme was required to be implemented by DGAC France AD F–2005–113, original issue and later revision 1 [parallel to part of FAA AD 2006–12–13].

A new EASA [European Aviation Safety Agency] AD 2008–0111, superseding DGAC France AD F–2005–113R1, was issued to reduce the applicability. For aeroplanes already compliant with DGAC France AD F–2005–113R1, no further action was required.

Since EASA AD 2008–0111 issuance, Airbus reviewed the inspection programmes of SB A300–57A0246 and SB A300–57A6101 to introduce repetitive inspections including a new inspection technique for holes 47 and 54 and to reduce inspections threshold and intervals from 700 Flight Cycles (FC) to 400 FC until a revised terminating action is made available.

For the reasons stated above, AD 2009–0081 superseded EASA AD 2008–0111 and required operators to comply with the new inspection programme introduced in

Revisions 3 of Airbus SB A300–57A0246 and Airbus SB A300–57A6101.

This AD is revised to introduce an optional terminating action which consists of spot-facing the sensitive holes of the MLG Rib 5 (LH and RH) bottom flanges.

Required actions include contacting Airbus for repair instructions, if necessary, and doing the repair. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Request To Revise Proposed Costs of Compliance

FedEx Express commented that the NPRM would affect 57 of its airplanes. FedEx Express states that the inspections do not require any special inspection techniques, training, or tooling, and that it has scheduled the proposed inspections although it has not yet inspected any airplanes. FedEx Express also states that the inspection interval is sufficient, but if cracks are found, significant downtime will be required.

From these comments, we infer that FedEx Express is requesting that we revise the Costs of Compliance section of the NPRM. We do not agree with the request. We recognize that, in accomplishing the requirements of any AD, operators might incur "incidental" costs in addition to the "direct" costs that are reflected in the cost analysis presented in the AD preamble. However, the cost analysis in AD rulemaking actions typically does not include incidental costs. We have, however, reviewed the figures that we have used over the past several years to calculate costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $80 per work hour to $85 per work hour. The cost impact information, below, reflects this increase in the specified hourly rate. We have also corrected the calculations used in determining the cost to operators.

Explanation of Change to the NPRM

Paragraph (p)(5) of the NPRM specifies contacting Airbus for a repair solution and doing the repair. The European Aviation Safety Agency (EASA) has assumed responsibility for the airplane models subject to this AD. Therefore, we have revised paragraph (p)(5) of this AD to add a provision for making repairs using a method approved by either the Manager of the International Branch, ANM–116, Transport Airplane Directorate, FAA or the EASA (or its delegated agent).

Explanation of Change to AD

We have revised paragraphs (j) and (k) of this AD; and Tables 1, 2, 3, 4, and 5 of this AD to remove Airbus Model A300 B2–1A, F4–622R, and C4–605R Variant F airplanes. We have determined that these airplanes were inadvertently carried over from the paragraph callouts of the previous AD into the NPRM. These airplanes are not subject to the identified unsafe condition and therefore are not affected by this AD.

Conclusion

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect about 155 products of U.S. registry.

The actions that are required by AD 2006–12–13 and retained in this AD take about 76 work-hours per product, at an average labor rate of $85 per work hour. Required parts cost about $10,270 per product. Based on these figures, the estimated cost of the currently required actions is $16,730 per product.

We estimate that it will take about 3 work-hours per product to comply with the new basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $39,525 or $255 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–14639 (71 FR 33994, June 13, 2006) and adding the following new AD:

2010–23–26 Airbus: Amendment 39–16516. Docket No. FAA–2009–1067; Directorate Identifier 2009–NM–071–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 5, 2011.

Affected ADs

(b) This AD supersedes AD 2006–12–13, Amendment 39–14639.

Applicability

(c) This AD applies to the airplanes, certificated in any category, identified in paragraphs (c)(1) and (c)(2) of this AD; except airplanes on which Airbus Modification 11912 or 11932 has been installed.

(1) Airbus Model A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.

(2) Airbus Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R airplanes.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

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

Following the occurrence of cracks on the MLG [main landing gear] rib 5 RH [right-hand] and LH [left-hand] attachment fitting lower flanges, DGAC [Direction Générale de l'Aviation Civile] France AD 2003–318(B) [parallel to part of FAA AD 2006–12–13] was issued to require repetitive inspections and, as terminating action, the embodiment of Airbus Service Bulletins (SB) A300–57–0235 and A300–57–6088 * * *.

Subsequently, new cases of cracks were discovered during scheduled maintenance checks by operators of A300B4 and A300–600 type aeroplanes on which the terminating action SB's were embodied. This condition, if not corrected, could affect the structural integrity of those aeroplanes.

To address and correct this condition, Airbus developed an inspection programme for aeroplanes modified in accordance with SB A300–57–0235 or A300–57–6088. This inspection programme was required to be implemented by DGAC France AD F–2005–113, original issue and later revision 1 [parallel to part of FAA AD 2006–12–13].

A new EASA [European Aviation Safety Agency] AD 2008–0111, superseding DGAC France AD F–2005–113R1, was issued to reduce the applicability. For aeroplanes already compliant with DGAC France AD F–2005–113R1, no further action was required.

Since EASA AD 2008–0111 issuance, Airbus reviewed the inspection programmes of SB A300–57A0246 and SB A300–57A6101 to introduce repetitive inspections including a new inspection technique for holes 47 and 54 and to reduce inspections threshold and intervals from 700 Flight Cycles (FC) to 400 FC until a revised terminating action is made available.

For the reasons stated above, AD 2009–0081 superseded EASA AD 2008–0111 and required operators to comply with the new inspection programme introduced in Revisions 3 of Airbus SB A300–57A0246 and Airbus SB A300–57A6101.

This AD is revised to introduce an optional terminating action which consists of spot-facing the sensitive holes of the MLG Rib 5 (LH and RH) bottom flanges.

Required actions include contacting Airbus for repair instructions, if necessary, and doing the repair.

Restatement of Requirements of AD 2000–05–07

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Repetitive Inspections

(g) Perform a detailed inspection and a high-frequency eddy current (HFEC) inspection to detect cracks in Gear Rib 5 of the main landing gear (MLG) attachment fittings at the lower flange, in accordance with the Accomplishment Instructions of any applicable service bulletin listed in Table 1 and Table 2 of this AD, at the time specified in paragraph (g)(1) or (g)(2) of this AD. After April 12, 2000 (the effective date of AD 2000–05–07, Amendment 39–11616), only the service bulletins listed in Table 2 of this AD may be used. Repeat the inspections thereafter at intervals not to exceed 1,500 flight cycles, until the actions specified in paragraph (i), (j), or (l) of this AD are accomplished.

TABLE 1—REVISION 01 OF SERVICE BULLETINS

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R and F4–605R airplanes.	A300–57–6087	01	March 11, 1998.
A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes	A300–57–0234	01	March 11, 1998.

TABLE 2—OTHER REVISIONS OF SERVICE BULLETINS

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R airplanes.	A300–57A6087	02, including Appendix 01	June 24, 1999.
		03, including Appendix 01	May 19, 2000.
		04, including Appendix 01	February 19, 2002.
		05, including Appendix 01	March 10, 2008.
A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.	A300–57A0234	02	June 24, 1999.
		03, including Appendix 01	September 2, 1999.
		04, including Appendix 01	May 19, 2000.
		05, including Appendix 01	February 19, 2002.

(1) For airplanes that have accumulated 20,000 or more total flight cycles as of March 9, 1998 (the effective date of AD 98–03–06, Amendment 39–10298): Inspect within 500 flight cycles after March 9, 1998.

(2) For airplanes that have accumulated less than 20,000 total flight cycles as of March 9, 1998: Inspect prior to the accumulation of 18,000 total flight cycles, or within 1,500 flight cycles after March 9, 1998, whichever occurs later.

Note 1: For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

Note 2: Accomplishment of the initial detailed and HFEC inspections prior to April 12, 2000, in accordance with Airbus Service Bulletin A300–57A0234 or A300–57A6087, both dated August 5, 1997, as applicable, is considered acceptable for compliance with the initial inspections required by paragraph (g) of this AD.

Repair for Any Crack Found During Inspections Required by Paragraph (g) of This AD

(h) If any crack is detected during any inspection required by paragraph (g) of this AD, prior to further flight, accomplish the requirements of paragraph (h)(1) or (h)(2) of this AD, as applicable.

(1) If a crack is detected at one hole only, and the crack does not extend out of the spotface of the hole, repair in accordance with the Accomplishment Instructions of the applicable service bulletin in Table 2 of this AD.

(2) If a crack is detected at more than one hole, or if any crack at any hole extends out of the spotface of the hole, repair in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or the European Aviation Safety Agency (EASA) (or its delegated agent).

Terminating Modification for Repetitive Inspections Required by Paragraphs (g) and (j) of This AD

(i) Except as required by paragraph (l) of this AD, prior to the accumulation of 21,000 total flight cycles, or within 2 years after October 20, 1999 (the effective date of AD 99–19–26, amendment 39–11313), whichever occurs later: Modify Gear Rib 5 of the MLG attachment fittings at the lower flange in accordance with the Accomplishment Instructions of the applicable service bulletin in Table 3 of this AD. After July 18, 2006 (the effective date of AD 2006–12–13), only Revision 04 of Airbus Service Bulletin A300–57–6088, and Revisions 04 and 05 of Airbus Service Bulletin A300–57–0235 may be used. Accomplishment of this modification constitutes terminating action for the repetitive inspection requirements of paragraphs (g) and (j) of this AD.

TABLE 3—SERVICE BULLETINS FOR TERMINATING MODIFICATION

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R airplanes.	A300–57–6088	01, including Appendix 01	February 1, 1999.
		02	September 5, 2002.
		04	December 3, 2003.
A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.	A300–57–0235	01, including Appendix 01	February 1, 1999.
		03	September 5, 2002.
		04	March 13, 2003.
		05	December 3, 2003.

Note 3: Accomplishment of the modification required by paragraph (i) of this AD prior to April 12, 2000, in accordance with Airbus Service Bulletin A300–57–6088 or A300–57–0235, both dated August 5, 1998; as applicable; is acceptable for compliance with the requirements of that paragraph.

Restatement of Requirements of AD 2006–12–13

Additional Repetitive Inspections

(j) For airplanes on which the modification specified in paragraph (i) or (l) of this AD has not been done before July 18, 2006 (the effective date of AD 2006–12–13, Amendment 39–14639), perform a detailed and an HFEC inspection to detect cracks of the lower flange of Gear Rib 5 of the MLG at holes 43, 47, 48, 49, 50, 52, and 54, in accordance with the applicable service bulletin listed in Table 4 of this AD. Perform the inspections at the applicable time specified in paragraph (j)(1), (j)(2), (j)(3), or (j)(4) of this AD. Repeat the inspections thereafter at intervals not to exceed 700 flight cycles until the terminating modification required by paragraph (l) of this AD is accomplished. Accomplishment of the inspections per paragraph (j) of this AD terminates the inspection requirements of paragraph (g) of this AD.

TABLE 4—SERVICE BULLETINS FOR REPETITIVE INSPECTIONS

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R airplanes.	A300–57A6087	04, including Appendix 01	February 19, 2002.
		05, including Appendix 01	March 10, 2008.
A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.	A300–57A0234	05, including Appendix 01	February 19, 2002.

(1) For Model A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes; and Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R airplanes that have accumulated 18,000 or more total flight cycles as of July 18, 2006: Within 700 flight cycles after July 18, 2006.

(2) For Model A300 B2–1C, B2K–3C, and B2–203 airplanes that have accumulated less than 18,000 total flight cycles as of July 18, 2006: Prior to the accumulation of 18,000 total flight cycles, or within 700 flight cycles after July 18, 2006, whichever occurs later.

(3) For Model A300 B4–2C, B4–103, and B4–203 airplanes that have accumulated less than 18,000 total flight cycles as of July 18, 2006: Prior to the accumulation of 14,500 total flight cycles, or within 700 flight cycles after July 18, 2006, whichever occurs later.

(4) For Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R airplanes that have accumulated less than 18,000 total flight cycles as of July 18, 2006: Prior to the accumulation of 11,600 total flight cycles, or within 700 flight cycles after July 18, 2006, whichever occurs later.

Crack Repair

(k) If any crack is detected during any inspection required by paragraph (j) of this AD, prior to further flight, accomplish the requirements of paragraphs (k)(1) and (k)(2) of this AD, as applicable.

(1) If a crack is detected at only one hole, and the crack does not extend out of the spotface of the hole, repair in accordance with Airbus Service Bulletin A300–57A0234, Revision 05, including Appendix 01, dated February 19, 2002 (for Model A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes); or A300–57A6087, Revision 04, including Appendix 01, dated February 19, 2002; or A300–57A6087, Revision 05, dated March 10, 2008 (for Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R airplanes); as applicable.

(2) If a crack is detected at more than one hole, or if any crack at any hole extends out of the spotface of the hole, repair in accordance with a method approved by the Manager, International Branch, ANM–116, or the EASA (or its delegated agent).

Terminating Modification for Repetitive Inspections Required by Paragraphs (g) and (j) of This AD for Certain Airplanes

(l) For airplanes on which the terminating modification in paragraph (i) of this AD has not been accomplished before July 18, 2006: At the earlier of the times specified in paragraphs (l)(1) and (l)(2) of this AD, modify Gear Rib 5 of the MLG attachment fittings at the lower flange. Except as provided by paragraph (m) of this AD, do the modification in accordance with the applicable service bulletin in Table 5 of this AD. This action terminates the repetitive inspections requirements of paragraphs (g) and (j) of this AD.

(1) Prior to the accumulation of 21,000 total flight cycles, or within 2 years after October 20, 1999, whichever is later.

(2) Within 16 months after July 18, 2006.

TABLE 5—SERVICE BULLETINS FOR TERMINATING MODIFICATION

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R and F4–605R airplanes.	A300–57–6088	04	December 3, 2003.
A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.	A300–57–0235	04	March 13, 2003.
		05	December 3, 2003.

(m) Where the applicable service bulletin specified in paragraph (l) of this AD specifies to contact Airbus for modification instructions; or if there is a previously installed repair at any of the affected fastener holes; or if a crack is found when accomplishing the modification: Prior to further flight, modify in accordance with a method approved by the Manager, International Branch, ANM–116, or the EASA (or its delegated agent).

Actions Accomplished per Previous Issues of Service Bulletins

(n) Actions accomplished before July 18, 2006, in accordance with the service bulletins listed in Table 6 of this AD, are considered acceptable for compliance with the corresponding action specified in paragraphs (g) through (m) of this AD.

TABLE 6—PREVIOUS ISSUES OF SERVICE BULLETINS

Airbus Service Bulletin—	Revision level—	Dated—
A300–57–0235	02, including Appendix 01	September 27, 1999.
	03	September 5, 2002.
A300–57–6088	02	September 5, 2000.
	03	March 13, 2003.

No Reporting

(o) Although the service bulletins identified in Tables 1, 2, 3, 4, 5, and 6 of this AD specify to submit certain information to the manufacturer, this AD does not include such a requirement.

New Requirements of This AD:

Actions and Compliance

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

(1) At the applicable time specified in paragraph (p)(2) of this AD, perform a detailed inspection for cracking at the locations specified in paragraphs (p)(1)(i), (p)(1)(ii), and (p)(1)(iii) of this AD, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–57A0246, Revision 03, dated March 11, 2009; or Revision 04, dated September 9, 2009; or Airbus Mandatory Service Bulletin A300–57A6101, Revision 03, dated March 11, 2009; or Revision 04, dated September 9, 2009; as applicable.

(i) The bottom flange and vertical web in the area between the wing rear spar/gear rib 5 attachment and the forward reaction-rod pick-up lug.

(ii) On the inboard side, around the fastener holes at locations 43, 47 to 50, 52, and 54.

(iii) On the outboard side, the lower flange, the vertical web and around the fastener holes at locations 43, 47 to 50, 52 and 54.

(2) Do the inspection required by paragraph (p)(1) of this AD at the later of the times in paragraphs (p)(2)(i) and (p)(2)(ii) of this AD.

(i) Within 400 flight cycles after the accomplishment of the actions required by paragraph (i) or (l) of this AD, as applicable.

(ii) Within 400 flight cycles or 4 months after the effective date of this AD, whichever occurs first.

(3) If no cracking is detected during the inspection required by paragraph (p)(1) of this AD, before further flight, perform a fluorescent penetrant inspection (FPI) at holes location 47 and 54, in the right-hand and left-hand MLG rib 5 attachment fitting lower flange, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–57A0246, Revision 03, dated March 11, 2009; or Revision 04, dated September 9, 2009; or Airbus Mandatory Service Bulletin A300–57A6101, Revision 03, dated March 11, 2009; or Revision 04, dated September 9, 2009; as applicable.

(4) Thereafter, at intervals not to exceed 400 flight cycles, repeat the detailed and FPI inspections, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–57A0246, Revision 03, dated March 11, 2009; or Revision 04, dated September 9, 2009; or Airbus Mandatory Service Bulletin A300–

57A6101, Revision 03, dated March 11, 2009; or Revision 04, dated September 9, 2009; as applicable.

(5) If any crack is detected during any of the inspections required by paragraphs (p)(1), (p)(3), and (p)(4) of this AD, and Airbus Mandatory Service Bulletin A300–57A0246, Revision 03, dated March 11, 2009; or Revision 04, dated September 9, 2009; or Airbus Mandatory Service Bulletin A300–57A6101, Revision 03, dated March 11, 2009; or Revision 04, dated September 9, 2009; recommends contacting Airbus for appropriate action: Before further flight, contact Airbus for a repair solution, and do the repair; or repair the cracking using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or EASA or its delegated agent.

(q) Spot-facing the sensitive holes on the bottom flange MLG ribs, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–57–0254, dated June 4, 2010, or Airbus Mandatory Service Bulletin A300–57–6110, dated June 7, 2010; as applicable; terminates the repetitive inspection requirements of paragraph (p)(4) of this AD.

FAA AD Differences

Note 4: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

Related Information

(s) Refer to MCAI EASA Airworthiness Directive 2009–0081R1, dated July 30, 2010, and the service information specified in Table 7 of this AD, for related information.

TABLE 7—RELATED SERVICE INFORMATION

Airbus—	Revision—	Dated—
Mandatory Service Bulletin A300–57A0246	03, including Appendices 1 and 2	March 11, 2009.
	04, including Appendices 1 and 2	September 9, 2009.
Mandatory Service Bulletin A300–57–0254	0, including Appendix 1	June 4, 2010.
Mandatory Service Bulletin A300–57A6101	03, including Appendixes 1 and 2	March 11, 2009.
	04, including Appendices 1 and 2	September 9, 2009.
Mandatory Service Bulletin A300–57–6110	0, including Appendix 1	June 7, 2010.
Service Bulletin A300–57A0234	02	June 24, 1999.
	03, including Appendix 01	September 2, 1999.
	04, including Appendix 01	May 19, 2000.
	05, including Appendix 01	February 19, 2002.
Service Bulletin A300–57A6087	02, including Appendix 01	June 24, 1999.
	03, including Appendix 01	May 19, 2000.
	04, including Appendix 01	February 19, 2002.
	05, including Appendix 01	March 10, 2008.
Service Bulletin A300–57–0235	04	March 13, 2003.
	05	December 3, 2003.
Service Bulletin A300–57–6088	04	December 3, 2003.

Material Incorporated by Reference

(t) You must use the service information specified in Table 8 of this AD to do the actions required by this AD, as applicable, unless the AD specifies otherwise.

TABLE 8—ALL MATERIAL INCORPORATED BY REFERENCE

Airbus—	Revision—	Dated—
Mandatory Service Bulletin A300–57A0246	03, including Appendices 1 and 2	March 11, 2009.
	04, including Appendices 1 and 2	September 9, 2009.
Mandatory Service Bulletin A300–57–0254	0, including Appendix 1	June 4, 2010.
Mandatory Service Bulletin A300–57A6101	03, including Appendices 1 and 2	March 11, 2009.
	04, including Appendices 1 and 2	September 9, 2009.
Mandatory Service Bulletin A300–57–6110	0, including Appendix 1	June 7, 2010.
Service Bulletin A300–57A0234	02	June 24, 1999.
	03, including Appendix 01	September 2, 1999.
	04, including Appendix 01	May 19, 2000.
	05, including Appendix 01	February 19, 2002.
Service Bulletin A300–57A6087	02, including Appendix 01	June 24, 1999.
	03, including Appendix 01	May 19, 2000.
	04, including Appendix 01	February 19, 2002.
	05, including Appendix 05	March 10, 2008.
Service Bulletin A300–57–0235	04	March 13, 2003.
	05	December 3, 2003.
Service Bulletin A300–57–6088	04	December 3, 2003.

(1) The Director of the Federal Register approved the incorporation by reference of the service information contained in Table 9 of this AD under 5 U.S.C. 552(a) and 1 CFR part 51.

TABLE 9—NEW MATERIAL INCORPORATED BY REFERENCE

Airbus—	Revision—	Dated—
Mandatory Service Bulletin A300–57A0246	03, including Appendices 1 and 2	March 11, 2009.
	04, including Appendices 1 and 2	September 9, 2009.
Mandatory Service Bulletin A300–57–0254	Original	June 4, 2010.
Mandatory Service Bulletin A300–57A6087	05, including Appendix 1	March 10, 2008.
Mandatory Service Bulletin A300–57A6101	03, including Appendices 1 and 2	March 11, 2009.
	04, including Appendices 1 and 2	September 9, 2009.
Mandatory Service Bulletin A300–57–6110	0, including Appendix 1	June 7, 2010.

(2) The Director of the Federal Register previously approved the incorporation by reference of the service information specified in Table 10 of this AD on July 18, 2006 (71 FR 33994, June 13, 2006).

TABLE 10—MATERIAL PREVIOUSLY INCORPORATED BY REFERENCE IN AD 2006–12–13

Airbus—	Revision—	Dated—
Service Bulletin A300–57A0234	04, including Appendix 01	May 19, 2000.
	05, including Appendix 01	February 19, 2002.
Service Bulletin A300–57A6087	03, including Appendix 01	May 19, 2000.
	04, including Appendix 01	February 19, 2002.
Service Bulletin A300–57–0235	04	March 13, 2003.
	05	December 3, 2003.
Service Bulletin A300–57–6088	04	December 3, 2003.

(3) The Director of the Federal Register previously approved the incorporation by reference of the service information specified in Table 11 of this AD on April 12, 2000 (65 FR 12077, March 8, 2000).

TABLE 11—MATERIAL PREVIOUSLY INCORPORATED BY REFERENCE IN AD 2000–05–07

Airbus—	Revision—	Dated—
Service Bulletin A300–57A0234	02	June 24, 1999.
	03, including Appendix 01	September 2, 1999.
Service Bulletin A300–57A6087	02, including Appendix 01	June 24, 1999.

(4) For service information identified in this AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; *e-mail account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

(5) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(6) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on November 3, 2010.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–28589 Filed 11–30–10; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28348; Directorate Identifier 2007–NM–060–AD; Amendment 39–16530; AD 2010–24–11]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 737–600, –700, –700C, –800, and –900 Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Model 737–600, –700, –700C, –800, and –900 series airplanes. This AD requires sealing the fasteners on the front and

rear spars inside the main fuel tank and on the lower panel of the center fuel tank, inspecting the wire bundle support installation in the equipment cooling system bays to identify the type of clamp installed and determine whether the Teflon sleeve is installed, and doing related corrective actions if necessary. This AD results from a design review of the fuel tank systems. We are issuing this AD to prevent arcing at certain fuel tank fasteners in the event of a lightning strike or fault current event, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: This AD becomes effective January 5, 2011.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of January 5, 2011.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tom Thorson, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6508; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a second supplemental notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Model 737–600, –700, –700C, –800, and –900 series airplanes. That second supplemental NPRM was published in the **Federal Register** on March 23, 2009 (74 FR 12094). That second supplemental NPRM proposed to require sealing the fasteners on the front and rear spars inside the main fuel tank and on the lower panel of the center fuel tank, inspecting the wire bundle support installation in the equipment cooling system bays to identify the type of clamp installed and determine whether the Teflon sleeve is installed, and doing related corrective actions if necessary.

Relevant Service Information

The second supplemental NPRM cited Boeing Alert Service Bulletin 737–57A1279, Revision 1, dated September 25, 2008, as the appropriate source of service information. Boeing has since revised the service bulletin. Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010, incorporates additional data that were included in Boeing Information Notice (IN) 737–57A1279 IN 02, dated September 25, 2008; 737–57A1279 IN 03, dated October 30, 2008; and 737–57A1279 IN 04, dated March 13, 2009. This additional information does not add more work.

Boeing has also issued IN 737–57A1279 IN 05, dated April 8, 2010. This IN specifies that Model 737–800 and –900 airplanes may have an additional clamp located at stringer 10 that requires the work shown in the steps of Figures 6, 7, 10, and 11 of Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010, in the environmental control system bay of the affected airplanes.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received on the second supplemental NPRM.

Support for the Second Supplemental NPRM

Boeing reviewed the second supplemental NPRM and concurred with the contents of the proposed rule.

Request To Delay AD Action

Continental Airlines (CAL) expressed continued concern that the manufacturer needs to update the maintenance service documents to avoid inadvertently demodifying the work that this AD requires, which would result in potential enforcement action against CAL. CAL commented that to ensure compliance with the maintenance planning data Fuel System Airworthiness Limitations, the requirements of Appendix H.1(a) of the Federal Aviation Regulations (14 CFR 25); and the requirements of sections 26.1(a), 26.1(b)(2), and 26.1(b)(3) of the Federal Aviation Regulations (14 CFR 26.1(a), 14 CFR 26.1(b)(2), and 14 CFR 26.1(b)(3)); must be complied with by the original equipment manufacturer or type certificate holder. In addition, the operator must also comply with section 91.1507(e) of the Federal Aviation Regulations (14 CFR 91.1507(e)); and section 121.1113(e) of the Federal Aviation Regulations (14 CFR 121.1113(e)). CAL stated that these procedures conflict with the regulations of sections 25.1529 and 25.1729 of the Federal Aviation Regulations (14 CFR 25.1529 and 25.1729) and applicable provisions of 14 CFR parts 21 and 26.

We acknowledge the commenter's concern. However, no new ICAs have been developed for the design change required by this AD. Operators and owners are responsible for ensuring that the configuration mandated by this AD is maintained in accordance with section 39.7 of the Federal Aviation Regulations (14 CFR 39.7).

If any new airworthiness limitations (AWLs) related to any of the design features mandated by this AD are developed, we may consider additional rulemaking to mandate incorporations of those AWLs into operators' maintenance programs. We have not changed the AD in regard to this issue.

CAL cited sections 91.1507(e) of the Federal Aviation Regulations (14 CFR 91.1507(e)) and other regulations and expresses concern that the absence of the ICAs could result in enforcement action. That section requires operators to include in their maintenance programs all fuel system ICAs developed under Special Federal Aviation Regulation (SFAR) 88. However, that regulation requires operators to incorporate ICAs provided by the design approval holder. Since no ICAs were developed for the required modification, operators do not violate that regulation if their maintenance programs do not yet contain ICAs for the referenced design change. However, under section 39.7 of the Federal Aviation Regulations (14 CFR 39.7), it is still the responsibility of the operators to keep their airplanes in a configuration that is in compliance with the AD. We have not changed the AD in regard to this issue.

The FAA is working with industry to evaluate potential changes to the AD process that are intended to more clearly identify how to maintain configurations that are required for AD compliance.

Request To Clarify Airplanes Subject to Paragraph (i) of the AD

The Air Transport Association (ATA), on behalf of its member American Airlines (AA), requested that we clarify the "applicability requirements" in paragraph (i) of the second supplemental NPRM to state that modifications should be acceptable for compliance with the AD if they were made in accordance with Boeing Alert Service Bulletin 737–57A1279, dated January 24, 2007, and if the table in paragraph 1.A., "Effectivity," of that service bulletin was used to correctly determine which airplanes are subject to the requirements of paragraph (i) of the AD. The commenter noted that the variable numbers following the table are erroneous.

Lufthansa Technik (LTK) also requested that we revise paragraph (i) of the second supplemental NPRM. LTK requested that we consider airplanes with line numbers 571 through 1691 inclusive on which the referenced actions have been performed in accordance with Boeing Alert Service Bulletin 737–57A1279, dated January 24, 2007, to be compliant with the proposed AD.

We agree with the requests to clarify which airplanes are subject to the requirements of paragraph (i) of this final rule. We have revised paragraph (i) of this final rule to state that actions done using the group assignments by line numbers found in the table in paragraph 1.A., "Effectivity," and in accordance with the original service bulletin, Boeing Service Bulletin 737–57A1279, dated January 24, 2007, are acceptable for compliance with the corresponding requirements of this AD.

Request To Allow Alternative Teflon Sleeving Procedure

The ATA, on behalf of its member AA, proposed an alternative sleeving procedure. In its comment, AA stated that the Teflon sleeve installation cannot be accomplished as shown in Figure 13 of Boeing Alert Service Bulletin 737–57A1279, dated January 24, 2007. AA stated that Figure 9 of the service bulletin shows that the adjacent tube conduit does not allow the sleeve to be 3 inches long and centered on the clamp. AA proposed that an alternative sleeving procedure extend the sleeving at least 1 inch beyond the edge of the clamp. If 1 inch of sleeving cannot be achieved, AA suggested that the sleeving be extended as far as possible.

We agree that clarification may be necessary. Boeing is revising Boeing Alert Service Bulletin 737–57A1279 to address this issue. However, due to the urgency of the unsafe condition and in consideration of the amount of time that has already elapsed since issuance of the original service bulletin, we have determined that further delay of this final rule is not appropriate. We disagree with the request to allow an alternative Teflon sleeving procedure in this final rule. We do not have sufficient data that indicate this procedure provides an acceptable level of safety. If operators can provide sufficient data to indicate that an alternative Teflon sleeving procedure would provide an acceptable level of safety, operators can request approvals of AMOCs in accordance with the requirements of paragraph (j) of this final rule. We have not changed the final rule regarding this issue.

Request To Allow Alternative Procedure To Seal Fasteners on Wing and Main Tanks

The ATA, on behalf of its member AA, requested that we remove the proposed requirement to reseal the fasteners if already done previously in accordance with Boeing Alert Service Bulletin 737–57A1279, dated January 24, 2007. In its comment, AA stated that sealant has been previously applied at some fastener locations in the center tank and the wing tanks during airplane assembly. Therefore, AA stated, it is not possible to accomplish the steps in Figures 14 and 15 of that service bulletin, and AA proposed that if the fasteners are sealed in accordance with that service bulletin, then no further work should be required. AA also stated that Boeing 737–57A1279 Information Notice (IN) 04, dated March 13, 2009, addresses this issue.

We agree with the commenter. Boeing 737–57A1279 IN 04, dated March 13, 2009, states that for fasteners that have been previously sealed to the specifications of Boeing Alert Service Bulletin 737–57A1279, it is not required for the existing seal to be removed and the fastener sealed again. Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010, incorporates the information included in Boeing 737–57A1279 IN 04, dated March 13, 2009. We updated this final rule to refer to Boeing Alert Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010, as an appropriate source of service information.

Request To Reference Additional Service Information

The ATA, on behalf of its member AirTran Airways, requested that we approve Boeing Information Notices 03 and 04 as sources of service information for the supplemental NPRM. In its comment, AirTran Airways stated that the information notices clarify and provide corrections to Boeing Service Bulletin 737–57A1279, Revision 1, dated September 25, 2008.

We partially agree. We acknowledge that the information contained in these notices may be useful to operators to complete the requirements of this AD. However, Boeing has issued Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010, to include the information in the information notices. We have revised the final rule accordingly.

Explanation of Change Made to This AD

We have revised this AD to identify the legal name of the manufacturer as published in the most recent type certificate data sheet for the affected airplane models.

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Explanation of Change to Costs of Compliance

Since issuance of the NPRM, we have increased the labor rate used in the Costs of Compliance from $80 per work-hour to $85 per work-hour. The Costs of Compliance information, below, reflects this increase in the specified hourly labor rate.

Costs of Compliance

There are about 1,754 airplanes of the affected design in the worldwide fleet; of these, 645 airplanes are U.S.-registered. The following table provides the estimated costs for U.S. operators to comply with this final rule, at an average hourly labor rate of $85.

ESTIMATED COSTS

Action	Group	Work hours	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Sealant application	1	62	$5,270	586	$3,088,220
	2	28	$2,380	44	104,720
	3	28	$2,380	15	35,700
Inspection	1	4	$340	586	199,240
	2	4	$340	44	14,960
	3	2	$170	15	2,550

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. *See* the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2010–24–11 The Boeing Company: Amendment 39–16530. Docket No. FAA–2007–28348; Directorate Identifier 2007–NM–060–AD.

Effective Date

(a) This AD becomes effective January 5, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, and –900 series airplanes, certificated in any category; as identified in Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Unsafe Condition

(e) This AD results from a design review of the fuel tank systems. The Federal Aviation Administration is issuing this AD to prevent arcing at certain fuel tank fasteners in the event of a lightning strike or fault current event, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Fastener Sealant

(g) Within 60 months after the effective date of this AD: Seal the fasteners on the front and rear spars inside the main fuel tank and on the lower panel of the center fuel tank, as applicable, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010.

Inspection and Corrective Action

(h) Within 60 months after the effective date of this AD: Perform a general visual inspection of the wire bundle support installation in the equipment cooling system bays to identify the type of clamp installed, and determine whether the Teflon sleeve is installed. Do these actions in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010. Do all applicable corrective actions before further flight in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010. Certain Model 737–800 and 737–900 airplanes may have an additional clamp location at stringer 10 that is required to perform the steps of Figures 6, 7, 10, and 11 of Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010, in the environmental control systems (ECS) bay.

Actions Accomplished Previously

(i) Actions done before the effective date of this AD using the group assignments with the line numbers in the table in paragraph 1.A., "Effectivity," and in accordance with Boeing Alert Service Bulletin 737–57A1279, dated January 24, 2007; or Revision 1, dated September 25, 2008; are acceptable for compliance with the corresponding requirements of this AD.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Thorson, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW.,

Renton, Washington 98057–3356; telephone (425) 917–6510; fax (425) 917–6508. Or, e-mail information to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Material Incorporated by Reference

(k) You must use Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington on November 18, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–29792 Filed 11–30–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3500

[Docket No. FR–5425–IA–02]

Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents Interpretive Rule: Response to Public Comments

AGENCY: Office of General Counsel, HUD.

ACTION: Interpretive rule; response to public comments.

SUMMARY: On June 25, 2010, HUD issued a rule interpreting certain provisions of RESPA as applied to the payment of fees to real estate brokers and agents by home warranty companies. The public was invited to comment on the interpretive rule. After reviewing and considering the comments, HUD determined that changes are not needed to the interpretive rule. Through this document, HUD responds to certain questions raised in the comments. HUD believes that its response to these questions serves to provide additional guidance relating to matters covered in the interpretive rule and the comments.

FOR FURTHER INFORMATION CONTACT: For legal questions, contact Paul S. Ceja, Assistant General Counsel for RESPA/SAFE, telephone number 202–708–3137; or Peter S. Race, Assistant General Counsel for Compliance, telephone number 202–708–2350; Department of Housing and Urban Development, 451 7th Street, SW., Room 9262, Washington, DC 20410. For other questions, contact Barton Shapiro, Director, or Mary Jo Sullivan, Deputy Director, Office of RESPA and Interstate Land Sales, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9158, Washington, DC 20410; telephone number 202–708–0502. These telephone numbers are not toll-free. Persons with hearing or speech impairments may access these numbers via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The requirements and prohibitions under RESPA apply to residential real estate transactions that include a federally related mortgage loan. Section 8 of RESPA prohibits giving and receiving "kickbacks" for the referral of real estate settlement services, and unearned fees, involving real estate transactions. Since 1992, HUD's RESPA regulations have defined "settlement service" to include "homeowner's warranties". 24 CFR 3500.2(11). While a referral of settlement services is not compensable under RESPA, a real estate broker or agent (or other person in a position to refer settlement service business) may be compensated for services that are actual, necessary and distinct from the primary services provided by the real estate broker or agent, if the services are not nominal, and the payment is not a duplicative charge. (*See* 24 CFR 3500.14(b), (c), (g)(1), and (g)(3)).

On June 25, 2010 (75 FR 36271), HUD issued an interpretive rule on the propriety under Section 8 of RESPA (12 U.S.C. 2607) of payments to real estate brokers and agents from home warranty companies (HWCs). The interpretive rule concluded:

(1) A payment by an HWC for marketing services performed by real estate brokers or agents on behalf of the HWC that are directed to particular homebuyers or sellers is an illegal kickback for a referral under section 8;

(2) Depending upon the facts of a particular case, an HWC may compensate a real estate broker or agent for services when those services are actual, necessary and distinct from the primary services provided by the real estate broker or agent, and when those additional services are not nominal and are not services for which there is a duplicative charge; and

(3) The amount of compensation from the HWC that is permitted under section 8 for such additional services must be reasonably related to the value of those services and not include compensation for referrals of business.

75 FR at 36273.

HUD received 72 comments in response to publication of the interpretive rule. HUD reviewed all of the comments, and appreciates the input and information provided by the commenters. Some commenters supported the interpretive rule and others did not. HUD found that the comments that were not supportive of its interpretation did not present concerns or information that warrant any changes to the interpretive rule. HUD, however, has identified and is responding to seven specific questions to provide additional guidance relating to matters covered in the interpretive rule and the comments.

II. Questions and Responses

1. *Question:* Is a home warranty company's flat fee payment (*e.g.,* monthly or annual payment) to a real estate broker or agent for marketing a home warranty product directly to particular homebuyers or sellers a permissible payment under section 8 of RESPA?

HUD Response: No, as provided in the interpretive rule, payments for marketing services directed to particular homebuyers or sellers are considered to be payments for affirmatively influencing their choice of settlement service providers and would therefore violate section 8 of RESPA as an illegal kickback for a referral, regardless of whether the payment is made to the broker or agent on a "per transaction" or a "flat fee" basis.

2. *Question:* Is the list of items in footnote 2 of the interpretive rule an exhaustive list of the services that a real estate broker or agent can be legally compensated for by a home warranty company under section 8 of RESPA?

HUD Response: No, the footnote itself begins with the introduction, "For example". The list in the footnote is not exhaustive but exemplary of services that, in a particular case, may be compensable. However, as discussed in the interpretive rule, to be compensable the services must be services that are "actual, necessary and distinct from the primary services provided by the real estate broker or agent, that are not nominal, and for which duplicative fees are not charged" (*see* fn.1 of the interpretive rule). Referrals of settlement service business are not compensable services. Therefore, payments made for "services" that were fabricated to disguise a payment to a real estate broker or agent for referrals and are not, in fact, "necessary" would be illegal under section 8 of RESPA.

3. *Question:* What is meant by the statement in the interpretive rule that evidence in support of a determination that compensable services have been performed by a real estate broker or agent may include: "The real estate broker or agent is by contract the legal agent of the HWC, and the HWC assumes responsibility for any representations made by the broker or agent about the warranty product."

HUD Response: While not conclusive, the fact that a home warranty company is willing to be legally committed by the work and representations of a real estate broker or agent who is compensated by the HWC for performing services is one indicator that those services provided are "actual, necessary and distinct" and not nominal—i.e., that actual work is being performed by the real estate broker or agent for which the home warranty company is willing to assume liability. Specifically, such a legal relationship indicates that the HWC has worked with the real estate broker or agent closely enough to understand the value of the services performed by the broker or agent, and to be confident enough of the broker's or agent's services and representations, that the HWC is willing to take responsibility for those services and representations. Conversely however, if in a contract with a consumer, for example, the HWC disclaims liability for acts and representations of the real estate broker or agent in connection with the home warranty, this may indicate that no actual services of value have been performed by the real estate broker or agent.

4. *Question:* Why is it a relevant factor in analyzing a potential section 8 violation that a home warranty company's payment to a real estate broker or agent was made under an exclusive-representation arrangement?

HUD Response: Section 8 of RESPA prohibits payments for referrals and unearned fees. Stated another way, referrals are not compensable services under section 8. See 24 CFR 3500.14(b). HUD's interpretive rule states that, in initially evaluating whether a payment from an HWC to a real estate broker or agent is a violation of section 8, HUD may look at whether the payment is tied to an arrangement that prohibits the broker or agent from receiving from a competitor comparable payment for comparable actual services. In other words, such an exclusive-representation arrangement between the HWC and the real estate broker or agent is evidence of an unlawful-payment-for-referral arrangement whereby the real estate broker or agent is only being paid for steering customers exclusively to the HWC and its products. However, as it is further noted in the interpretive rule, if it is determined that the HWC's payment is only for compensable services, the existence of an exclusive-representation arrangement would be permissible under section 8.

5. *Question:* Does the interpretive rule prohibit payments from an HWC to real estate brokers or agents for general advertising services performed by the brokers or agents on behalf of the HWC?

HUD Response: No. The interpretive rule specifically prohibits compensation for marketing performed by a real estate broker or agent on behalf of an HWC when the marketing is directed to selling the HWC's home warranty product to particular homebuyers or sellers. HUD would evaluate the permissibility of compensation provided by an HWC to real estate brokers or agents for other advertising by applying the definition of "referral" in § 3500.14(f) of HUD's RESPA regulations. For example, a reasonable payment for an advertisement by an HWC in a real estate broker's or agent's publication or on the broker's or agent's website would not, in and of itself, be a payment for a referral under RESPA. If the marketing services for which the HWC is paying the real estate broker or agent are services directed to a homebuyer or seller that have the effect of "affirmatively influencing" the selection by the homebuyer or seller of the HWC's home warranty product in connection with the real estate settlement, then those marketing services would be subject to RESPA's prohibitions on referral payments.

6. *Question:* Is a home warranty always considered to be a "settlement service" for purposes of RESPA coverage?

HUD Response: No. RESPA's kickback and referral fee prohibitions are applicable in the context of "settlement services", a term that is defined broadly under RESPA and HUD's RESPA regulations. RESPA defines "settlement services" to include "any service provided in connection with a real estate settlement" and provides a nonexclusive listing of such services (12 U.S.C. 2602(3)). In its regulations HUD has long defined "settlement service" to include "any service provided in connection with a prospective or actual settlement * * *" (24 CFR 3500.2). As noted above and in the interpretive rule, "homeowner's warranties" have been specifically included in HUD's definition of "settlement service" since 1992 (24 CFR 3500.2(11)). Therefore, when a home warranty is "provided in connection with a prospective or actual settlement", it is a "settlement service" under HUD's regulatory interpretation of RESPA.

In determining whether services involving a home warranty are provided in connection with a prospective or actual settlement, HUD would consider, among other things: (i) Whether the charge for the home warranty is paid out of the proceeds at the settlement; and (ii) if the charge is not paid at settlement, whether the timing of the purchase of and payment for the home warranty indicates that the purchase is so removed from the settlement that it is not provided "in connection with" a settlement within the meaning of RESPA and HUD's regulations. Items paid in connection with a RESPA-covered transaction, of course, may be paid and disclosed on the HUD–1/1A settlement statement as paid outside of closing (P.O.C.) or through the accounting at settlement.

7. *Question:* Does the interpretive rule apply to situations beyond home warranty company payments to real estate brokers and agents, for example to payments by other settlement service providers to real estate brokers and agents?

HUD Response: The interpretive rule is specifically directed to home warranty company payments to real estate brokers and agents. However, the analysis in the interpretive rule is based on an interpretation of the RESPA statute and HUD's existing regulations, which analysis may be applicable to payments made by other settlement service providers to real estate brokers or agents.

III. Confirmation of June 25, 2010, Interpretive Rule

Again, HUD appreciates the input and information provided by the members of the public and representatives of industry who responded to HUD's solicitation of public comment on the June 25, 2010, interpretive rule. After consideration of the comments, HUD confirms its June 25, 2010, interpretation of certain provisions of RESPA as applied to the payment of fees to real estate brokers and agents by home warranty companies. The interpretive rule therefore stands without change.

Finally, some commenters asked whether the interpretive rule has prospective or retroactive effect. An interpretive rule does not change existing law. As noted in the concluding paragraph of the rule, the interpretive rule represents HUD's interpretation of its existing regulations. This interpretive rule, therefore, does not constitute a change in HUD's interpretation of RESPA or the RESPA regulations, but is an articulation of HUD's interpretation of RESPA and the implementing regulations that specifically applies to home warranty company payments to real estate brokers and agents.

Authority: 12 U.S.C. 2601–2617; 42 U.S.C. 3535(d).

Dated: November 23, 2010.

Helen R. Kanovsky,

General Counsel.

[FR Doc. 2010–30243 Filed 11–30–10; 8:45 am]

BILLING CODE 4210–67–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4044

Allocation of Assets in Single-Employer Plans; Valuation of Benefits and Assets; Expected Retirement Age

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule amends Pension Benefit Guaranty Corporation's regulation on Allocation of Assets in Single-Employer Plans by substituting a new table for determining expected retirement ages for participants in pension plans undergoing distress or involuntary termination with valuation dates falling in 2011. This table is needed in order to compute the value of early retirement benefits and, thus, the total value of benefits under a plan.

DATES: *Effective Date:* January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) sets forth (in subpart B) the methods for valuing plan benefits of terminating single-employer plans covered under Title IV. Guaranteed benefits and benefit liabilities under a plan that is undergoing a distress termination must be valued in accordance with subpart B of part 4044. In addition, when PBGC terminates an underfunded plan involuntarily pursuant to ERISA section 4042(a), it uses the subpart B valuation rules to determine the amount of the plan's underfunding.

Under § 4044.51(b) of the asset allocation regulation, early retirement benefits are valued based on the annuity starting date, if a retirement date has been selected, or the expected retirement age, if the annuity starting date is not known on the valuation date. Sections 4044.55 through 4044.57 set forth rules for determining the expected retirement ages for plan participants entitled to early retirement benefits. Appendix D of part 4044 contains tables to be used in determining the expected early retirement ages.

Table I in appendix D (Selection of Retirement Rate Category) is used to determine whether a participant has a low, medium, or high probability of retiring early. The determination is based on the year a participant would reach "unreduced retirement age" (*i.e.,* the earlier of the normal retirement age or the age at which an unreduced benefit is first payable) and the participant's monthly benefit at unreduced retirement age. The table applies only to plans with valuation dates in the current year and is updated annually by the PBGC to reflect changes in the cost of living, etc.

Tables II–A, II–B, and II–C (Expected Retirement Ages for Individuals in the Low, Medium, and High Categories respectively) are used to determine the expected retirement age after the probability of early retirement has been determined using Table I. These tables establish, by probability category, the expected retirement age based on both the earliest age a participant could retire under the plan and the unreduced retirement age. This expected retirement age is used to compute the value of the early retirement benefit and, thus, the total value of benefits under the plan.

This document amends appendix D to replace Table I–10 with Table I–11 in order to provide an updated correlation, appropriate for calendar year 2011, between the amount of a participant's benefit and the probability that the participant will elect early retirement. Table I–11 will be used to value benefits in plans with valuation dates during calendar year 2011.

PBGC has determined that notice of and public comment on this rule are impracticable and contrary to the public interest. Plan administrators need to be able to estimate accurately the value of plan benefits as early as possible before initiating the termination process. For that purpose, if a plan has a valuation date in 2011, the plan administrator needs the updated table being promulgated in this rule. Accordingly, the public interest is best served by issuing this table expeditiously, without an opportunity for notice and comment, to allow as much time as possible to estimate the value of plan benefits with the proper table for plans with valuation dates in early 2011.

PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this regulation, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

List of Subjects in 29 CFR Part 4044

Pension insurance, Pensions.

■ In consideration of the foregoing, 29 CFR part 4044 is amended as follows:

■ 1. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 2. Appendix D to part 4044 is amended by removing Table I–10 and adding in its place Table I–11 To read as follows:

Appendix D to Part 4044—Tables Used To Determine Expected Retirement Age

TABLE I–11—SELECTION OF RETIREMENT RATE CATEGORY

[For plans with valuation dates after December 31, 2010, and before January 1, 2012]

If participant reaches URA in year—	Participant's retirement rate category is—			
	Low [1] if monthly benefit at URA is less than—	Medium [2] if monthly benefit at URA is—		High [3] if monthly benefit at URA is greater than—
		From—	To—	
2012	568	568	2,400	2,400
2013	579	579	2,448	2,448
2014	591	591	2,497	2,497
2015	602	602	2,547	2,547
2016	614	614	2,598	2,598
2017	627	627	2,652	2,652
2018	640	640	2,708	2,708
2019	654	654	2,765	2,765
2020	668	668	2,823	2,823
2021 or later	682	682	2,882	2,882

[1] Table II–A.
[2] Table II–B.
[3] Table II–C.

* * * * *

Issued in Washington, DC, this 29th day of November 2010.

Vincent K. Snowbarger,

Deputy Director for Operations, Pension Benefit Guaranty Corporation.

[FR Doc. 2010–30301 Filed 11–30–10; 8:45 am]

BILLING CODE 7709–01–P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 381

[Docket No. 2010–9 CRB]

Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges announce a cost of living adjustment ("COLA") of 1.2% in the royalty rates that colleges, universities, and other nonprofit educational institutions that are not affiliated with National Public Radio pay for the use of published nondramatic musical compositions in the ASCAP, BMI and SESAC repertories. The COLA is based on the change in the Consumer Price Index from October 2009 to October 2010.

DATES: *Effective Date:* January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. Telephone: (202) 707–7658. E-mail: *crb@loc.gov*.

SUPPLEMENTARY INFORMATION: Section 118 of the Copyright Act, title 17 of the United States Code, creates a compulsory license for the use of published nondramatic musical works and published pictorial, graphic, and sculptural works in connection with noncommercial broadcasting. Terms and rates for this compulsory license, applicable to parties who are not subject to privately negotiated licenses, are published in 37 CFR parts 253 and 381.

Final regulations governing the terms and rates of copyright royalty payments with respect to certain uses by public broadcasting entities of published nondramatic musical works, and published pictorial, graphic, and sculptural works for the license period beginning January 1, 2008, and ending December 31, 2012, were published in the **Federal Register** on November 30, 2007. *See* 72 FR 67646. Pursuant to these regulations, on or before December 1 of each year the Judges shall publish a notice of the change in the cost of living as determined by the Consumer Price Index (all urban consumers, all items ("CPI–U")) during the period from the most recent index published prior to the previous notice, to the most recent index published prior to December 1 of that year. *See* 37 CFR 381.10(a). The regulations also require that the Judges publish a revised schedule of rates for the public performance of musical compositions in the ASCAP, BMI, and SESAC repertories by public broadcasting entities licensed to colleges and universities, reflecting the change in the CPI–U. 37 CFR 381.10(a)(requiring publication of a revised schedule of rates for 37 CFR 381.5). Accordingly, the Judges are hereby announcing the change in the CPI–U and applying the annual COLA to the rates set out in 37 CFR 381.5(c).

The change in the cost of living as determined by the CPI–U during the period from the most recent index published before December 1, 2009, to the most recent index published before December 1, 2010, is 1.2%.[1] Rounding to the nearest dollar,[2] the royalty rates for the performance of published nondramatic musical compositions in the repertories of ASCAP, BMI, and SESAC are $301, $301, and $121, respectively.

List of Subjects in 37 CFR Part 381

Copyright, Music, Radio, Television, Rates.

Final Regulations

■ For the reasons set forth in the preamble, part 381 of title 37 of the Code of Federal Regulations is amended to read as follows:

PART 381—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

■ 1. The authority citation for part 381 continues to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1), and 803.

■ 2. Section 381.5 is amended by revising paragraphs (c)(1) through (c)(3) to read as follows:

[1] The most recent CPI–U figures are published in November of each year and use the period 1982–1984 to establish a reference base of 100. The index for October 2009 was 216.177, while the figure for October 2010 was 218.711.

[2] *See* 37 CFR 381.10(b) (adjusted royalty rates shall be "fixed at the nearest dollar").

§ 381.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.

* * * * *

(c) * * *

(1) For all such compositions in the repertory of ASCAP, $301 annually.

(2) For all such compositions in the repertory of BMI, $301 annually.

(3) For all such compositions in the repertory of SESAC, $121 annually.

* * * * *

Dated: November 24, 2010.

James Scott Sledge,

Chief, U.S. Copyright Royalty Judge.

[FR Doc. 2010–30060 Filed 11–30–10; 8:45 am]

BILLING CODE 1410–72–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–0113–201016(a); FRL–9234–4]

Approval and Promulgation of Implementation Plans; Georgia: Stage II Vapor Recovery

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Georgia State Implementation Plan (SIP), submitted by the Georgia Environmental Protection Division (GA EPD) on September 26, 2006, with a clarifying revision submitted on November 6, 2006. The September 26, 2006, submittal includes multiple modifications to Georgia's Air Quality Rules found at Chapter 391–3–1. Previously, EPA took action on the majority of the September 26, 2006, submittal in an action published in the **Federal Register** on February 9, 2010. In today's action, EPA is addressing only the portion of the September 26, 2006, submittal that relates to revisions to Georgia's Stage II gasoline vapor recovery rule at 391–3–1–.02(zz). These revisions are part of Georgia's strategy to meet the national ambient air quality standards (NAAQS). EPA has determined that these revisions are consistent with the December 12, 2006, EPA memorandum from Stephen D. Page entitled *Removal of Stage II Vapor Recovery in Situations Where Widespread Use of Onboard Refueling Vapor Recovery is Demonstrated.* EPA is approving Georgia's SIP revisions pursuant to section 110 of the Clean Air Act (CAA or Act).

DATES: This direct final rule is effective January 31, 2011 without further notice, unless EPA receives adverse comment by January 3, 2011. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number, "EPA–R04–OAR–2007–0113," by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: benjamin.lynorae@epa.gov.*
3. *Fax:* 404–562–9019.
4. *Mail:* "EPA–R04–OAR–2007–0113," Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID Number, "EPA–R04–OAR–2007–0113." EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jane Spann, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9029. Ms. Spann can also be reached via electronic mail at *spann.jane@epa.gov.*

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SUPPLEMENTARY INFORMATION:

I. Background

A. Georgia's Submittals

On September 26, 2006, with a clarifying revision submitted on November 6, 2006, GA EPD submitted proposed SIP revisions to EPA for review and approval into the Georgia SIP. The September 26, 2006, submittal

included multiple modifications to Georgia's Air Quality Rules found at Chapter 391–3–1. Previously, EPA took action on the majority of the September 26, 2006, submittal in an action published in the **Federal Register** on February 9, 2010, which approved revisions to rules 391–3–1–.01(llll), 391–3–1–.01(nnnn), 391–3–1–.–02(2)(d), 391–3–1–.02(2)(tt), 391–3–1–.02(2)(yy), 391–3–1–.02(2)(rrr), 391–3–1–.02(4), 391–3–1–.02(5), 391–3–1–.03(6)(b), 391–3–1–.03(6)(j), 391–3–1–.03(11)(b)3(i), 391–3–1–.03(11)(b)5(i), and 391–3–1–.05. 75 FR 6309. In today's action, EPA is approving only the portion of the September 26, 2006, submittal (as clarified in a November 6, 2006, submittal) that relates to revisions to Georgia's Stage II gasoline vapor recovery rule at 391–3–1–.02(2)(zz).

Action on the remaining portions of the September 26, 2006, SIP revision is still under consideration, and will be addressed in separate actions. EPA is not acting on revisions to rules 391–3–1–.01(qqqq), 391–3–1–.02(2)(mmm), 391–3–1–.02(6)(a), 391–3–1–.03(6)(g), and 391–3–1–.03(6)(i) at this time. EPA is also not taking action on revisions to rule 391–3–1–02(2)(ooo), as Georgia has submitted a revised version of this rule. Additionally, EPA is not acting on revisions to rules 391–3–1–.02(ppp), 391–3–1–.02(8)(a), 391–3–1–.02(9), 391–3–1–.03(9), 391–3–1–.03(10)(b)2, 391–3–1–.03(10)(e)(6), and 391–3–1–.03(10)(g)2, as they are not part of the Federally-approved SIP.

B. Atlanta Area Ozone NAAQS Status [1]

Effective January 6, 1992, 13 counties in and around Atlanta, Georgia (Cherokee, Clayton, Cobb, Coweta, Dekalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Paulding and Rockdale) were designated "serious" nonattainment for the 1-hour ozone NAAQS (hereafter referred to as the "Atlanta 1-Hour Area"). 56 FR 56694. The original attainment date for the Atlanta 1-Hour Area to attain the 1-hour ozone NAAQS was no later than November 15, 1999. However, the Atlanta 1-Hour Area did not attain the 1-hour ozone NAAQS by that time. Because Atlanta failed to attain the 1-hour ozone NAAQS by November 15, 1999, EPA issued a final rulemaking action on September 26, 2003 (68 FR 55469) determining that, by operation of law, the Atlanta 1-Hour Area was being reclassified as a severe ozone nonattainment area effective January 1, 2004. Subsequently, effective June 14, 2005, the Atlanta 1-Hour Area was redesignated to attainment for the 1-hour ozone NAAQS. 70 FR 34660.

Before being redesignated to attainment for the 1-hour ozone NAAQS however, effective June 15, 2004, the original 13 counties, and an additional 7 surrounding counties (Bartow, Barrow, Carroll, Hall, Newton, Spalding, and Walton),[2] were designated as a "marginal" ozone nonattainment for the 1997 8-hour ozone NAAQS (hereafter referred to as the "Atlanta 1997 8-Hour Ozone Area"). 69 FR 23858. The Atlanta 1997 8-Hour Ozone Area was initially classified "marginal" based on a design value of 0.091 parts per million (ppm) with an attainment date of June 15, 2007. The Atlanta 1997 8-Hour Ozone Area failed to attain the 1997 8-hour ozone NAAQS by the June 15, 2007, deadline. Subsequently, on March 6, 2008, the Atlanta 1997 8-Hour Ozone Area was reclassified from a "marginal" to "moderate" 8-hour ozone nonattainment area. The Atlanta 1997 8-Hour Ozone Area remains designated as moderate ozone nonattainment area, and has a 2007–2009 design value of 0.087 ppm.[3]

Effective May 27, 2008, EPA strengthened the 8-hour ozone NAAQS by revising it to 0.075 ppm. 73 FR 16436. Consistent with a directive of the new Administration regarding the review of new and pending regulations, the Administrator reviewed a number of actions that were taken by the previous Administration. 74 FR 4435. The 2008 8-hour ozone NAAQS final rule was included in this review. Based on EPA's reconsideration, on January 19, 2010, EPA proposed to set different primary and secondary ozone NAAQS than those set in 2008, to provide requisite protection of public health and welfare, respectively. 75 FR 2938. Initially, EPA expected these NAAQS to become final by August 31, 2010, but now expects them to be finalized later in 2010. Today's rulemaking does not address requirements for the revised or reconsidered 2008 or proposed 2010 8-hour ozone NAAQS.

II. CAA and Georgia SIP Provisions

A. Gasoline Vapor Recovery Provisions

Georgia's Stage II gasoline vapor recovery rule prohibits any person from constructing or reconstructing a gasoline dispensing facility unless the "facility is equipped and operating with a vapor recovery system to recover the displacement vapors from the vehicle's gasoline storage tank." Rule 391–3–1–.02(2)(zz)(1). The vapor recovery system must have a demonstrated 95 percent by weight or greater volatile organic compound (VOC) control efficiency, as demonstrated by California Air Resources Board (CARB), or equivalent test procedures and methods. Rule 391–3–1–.02(2)(zz)(3).

Today's action approves revisions to Georgia's Stage II gasoline vapor recovery rule at 391–3–1–.02(2)(zz). This rule was initially developed by the State of Georgia, and submitted to EPA for approval to comply with Section 182 of the CAA. Section 182(b)(3) of the CAA calls for States with "moderate" ozone nonattainment areas to submit revisions to their SIPs requiring all owners or operators of gasoline dispensing systems to install and operate a system for gasoline vapor recover of emissions from the fueling of motor vehicles. 42 U.S.C. 7511a(b)(3). Sections 182(c), 182(d) and 182(e) of the CAA apply this requirement to States with "serious," "severe" and "extreme" ozone nonattainment areas as well. 42 U.S.C. § 7511a(c), (d), and (e). Accordingly, as a serious ozone nonattainment area, Georgia submitted its initial Stage II gasoline vapor recovery rule at 391–3–1–.02(2)(zz) on November 13, 1992, to EPA for initial approval. EPA approved Georgia's gasoline vapor rule into the Georgia SIP on February 2, 1996. 61 FR 3819.

B. CAA Onboard Refueling Vapor Recovery (ORVR) Provisions

Generally speaking, the scheme set up by the CAA anticipates that ORVR may replace Stage II systems. VOC emissions, which are precursors of ozone, are emitted by fueling vehicles but these emissions are mitigated by both Stage II vapor recovery systems and by use of vehicles equipped with ORVR. Both ORVR and Stage II systems operate to control VOC emissions during motor vehicle fueling. Stage II vapor recovery systems are installed at the gasoline dispensing facility, while ORVR is installed within the motor vehicle itself.

The Stage II vapor recovery provisions of CAA section 182(b)(3) "shall not apply" to "moderate" ozone nonattainment areas after EPA

[1] While this section focuses on the ozone status for the Atlanta Area, EPA considered the Atlanta Area's status with regard to the other NAAQS in evaluating this revision.

[2] The 20 county area designated nonattainment for the 1997 8-hour ozone NAAQS consists of Cherokee, Clayton, Cobb, Coweta, Dekalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Paulding and Rockdale, Bartow, Barrow, Carroll, Hall, Newton, Spalding, and Walton—will be referred to as the "Atlanta 1997 8-Hour Ozone Area" throughout this rulemaking.

[3] The primary and secondary ozone ambient air quality standards (for the 1997 8-hour ozone NAAQS) are met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm. *See* 40 CFR part 50, Appendix I.

promulgates ORVR standards. 42 U.S.C. 7521(a)(6). According to 40 CFR 51.905(a)(1)(i), Atlanta remains subject to the obligation to implement the applicable requirements as defined in 51.900(f) which include Stage II Vapor Recovery (51.900(f)(5)), except as provided in 40 CFR 51.905(b). 40 CFR 51.905(b) requires that a State remain subject to Stage II Vapor Recovery (and other 51.900(f) requirements) until the area attains the 8-hour NAAQS. After the area attains the 8-hour NAAQS, the State may request such obligations be shifted to contingency measures, consistent with sections 110(l) and 193 of the CAA; however, the State cannot remove the obligations from the SIP. As stated earlier, since Georgia is not "removing the obligation" but is instead revising the Stage II requirements for a certain portion of the fleet, as explained in this direct final rule, this revision is consistent with 40 CFR 51.905(a)(1)(i).

On April 6, 1994, EPA issued final regulations requiring the phase-in of ORVR emissions control systems on new motor vehicles, requiring a minimum of 95 percent evaporative emission capture efficiency. 59 FR 16262. For ozone nonattainment areas classified as "serious" or above, the CAA allows EPA to revise or waive the Section 182(b)(3) Stage II gasoline vapor recovery rules, after determining ORVR emissions control systems are in widespread use throughout the motor vehicle fleet. 42 U.S.C. § 7521(a)(6). This determination of widespread use has not yet been made for the entire fleet; however, EPA has issued a guidance on December 12, 2006, entitled *Removal of Stage II Vapor Recovery in Situations Where Widespread Use of Onboard Refueling Vapor Recovery is Demonstrated.* More discussion on how this guidance relates to today's action can be found in section II.B.3 of this rulemaking. While this action is supported by EPA's policies regarding ORVR, the revision must also meet the requirements of CAA section 110(l). *See* below for more information on CAA section 110(1) and its relation to Georgia's SIP revision.

C. CAA Section 110(l)

EPA's primary consideration for determining the approvability of Georgia's request is whether this requested action complies with section 110(l) of the CAA which states:

> Plan Revision—Each revision to an implementation plan submitted by a State under this chapter shall be adapted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

Thus, while "moderate" ozone nonattainment areas are not required to implement Stage II vapor recovery programs after promulgation of ORVR standards, if these areas already have Stage II vapor recovery programs in the SIPs, such programs cannot be revised or removed unless the revision or removal of such program from the SIP would not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement under the CAA. 42 U.S.C. 7410(l). EPA's March 9, 1993, memorandum entitled *Impact of the Recent Onboard Decision on Stage II Requirements in Moderate Nonattainment Areas,* states "When onboard rules are promulgated, a State may withdraw its stage II rules for moderate areas from the SIP (or from consideration as a SIP revision) consistent with its obligation under sections 182(b)(3) and 202(a)(6), so long as withdrawal will not interfere with any other applicable requirement of the Act." While Georgia's SIP revisions do not remove Stage II requirements for the Atlanta ozone moderate area, it does revise the Stage II requirements for a certain portion of the fleet.

III. Analysis of Georgia's SIP Revisions

On September 26, 2006, GA EPD submitted a proposed SIP revision to EPA for approval into the Georgia SIP. A clarifying revision was submitted on November 6, 2006. The first change being proposed for approval today is to Georgia Air Quality Rule 391–3–1–.02(2)(zz)3(i)(1). If certain conditions are met, this change will allow certification of Stage II equipment using certification procedures other than the CARB procedures, as previously required. Today, EPA is also taking action to approve the component of the September 26, 2006, submittal (as clarified in the November 6, 2006, submittal) that modifies Georgia Air Quality Rule, Chapter 391–3–1–.02, paragraph (2) "Emission Limitations and Standards," subparagraph (zz) "Gasoline Dispensing Facilities—Stage II." As explained above, this rule was initially approved by EPA into the Georgia SIP on February 2, 1996, and requires owners or operators of gasoline dispensing systems to install and operate Stage II gasoline vapor recovery systems to recover the vapors from the fueling of motor vehicles. The current Georgia Air Quality Rule at 391–3–1–.02(2)(zz)2, exempts facilities used exclusively for the re-fueling of vehicles equipped with ORVR equipment. This exemption is being expanded today to cover initial fueling as well. Now, facilities used exclusively for the initial fueling and/or re-fueling of vehicles equipped with ORVR equipment are exempt. EPA's analysis of these two changes is discussed below.

A. Federal Requirements for Stage II

As previously mentioned in this rulemaking, States were required to adopt Stage II rules for all areas classified as "moderate" or worse under section 182(b)(3) of the CAA. However, section 202(a)(6) of the CAA states that "the requirements of section 182(b)(3) (relating to Stage II gasoline vapor recovery) for areas classified under section 181 as moderate for ozone shall not apply after promulgation of such standards." ORVR regulations were issued by EPA on April 6, 1994. *See* 59 FR 16262, 40 CFR 86.001 and 40 CFR 86.098). As a result, the CAA no longer requires moderate areas to impose Stage II controls under section 182(b)(3), and such areas may seek SIP revisions to remove such requirements from their SIP, subject to section 110(l) of the Act.

B. Section 110(l) Noninterference Demonstration

Under CAA section 110(l), Stage II vapor recovery programs cannot be revised or removed unless it is demonstrated that revision or removal of such program from the SIP would not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement under the CAA. 42 U.S.C. 7410(l). While Georgia's September 26, 2006, and November 6, 2006, SIP revisions are not requesting the withdrawal of its Stage II rule for the Atlanta Area, these SIP revisions are requesting revisions to Georgia's Stage II requirements, and thus these revisions must be shown to satisfy 110(l) of the CAA.

1. CAA Section 110(l) Demonstration for Revision to Georgia Air Quality Rule 391–3–1–.02(2)(zz)(3)—CARB

Georgia's September 26, 2006, revision changes Georgia Air Quality Rule 391–3–1–.02(2)(zz)(3) to allow mixing of equipment components under separate, non-CARB certification procedures when supported by the manufacturer or independent third-party certification that the configuration meets or exceeds the applicable performance standards and has received prior written approval by GA EPD. The State has requested the rule change to allow the maintenance of existing Stage II systems with certified components by

a third party other than CARB. This change is needed because the CARB discontinued its certification of Stage II components upon implementation of a new vapor recovery system in California. Many components of California's new vapor recovery system are not compatible with Stage II systems. Stage II components that need replacing may not be able to be replaced with components from California's new vapor recovery system. Since CARB discontinued certification of Stage II components, it takes a third party or manufacturer to test and verify Stage II systems. This rule change will enable existing Stage II systems in Georgia to be maintained and have components replaced as needed, without having to convert the entire systems from Stage II to California's new vapor recovery system. The change requires Stage II components to continue to be certified, but allows certification through a third party, or through the manufacturer, upon prior written approval by GA EPD. This rule change is approvable because it merely allows for third party certification other than CARB and no emissions changes are expected to result from this revision.

2. CAA Section 110(l) Demonstration for Revision to Georgia Air Quality Rule 391–3–1–.02(2)(zz)(1)—Initial Fueling of Vehicles With ORVR

The revisions being approved today exclude from Georgia's Stage II vapor recovery program the initial fueling of vehicles equipped with ORVR, stating "[t]he requirements of this subsection shall not apply to facilities * * * used exclusively for the initial fueling and/or re-fueling of vehicles equipped with onboard refueling vapor recovery (ORVR) equipment." Georgia Air Quality Rule 391–3–1–.02(2)(zz)(1) (underlined text is being added to current rule). Georgia has confirmed that 100 percent of vehicles contemplated by their rule for initial refueling would be equipped with ORVR.

This SIP revision is approvable because all the vehicles whose initial fueling is being excluded from Stage II vapor recovery rules are equipped with ORVR, an equivalent vapor recovery system. Both Stage II and ORVR systems must demonstrate a 95 percent or greater VOC control efficiency; thus, there will be no increase in emissions as a result of these SIP revisions. Therefore, these revisions will not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement under the CAA.

3. EPA Guidance on Widespread ORVR Use

These revisions are consistent with EPA guidance set forth in a December 12, 2006 memorandum from Stephen D. Page entitled *Removal of Stage II Vapor Recovery in Situations Where Widespread Use of Onboard Refueling Vapor Recovery is Demonstrated* (Page Memorandum). In relevant part, the Page Memorandum states that if a SIP revision demonstrates that 95 percent of the new vehicles fueled at an automobile assembly plant are equipped with ORVR, and that this level of ORVR use would not decrease, then EPA can determine that widespread use of ORVR has been achieved for the fleet of motor vehicles that are fueled at that facility. Page Memorandum, page 2. The December 12, 2006, memorandum also explains that "any EPA SIP approval would also be subject to the CAA section 110(l) requirement that the revision not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other requirement of the CAA." December 12, 2006, memorandum, page 3. As explained above, for ozone nonattainment areas "worse" than "moderate," the CAA allows EPA to revise or waive the Section 182(b)(3) Stage II gasoline vapor recovery rules, after determining ORVR emissions control systems are in widespread use throughout the motor vehicle fleet. 42 U.S.C. 7521(a)(6).

Georgia revised its Stage II vapor recovery rules to exclude initial fueling of motor vehicles equipped with ORVR. Under Georgia's changes, the only vehicles excluded from Stage II vapor recovery rules are vehicles equipped with ORVR. Because 100 percent of the vehicles subject to Georgia's rule changes, the criteria for widespread use for this fleet of vehicles is achieved. Georgia's rule changes for Stage II are consistent with the CAA, implementing regulations, guidance, including the Page Memorandum, and EPA's action in other similar situations. *See* 74 FR 26103 (approving removal of Stage II vapor control requirements for new and upgraded gasoline dispensing facilities in southeast Florida area); and 71 FR 52464 (approving removal of Stage II vapor recovery systems at Ford's Chicago Assembly Plant).

IV. Final Action

EPA is taking direct final action to approve into the Georgia SIP, the aforementioned revisions to Georgia's Stage II vapor recovery rule at 391–3–1–.02(2)(zz), submitted by GA EPD on September 26, 2006, and November 6, 2006. Today's revisions exclude initial fueling of motor vehicles equipped with ORVR from the Stage II vapor recovery rules; and allows mixing of Stage II equipment components under separate, non-CARB certification procedures when supported by the manufacturer or independent third-party certification that the configuration meets or exceeds the applicable performance standards and has received prior written approval by GA EPD. These revisions are consistent with EPA guidance and the CAA.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective January 31, 2011 without further notice unless the Agency receives adverse comments by January 3, 2011.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on January 31, 2011 and no further action will be taken on the proposed rule.

V. Statutory and Executive Order Reviews

Under the CAA, 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 CAA. 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 proposed 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 CAA; 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 31, 2011. 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 10, 2010.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

■ 40 CFR part 52 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 L—Georgia

■ 2. Section 52.570(c) is amended by revising the entry for "391–3–1–.02(2)(zz)" to read as follows:

§ 52.570 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED GEORGIA REGULATIONS

State citation	Title/Subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
391–3–1–.02(2)(zz)	Gasoline Dispensing Facility—Stage II.	1/9/05	12/1/10 [Insert citation of publication].	Exemption for initial fueling of vehicles equipped with ORVR from Stage II requirements; allowing mixing of Stage II components when supported by third party certification and prior written approval of GA EPD.
*	*	*	*	*

* * * * *

[FR Doc. 2010–30119 Filed 11–30–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0095; FRL–8851–6]

Tristyrylphenol Ethoxylates; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of poly (oxy-1,2-ethanediyl), α-[tris(1-phenylethyl)phenyl]-ω-hydroxy-, (CAS Reg. No. 99734–09–5), here in referred to as tristyrylphenol ethoxylate, when used as an inert ingredient post-harvest as a surfactant under 40 CFR 180.910 with a maximum of 15 percent by

weight in pesticide formulations. Ag-Chem Consulting, on behalf of LG Life Science, submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting the establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of tristyrylphenol ethoxylate.

DATES: This regulation is effective December 1, 2010. Objections and requests for hearings must be received on or before January 31, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see also* Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0095. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0095 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 31, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2008–0095, by one of the following methods:

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

II. Petition for Exemption

In the **Federal Register** of June 23, 2010 (75 FR 35801) (FRL–8831–3), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP 0E7701) by Ag-Chem Consulting, 12208 Quinque Lane, Clifton, VA 21024, on behalf of LG Life Science, 910 Sylvan Ave., Englewood Cliffs, NJ 07632. The petition requested that 40 CFR 180.910 be amended by establishing an exemption from the requirement of a tolerance for residues of tristyrylphenol ethoxylate (CAS Reg. No. 99734–09–5) when used as an inert ingredient as a surfactant with a maximum of 10 percent by weight in pesticide formulations applied to food areas and food contact surfaces in food service and food handling establishments. That notice referenced a summary of the petition prepared by Ag-Chem Consulting, the petitioner, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the exemption requested by limiting tristyrylphenol ethoxylate (CAS Reg. No. 99734–09–5) to a maximum of 15 percent by weight in pesticide formulations. This limitation is based on the Agency's risk assessment which can be found at *http://www.regulations.gov* in document "PC Code: 800900; Decision Document for Pesticide Petition 0E7701; poly(oxy-1,2-ethanediyl), α-[tris(1-phenylethyl)phenyl]-ω-hydroxy-, (CAS Reg. No. 99734–09–5) for use post-harvest under 40 CFR 180.910 as an inert ingredient as a surfactant with a maximum of 15 percent by weight in pesticide formulations" in docket ID number EPA–HQ–OPP–2008–0095.

It should be noted that there are other tolerance exemptions under 40 CFR 180.920 and 40 CFR 180.1288 that apply to this tristyrylphenol ethoxylate compound (CAS Reg. No. 99734–09–5),

as well as, other closely related tristyrylphenol ethoxylate chemicals. The Agency believes that these existing exemptions could be consolidated at a later date by establishing a pre- and post-harvest exemption under 40 CFR 180.910 for these tristyrylphenol ethoxylate compounds since these chemicals share a common chemical structure and are members of the same chemical class.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term "inert" is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

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

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

Consistent with section 408(c)(2)(A) of FFDCA, and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for tristyrylphenol ethoxylate including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with tristyrylphenol ethoxylate follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by the tristyrylphenol ethoxylates as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in the final rule published in the **Federal Register** of March 25, 2009 (74 FR 12621) (FRL–8404–7). As stated in that document, the available toxicity database for the tristyrylphenol ethoxylates consists of studies on some of the tristyrylphenol ethoxylate chemicals, such as CAS Reg. Nos. 90093–37–1 and 119432–41–6), and guideline studies on an analog chemical (CAS Reg. No. 105362–40–1). The studies on the tristyrylphenol ethoxylate chemicals and analog chemicals were considered appropriate to evaluate the toxicity of the tristyrylphenol ethoxylates because these chemicals share a common chemical structure and are members of the same chemical class. The tristyrylphenol ethoxylates and analog chemicals share a close structural similarity and same functional groups with the only difference being in the associated counterions. Therefore, the toxicity of these chemicals is expected to be similar. The Agency has determined that these data are appropriate and adequate to characterize the toxicity of the tristyrylphenol ethoxylates.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, *see http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints used for human risk assessment is discussed in Unit IV of the final rule published in the **Federal Register** of March 25, 2009 (74 FR 12621) (FRL–8404–7).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to tristyrylphenol ethoxylate, EPA considered exposure under the proposed exemption from the requirement of a tolerance as well as the other existing exemptions from tolerance for other closely related tristyrylphenol ethoxylate chemicals. EPA assessed dietary exposures from

tristyrylphenol ethoxylate in food as follows:

i. *Acute exposure.* No adverse effects attributable to a single exposure of tristyrylphenol ethoxylate were seen in the toxicity databases. Therefore, an acute dietary risk assessment for tristyrylphenol ethoxylate is not necessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used food consumption information from the United States Department of Agriculture (USDA) [1994–1996 and 1998] Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for tristyrylphenol ethoxylate. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredient. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled "Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts." (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

In the dietary exposure assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentration of active ingredient in agricultural products is generally at least 50 percent of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient. In the case of tristyrylphenol ethoxylate, EPA made a specific adjustment to the dietary exposure assessment to account for the use limitations of the amount of tristyrylphenol ethoxylate that may be in formulations (no more than 15 percent by weight in pesticide) and assumed that tristyrylphenol ethoxylate is present at the maximum limitations rather than at equal quantities with the active ingredient. In addition, in a previous risk assessment (2009) which can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2009–0095, the Agency concluded that residues following post harvest application to citrus crops would not be likely to exceed three times the residue attained following pre-harvest application. Therefore, the Agency applied a correction factor of 3x to the citrus crop group to account for the potentially higher residues from post-harvest treatment of this use.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at the highest tolerance level. In other words, EPA assumed 100 percent of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In summary, EPA chose a very conservative method for estimating what level of inert residue could be on food, then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data shows that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

iii. *Cancer.* Considering the lack of mutagenicity, the lack of target organ toxicity in subchronic studies and known mode of action for the target organ toxicity, and the SAR predictions, the Agency concluded that carcinogenicity concerns are unlikely for the tristyrylphenol ethoxylate. Therefore, a cancer dietary exposure assessment was not performed.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for tristyrylphenol ethoxylate. Tolerance level residues and/or 100 percent CT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for tristyrylphenol ethoxylate, a conservative drinking water concentration value of 100 ppb based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for parent compound. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

Tristyrylphenol ethoxylate may be used as an inert ingredient in pesticide products that are registered for specific uses that may result in both outdoor and indoor residential exposures. In addition, tristyrylphenol ethoxylate may be used as an inert ingredient in pesticide formulations that are used in and around the home. Although dermal and inhalation exposures are possible from residential use of pesticide products containing this inert ingredient, negligible inhalation and dermal absorption is expected based on the molecular weight and the physicochemical properties of the compound. A screening level residential exposure and risk assessment was completed for products containing tristyrylphenol ethoxylate as an inert ingredient. The Agency conducted an assessment to represent worst-case residential exposure by assessing post

application exposures and risks from tristyrylphenol ethoxylate in pesticide formulations (Outdoor Scenarios) and tristyrylphenol ethoxylate in disinfectant-type uses (Indoor Scenarios). Further details of this residential exposure and risk analysis can be found in the document (D364751) in docket ID number EPA–HQ–OPP–2008–0710.

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

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

D. Safety Factor for Infants and Children

1. In general. Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

2. EPA has sufficient data to assess the toxicity of the tristyrylphenol ethoxylates. The data presented in the assessment on the tristyrylphenol ethoxylates are adequate to characterize the expected behavior of the subject chemical. The primary toxicity appears to be to the kidney and thyroid in rats and liver in dogs. Because the kidney effects are the most sensitive endpoint, protective measures for kidney toxicity will be protective of any other long term effects. Further, EPA concluded that there is no need for the additional FQPA safety factor for use of subchronic toxicity for long term exposure assessment. The critical effect seen in the subchronic study (intratubular mineralization in the kidney) is believed to occur as a result of precipitation of a chemical based on its physicochemical properties. Precipitation of a chemical based on its physiochemical properties is a function primarily of dose level rather than duration of dosing. Thus, once the threshold for precipitation of the chemical is established (as it was in the subchronic dog study), this threshold level would be considered protective of any short or long term exposure. Therefore, the additional safety factor for the lack of long term studies is not warranted.

3. EPA concluded that there is no evidence of increased susceptibility to infants and children. The developmental toxicity study in which rats were administered (CAS Reg. No. 119432–41–6) resulted in a NOAEL of 300 mg/kg/day for maternal toxicity (based on reduced body weights and increase in liver weights and loose feces seen at the LOAEL of 1,000 mg/kg/day) and a NOAEL of 300 mg/kg/day for developmental toxicity based on increased skeletal variations (increased incidence of all unossified proximal phalanges of the hind limb seen at the LOAEL of 1,000 mg/kg/day). Fetal effects were seen only at the limit dose and in the presence of maternal toxicity.

4. No rabbit developmental study or reproductive toxicity studies are available for these chemicals, however, the developmental toxicity study in rats indicates no robust developmental toxicity at the limit dose and none of the reproductive parameters were affected in the rat developmental study at the limit dose of 1,000 mg/kg/day. This endpoint in the developmental study is considered conservative since the incidence of skeletal variations seen at 1,000 mg/kg/day was marginal.

5. There is no indication in the database that the tristyrylphenol ethoxylates are neurotoxic chemicals and there is no evidence of increased susceptibility. Therefore, there is no need for a developmental neurotoxicity study or the acute neurotoxicity and 90-day neurotoxicity studies.

6. No treatment related effects were observed on the thymus or spleen at very high doses, indicating a lack of immunotoxic effects. Therefore, a functional immunotoxicity test is not required at this time and no additional uncertainty factor is required because of the lack of a immunotoxicity study.

7. There are no residual uncertainties identified in the exposure databases. In the absence of actual exposure data on tristyrylphenol ethoxylates, a highly conservative dietary exposure assessment would not underestimate the risk to infants and children. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by the tristyrylphenol ethoxylates. Based on overall weight of evidence, the FQPA factor of 10X was reduced to 1X.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

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

2. *Chronic risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for chronic exposure and the use limitations of not more than 15 percent by weight in pesticide formulations, the chronic dietary exposure from food and water to tristyrylphenol ethoxylate is 13.5 percent of the cPAD for the U.S. population and 43.6 percent of the cPAD for children 1 to 2 years old, the most highly exposed population subgroup.

3. *Short-term risk.* Short-term aggregate exposure takes into account

short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Tristyrylphenol ethoxylate is used as an inert ingredient in pesticide products that are currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to tristyrylphenol ethoxylate. Using the exposure assumptions described in this document, EPA has concluded that the combined short-term aggregated food, water, and residential exposures result in aggregate MOEs of 91 for both adult males and females respectively. Adult residential exposure combines high end dermal and inhalation handler exposure from indoor hand wiping with a high end post application dermal exposure from contact with treated lawns. The models assume high end application rates, and high end exposures representing worst case scenarios, as well as, assuming that the inert ingredients are used on all commodities and that 100 percent of crops are treated and that residues will be present for every consumed commodity (including meat, milk, poultry, and eggs) that is included in the Dietary Exposure Evaluation Model (DEEM™). Considering the extremely conservative nature of this screening level model the Agency concluded that this MOE is not of a concern. EPA has concluded that the combined short-term aggregated food, water, and residential exposures result in an aggregate MOE of 207 for children. Children's residential exposure includes total exposures associated with contact with treated lawns (dermal and hand-to-mouth exposures). As the level of concern is for MOEs that are lower than 100, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Tristyrylphenol ethoxylate is currently registered for uses that could result in intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to tristyrylphenol ethoxylate. Using the exposure assumptions described in this document, EPA has concluded that the combined intermediate-term aggregated food, water, and residential exposures result in aggregate MOE of 869 for adult males and a MOE of 898 for adult females. Adult residential exposure includes high end post application dermal exposure from contact with treated lawns. EPA has concluded the combined intermediate-term aggregated food, water, and residential exposures result in an aggregate MOE of 218 for children. Children's residential exposure includes total exposures associated with contact with treated lawns (dermal and hand-to-mouth exposures). As the level of concern is for MOEs that are lower than 100, this MOE is not of concern.

5. *Aggregate cancer risk for U.S. population.* The Agency has not identified any concerns for carcinogenicity relating to the tristyrylphenol ethoxylate.

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

V. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is not establishing a numerical tolerance for residue of tristyrylphenol ethoxylate in or on any food commodities. EPA is establishing a limitation on the amount of tristyrylphenol ethoxylate that may be used in pesticide formulations. That limitation will be enforced through the pesticide registration process under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. 136 *et seq.* EPA will not register any pesticide for sale or distribution that contains greater than 15 percent of tristyrylphenol ethoxylate by weight in food use pesticide formulations.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for tristyrylphenol ethoxylate.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.910 for poly(oxy-1,2-ethanediyl), α-[tris(1-phenylethyl)phenyl]-ω-hydroxy-, (CAS Reg. No. 99734–09–5), when used post-harvest as an inert ingredient as a surfactant with a maximum of 15 percent by weight in pesticide formulations.

VII. Statutory and Executive Order Reviews

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

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes,

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

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 18, 2010.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. In § 180.910, add alphabetically the following inert ingredient to the table to read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

* * * * *

Inert ingredients	Limits	Uses
*	*	*
Poly(oxy-1,2-ethanediyl), α-[tris(1-phenylethyl)phenyl]-ω-hydroxy-, (CAS Reg. No. 99734–09–5).	For use in post-harvest applications; Not to exceed 15% by weight in pesticide formulations.	Surfactants.
*	*	*

[FR Doc. 2010–29992 Filed 11–30–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0136; FRL–8850–9]

Spiroxamine; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of spiroxamine, [(8-(1,1-dimethylethyl)-*N*-ethyl-*N*-propyl-1, 4-dioxaspiro[4,5]decane-2-methanamine)], including its metabolites and degradates in or on artichoke, globe, import at 0.7 parts per million (ppm) asparagus, import at 0.05 ppm; and vegetables, fruiting, crop group 8, import at 1.2 ppm. Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 1, 2010. Objections and requests for hearings must be received on or before January 31, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see* also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0136. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Tamue L. Gibson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 305–9096; *e-mail address: gibson.tamue@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

This listing is not intended to be exhaustive, but rather to provide a guide

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

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0136 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 31, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0136, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of March 24, 2010 (75 FR 14154) (FRL–8815–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7564) by Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, North Carolina 27709. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of the fungicide spiroxamine, (8-(1,1-dimethylethyl)-N-ethyl-N-propyl-1,4-dioxaspiro[4,5]decane-2-methanamine) and its metabolites containing the N-ethyl-N-propyl-1,2-dihydroxy-3-aminopropane moiety, calculated as parent equivalent, in or on artichoke, globe at 0.7 parts per million (ppm); asparagus at 0.05 ppm and vegetable, fruiting, group 8 at 1.2 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for spiroxamine including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with spiroxamine follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by spiroxamine as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Spiroxamine: Human Health Risk Assessment for Spiroxamine on Imported Artichoke, Asparagus and Fruiting Vegetables (Corp Group 8)," pp. 33–36 in docket ID number EPA–HQ–OPP–2010–0136.

Spiroxamine has low acute oral and inhalation toxicity and is not irritating to the eye. However, spiroxamine is a skin sensitizer when tested in guinea pigs and is a severe dermal irritant. Spiroxamine subchronic studies show the target organ of toxicity is the liver. These studies were characterized by slight to mild hepatotoxicity, with associated elevation in liver enzymes. Mucous membranes of the esophagus and forestomach were keratinized and hyperplastic as a result of the strong irritant properties of spiroxamine. Administration of spiroxamine in long-term studies in the dog resulted in hepatocytomegaly, cataracts, and liver discoloration. In the rat, it resulted in an increased mortality in females, decreased body weights and body weight gains in both sexes, and increased esophageal hyperkeratosis in both sexes, while in the mouse, chronic administration resulted in uterine nodules, hyperplasia in the adrenal gland of males, hyperkeratosis in the esophagus, forestomach, and tongue of females, and acanthosis in the pinnae and tails of females. Developmental effects in rats entailed delayed ossification which may be considered secondary to decreased body weight. Treatment-related developmental effects

were not seen in rabbits. There was no evidence of increased susceptibility of the young animals following exposure to spiroxamine in any developmental toxicity studies in the data base. There was evidence of mild spiroxamine-induced neurotoxicity characterized by piloerection and slight to moderate gait incoordination, and functional observational battery (FOB) effects of decreased forelimb grip strength and foot splay in males in the acute neurotoxicity study. No neuropathology was seen in either the acute or subchronic toxicity studies in rats and no neurotoxicity was detected in the subchronic study. Spiroxamine has no carcinogenic potential, as indicated in both the rat and the mouse carcinogenicity studies. In addition, spiroxamine has no mutagenicity potential, based on several *in vivo* and *in vitro* studies.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for spiroxamine used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR SPIROXAMINE FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure scenario	Point of departure	Uncertainty/FQPA safety factors	RfD, PAD, level of concern for risk assessment	Study and toxicological effects
Acute Dietary (General population, including infants and children.	NOAEL = 10 mg/kg/day.	UF_A = 10X ..... UF_H = 10X FQPA = 1X	aRfD = 0.1 mg/kg/day. aPAD = 0.1 mg/kg/day	Acute Neurotoxicity in Rats. LOAEL = 30 mg/kg based on clinical signs (piloerection and slight to moderate gait in coordination) and FOB effects (decreased forelimb grip strength and foot splay) in males on Day 0–1.
Acute Dietary (females 13–49 years old).	No hazard identified.			
Chronic Dietary—general population, including infants and children.	NOAEL = 2.5 mg/kg/day.	UF_A = 10X ..... UF_H = 10X FQPA = 1X	cRfD = 0.025 mg/kg/day. cPAD = 0.025 mg/kg/day	Chronic Oral Toxicity Study in Dogs. LOAEL = 28.03/25.84 mg/kg/day M/F based on hepatocytomegaly, cataracts and decreased albumin in males and females; liver discoloration and decreased triglycerides in females; and increased alanine aminotransferase in males.
Short-term (1–30 days) Incidental Oral.	No residential uses are proposed.			
Intermediate Term (1–6 months) Incidental Oral.	No residential uses are proposed.			
Short-term (1–30 days) Dermal	NOAEL 5 mg/kg/day	UF_A = 10X ..... UF_H = 10X FQPA = 1X	LOC = ... MOE ≤ 100	Prenatal Toxicity study in Rats (Dermal). The maternal LOAEL (systemic) is 20 mg/kg/day based on decreased body weight gains.
Intermediate term (1–6 months) Dermal.	NOAEL 5 mg/kg/day	UF_A = 10X ..... UF_H = 10X FQPA = 1X	LOC = ... MOE ≤ 100	Prenatal Toxicity study in Rats (Dermal). The maternal LOAEL (systemic) is 20 mg/kg/day based on decreased body weight gains.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR SPIROXAMINE FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure scenario	Point of departure	Uncertainty/FQPA safety factors	RfD, PAD, level of concern for risk assessment	Study and toxicological effects
Short term (1–30 days) Inhalation	NOAEL = 23.6 mg/kg/day.	UF_A = 10X UF_H = 10X FQPA = 1X	LOC = MOE ≤ 100	28-day Inhalation Toxicity Study in Rats. LOAEL = 0.518 mg/L = 140.5 mg/kg/day based on decreased body weights and body weight gains, increased incidences of clinical signs of toxicity and dermal irritation, thymic atrophy and toxicity to the skin, respiratory system and liver.
Intermediate term (1–6 months) Inhalation.	NOAEL = 23.6 mg/kg/day.	UF_A = 10X UF_H = 10X FQPA = 1X	LOC = MOE ≤ 100	28-day Inhalation Toxicity Study in Rats. LOAEL = 0.518 mg/L = 140.5 mg/kg/day based on decreased body weights and body weight gains, increased incidences of clinical signs of toxicity and dermal irritation, thymic atrophy and toxicity to the skin, respiratory system and liver.
Cancer (oral, dermal, inhalation)	Classification: Not likely to be carcinogenic to humans based on negative genotoxicity and carcinogenicity in long term cancer studies in rats and mice.			

Point of Departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no observed adverse effect level. LOAEL = lowest observed adverse effect level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). FQPA = FQPA Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern. N/A = not applicable.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to spiroxamine, EPA considered exposure under the petitioned-for tolerances as well as all existing spiroxamine tolerances in 40 CFR 180.602. EPA assessed dietary exposures from spiroxamine in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for spiroxamine. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed tolerance levels residues and 100 percent crop-treated (PCT) for the requested uses for spiroxamine.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed tolerance level residues and 100 PCT for the requested and currently registered uses of spiroxamine.

iii. *Cancer.* The Agency classified spiroxamine as "Not Likely to be Carcinogenic to Humans" based on the results of the carcinogenicity studies in rats and mice. Spiroxamine was determined to be non-mutagenic in bacteria, negative in an *in vivo* mammalian cytogenetics assay, and did not cause unscheduled DNA synthesis in mammalian cells *in vitro.* Accordingly, an exposure assessment to evaluate cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for spiroxamine. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

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

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and SCI–GROW model, the estimated drinking water concentrations (EDWCs) of spiroxamine for acute exposures are estimated to be 19 parts per billion (ppb) for surface water and 0.035 ppb for ground water. For chronic exposures for non-cancer assessments are estimated to be 15 ppb for surface water and 0.035 ppb for ground water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Spiroxamine is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA

requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

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

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* There is no concern for pre- or postnatal toxicity due to spiroxamine exposure. Delays in ossification, balanopreputial separation and vaginal patency were observed in the rat and may be secondary to decreased body weight. The latter two delays were resolved within the appropriate age range of puberty and no effects on reproductive function were observed in the multigeneration study in rats. Delayed balanopreputial separation was seen only in the presence of maternal toxicity and is not more severe than the maternal effects of decreased body weight and esophageal hyperkeratosis (due to irritation) seen at the common LOAEL of the multigeneration study. Delayed balanopreputial separation or vaginal patency does not cause concern for increased sensitivity to the young. There were no other treatment-related effects on fertility, viability or lactation indices or other reproductive parameters in either generation of the 2-generation reproductive toxicity study.

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

i. Except for an immunotoxicity study, the toxicity database for spiroxamine is complete. In accordance with the revised part 158 an immunotoxicity study is required. Although a test-article related structural effect on the immune system was observed in the 90-day rat inhalation study in the form of thymic atrophy accompanied by decreased platelets and consequent increased clotting time, decreased lymphocytes and increased neutrophils, these lesions were seen only when inhalation was the route of administration and at the highest dose tested of 3,000 mg/m^3 (equivalent to 141 mg/kg/day) which exceeds the limit dose of 1 mg/L (1,000 mg/m^3). These route-specific lesions are likely secondary to local (respiratory system) irritation, inflammation and injury and not attributable to frank immunotoxicity. The Agency does not believe that conducting the immunotoxicity study will result in a dose less than the POD used in this risk assessment: NOAEL = 2.5 mg/kg/day based on liver toxicity at approximately 25 mg/kg/day. Hepatotoxicity was accompanied by decreased body weight and food consumption which were also considered secondary to local (digestive system) irritation resulting in test-article related hyperkeratosis of the tongue, esophagus and stomach.

ii. There is no concern for neurotoxicity with spiroxamine. Signs of neurotoxicity were reported in the acute neurotoxicity study only. Minimal clinical signs of neurotoxicity was observed only in males at the lower dose level. However, no evidence of neurotoxicity were observed at the highest dose level in the subchronic neurotoxicity study. Therefore, there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

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

iv. Although storage and stability sampling and analysis dates have been requested for hops, there are no residual uncertainties identified in the exposure database because there is no indication of residue degradation during frozen storage. The acute and chronic dietary exposure assessments were performed based on 100 PCT and tolerance-level residues. Conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to spiroxamine in drinking water. Residential exposures are not expected. These assessments will not underestimate exposures and risks posed by spiroxamine.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-term, intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to spiroxamine will occupy 36% of the aPAD for children 1–2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to spiroxamine from food and water will utilize 40% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are no proposed or existing residential uses for spiroxamine. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of spiroxamine is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Spiroxamine is not registered for any use patterns that would result in residential exposure. Therefore, there is no potential for short-term risk to spiroxamine.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Spiroxamine is not registered for any use patterns that would result in intermediate-term residential exposure. Therefore, there is no potential for intermediate-term risk to spiroxamine.

5. *Aggregate cancer risk for U.S. population.* For spiroxamine, there were no observed evidence of carcinogenicity in two adequate rodent carcinogenicity studies, spiroxamine was determined to be non-mutagenic in bacteria, negative in an *in vivo* mammalian cytogenetics assay and did not cause unscheduled DNA synthesis in mammalian cells *in vitro.* Therefore, spiroxamine is not expected to pose a cancer risk to humans.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (gas chromatography/mass spectrometry (GC/MS) Bayer AG Method No. 00407) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; *telephone number:* (410) 305–2905; *e-mail address: residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/ World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

There are no currently established Codex, Canadian, or Mexican maximum residue limits for spiroxamine on artichoke, asparagus and fruiting vegetables (crop group 8).

C. Revisions to Petitioned-for Tolerances

EPA is revising the tolerance expression to spiroxamine to clarify the chemical moieties that are covered by the tolerances and specify how compliance with the tolerances is to be measured. The revised tolerance expression makes clear that the tolerances cover residues of the spiroxamine, including its metabolites and degradates, but that compliance with the specified tolerance levels is to be determined by measuring only the sum of spiroxamine and its metabolites containing the N-ethyl-N-propyl-1,2-dihyroxy-3-amino propane moiety, calculated as the stoichiometric equivalent of spiroxamine, in or on the commodity. In addition, although it was not noted in the company petition, a request for import tolerances (only) was petitioned of the Agency for the uses in this final rule.

V. Conclusion

Therefore, tolerances are established for residues of spiroxamine, including its metabolites and degradates in or on artichoke, globe, import at 0.7 ppm; asparagus, import at 0.05 ppm and vegetables, fruiting (crop group 8), import at 1.2 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 17, 2010.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.602 is amended by revising paragraph (a) introductory text and alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.602 Spiroxamine; tolerances for residues.

(a) *General.* Tolerances are established for residues of the fungicide spiroxamine, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified in the following table is to be determined by measuring only spiroxamine, [(8-(1,1-dimethylethyl)-N-ethyl-N-propyl-1,4-dioxaspiro[4,5]decane-2-methanamine) in or on the commodities.

Commodity	Parts per million
Artichoke, globe, import [1]	0.7
Asparagus [1]	0.05
* * * * *	
Vegetable, fruiting , crop group 8 [1]	1.2

[1] No U.S. registration as of December 1, 2010.

* * * * *

[FR Doc. 2010–30114 Filed 11–30–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 100507218–0325–02]

RIN 0648–AY91

International Fisheries; South Pacific Tuna Fisheries; Procedures To Request Licenses and a System To Allocate Licenses

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

ACTION: Final rule.

SUMMARY: Pursuant to its authority under the South Pacific Tuna Act of 1988 (SPTA), NMFS issues regulations to modify the procedures that U.S. purse seine vessels use to request fishing licenses to fish in areas managed under the SPTA. This rule also establishes a system for allocating licenses in the event more applications are received than there are licenses available. Such an allocation system is needed because the number of applications is approaching the number of available licenses, and may exceed that number. The license allocation system includes objective criteria to be used by NMFS in prioritizing among license applicants. The license application procedures are modified in accordance with the allocation system, and are designed to provide license holders and prospective license applicants with a clear and certain regulatory process. The regulations for vessels licensed under the SPTA are also modified to require that the vessel monitoring system units (VMS units), also known as mobile transmitting units, installed and carried on the vessels are a type that is NMFS-approved.

DATES: This final rule is effective January 3, 2011.

ADDRESSES: Copies of supporting documents that were prepared for this final rule, including the regulatory impact review (RIR), as well as the proposed rule, are available via the Federal e-Rulemaking portal, at *http://www.regulations.gov.* Those documents are also available from the Regional Administrator, NMFS, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Pacific Islands Regional Office (see contact information above), and by e-mail to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS, Pacific Islands Regional Office, 808–944–2219.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is also accessible at *http://www.gpoaccess.gov/fr.*

Background

On June 28, 2010, NMFS published a proposed rule in the **Federal Register** (75 FR 36619) that would modify the regulations at 50 CFR part 300, subpart D. Those regulations are issued under the authority of the South Pacific Tuna Act of 1988 (SPTA) (16 U.S.C. 973–973r), which was enacted to implement the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America and its annexes, schedules, and implementing agreements, as amended ("the Treaty"). The SPTA authorizes the Secretary of Commerce (Secretary), with the concurrence of the Secretary of State and after consultation with the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to issue regulations as may be necessary to carry out the purposes and objectives of the Treaty and the SPTA. The authority to issue regulations has been delegated to NMFS.

The Treaty governs the conduct of U.S. fishing vessel operations in the Treaty Area, as defined at 50 CFR 300.31, and which encompasses approximately 10 million square miles (26 million square kilometers) of the western and central Pacific Ocean (WCPO). The Treaty allows U.S. purse seine vessels access to a large portion of the WCPO by authorizing, and regulating through a licensing system, U.S. purse seine vessels operations within all or part of the exclusive economic zones (EEZs) of the 16 Pacific Island Parties (PIPs) to the Treaty. Licenses to operate in the Licensing Area under the Treaty are issued by the Pacific Islands Forum Fisheries Agency (FFA), based in Honiara, Solomon Islands, which acts as the Treaty Administrator on behalf of the PIPs. Licenses are issued on an annual basis, with the licensing period starting June 15th of each year. U.S. purse seine vessels licensed under the Treaty are used to target skipjack tuna and yellowfin tuna.

Currently, the Treaty allows for a maximum of 45 licenses to U.S. purse seine fishing vessels to fish in the Licensing Area of the Treaty. Of the 45 licenses, 5 are reserved for U.S. vessels engaged in "joint venture" arrangements designed to maximize the benefits generated for the PIPs. The Licensing Area comprises the entire Treaty Area, with the exception of areas subject to the jurisdiction of the United States and areas closed to fishing under the Treaty. It thus includes all or part of the EEZs of the following countries: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

Treaty licenses are issued by the FFA, but license applications for U.S. vessels are first submitted to, and must be approved by, NMFS, on behalf of the Secretary, before being forwarded to the FFA. Under current practices, NMFS ensures that applications are complete, and forwards them to the FFA on a first-come, first-served basis.

Under section 973g of the SPTA, the Secretary may establish a system of allocating Treaty licenses in the event more applications are received than there are licenses available. NMFS is now establishing such a system through this final rule. Section 973g of the SPTA also authorizes the Secretary to establish procedures for vessel operators ("operator" is defined under the SPTA to mean any person who is in charge of, directs, or controls a vessel, including the owner, charterer, and master) to request licenses from the Secretary to fish in the Treaty's Licensing Area. Such procedures have been established by NMFS, on behalf of the Secretary, at 50 CFR 300.32. In order to accommodate the allocation system that this final rule establishes, this rule also modifies the procedures used by applicants to request licenses along with the procedures used by NMFS to process those requests. The modifications to the procedures are designed in part to provide license holders and prospective license applicants with a clear and certain regulatory process.

The proposed rule provides additional background information on the SPTA, the Treaty, and the basis for the proposed regulations. The proposed rule also includes information about an advance notice of proposed rulemaking (ANPR) that was issued on March 28, 2008 (73 FR 16619). The ANPR established a control date of March 28, 2008, for participation in the U.S. purse seine fishery managed under the SPTA (hereafter, "WCPO purse seine fishery"). The control date is the date after which vessel owners and operators attempting to enter the WCPO purse seine fishery are not assured of being granted entry into or future participation in the fishery if all available licenses have been issued, or if NMFS limits the number of available licenses or imposes other management measures in the fishery. The ANPR also solicited comments and input on possible criteria and procedures that NMFS could use to review, order, and process license applications. The public comments made in response to the ANPR are summarized in the proposed rule.

New Requirements

The main elements of this final rule are described below, starting with the license application and review procedures, followed by the license allocation system (including transferability provisions), and closing with the VMS-related requirements.

License Application and Review Procedures

(1) The distinction between joint venture licenses (licenses for fishing activities designed to maximize the benefits generated for the PIPs, of which there are five available) and "general licenses" (the remaining licenses, of which there are 40 available) is clarified, and separate application procedures are established for the two license types.

(2) To obtain approval from NMFS for a joint venture license, in addition to submitting a complete application, as for a general license, an applicant is required to obtain initial approval from the FFA, as Treaty Administrator, as well as documentation from the relevant PIP or PIPs providing concurrence for the issuance of a joint venture license for the vessel. Upon receipt of a complete application for a joint venture license, NMFS will process and approve the application as it would for a general license, except that it will not issue pre-approvals, as described below for general licenses. NMFS will approve applications for joint venture licenses on a first-come, first-served basis, based on the date of initial approval by the FFA.

(3) To provide an opportunity for applicants to receive earlier and greater certainty on the status of their general license applications for a given licensing period, applicants will be allowed to seek and receive pre-approval of their applications. They may do so by submitting expressions of interest earlier than the submission of complete applications. A pre-approval will serve to temporarily reserve an application approval spot until the time that complete applications are due. Whether a pre-approval is issued for a given application will depend on the outcome of the allocation process, described below. Because of time constraints associated with implementing this rule, pre-approvals will not be issued for the 2011–2012 licensing period.

(4) For a given licensing period—with the exception of the 2011–2012 licensing period, for which pre-approvals will not be issued—the due date for submitting expressions of interest for general licenses is June 1st of the year preceding the year in which the licensing period begins. The due date for submitting complete applications for general licenses is February 5th of the year in which the licensing period begins. Complete applications may be submitted after this date, but they will be considered for approval only if licenses remain available after giving preference to expressions of interest and complete applications that were received by their respective due dates. License approvals for such late applications will be considered on a first-come, first-served basis. Due dates are also established for applications for general licenses that become available after the initial issuance of license approvals.

(5) With the exception of the 2011–2012 licensing period, for which pre-approvals will not be issued, NMFS will pre-approve applications for general licenses by July 16th of the year preceding the year in which the licensing period begins, and notify applicants of its decisions by July 26th of that preceding year. NMFS will approve applications for general licenses by March 7th of the year in which the licensing period begins, and notify applicants of its decisions by March 17th of the same year.

(6) A process to appeal NMFS' pre-approval and approval decisions is established. Appeals will be required to be submitted in writing within 14 days of the notice of NMFS' decision. The initial decision on an appeal will be made by a designee of the NMFS Pacific Islands Regional Administrator within 30 days of the appeal. Within 10 days of notice of the initial decision, the applicant may request a review of the initial decision. The final decision on an appeal will be made by the Assistant Administrator for Fisheries, NOAA, or a designee, within 30 days of the request for review. The final decision will constitute the final administrative action of the Department of Commerce.

(7) Interim procedures are established through these regulations for the 2011–2012 licensing period, as the final rule will not become effective in time for the new procedures to be fully applied for that licensing period. These procedures do not include any provisions regarding pre-approvals. Instead, the application process starts with the February 5, 2011, due date for submitting complete applications.

License Allocation System

(1) The following criteria will be used to prioritize applicants for general licenses. Based on this prioritization, NMFS will issue pre-approvals for up to 40 applications for general licenses. However, for the 2011–2012 licensing period only, for which NMFS will not issue pre-approvals, NMFS will use

these same prioritization criteria to issue approvals.

First priority will be given to applications for license renewals, but not all renewing applicants will necessarily receive first priority. Specifically, an application will receive first priority if NMFS has approved a license application for that vessel not later than fourteen (14) days prior to the start of the preceding licensing period. Also included in the first priority pool are applications for vessels licensed in the current or previous two licensing periods, but that were lost or were destroyed. In the event that a licensed vessel is lost or destroyed, the applicant will be reserved an approval spot for the licensing period in which the vessel was lost, and for the two subsequent licensing periods, provided that the ownership of the replacement vessel is identical to the ownership of the lost vessel.

Second priority will be given to applicants according to a ranking system in which points are assigned to an applicant as follows: (a) 15 points will be assigned if the vessel has been issued, or will be issued by the time application approvals are issued, in accordance with applicable U.S. Coast Guard regulations, a valid U.S. Coast Guard Certificate of Documentation with a fishery endorsement (among the eligibility criteria for receiving a fishery endorsement are that the vessel must have been built in the United States, and if rebuilt, it must have been rebuilt in the United States); (b) one point will be assigned for each licensing period, starting with the 1988–1989 licensing period, in which a Treaty license has been issued for the vessel, for a total of no more than 10 points; (c) one point will be assigned for each calendar year in which at least 3,000 metric tons of fish were landed or transshipped from the vessel in U.S. ports (including ports located in any of the U.S. States, commonwealths, territories, or possessions) starting in 1988 and ending in the year prior to the year in which the applied-for licensing period starts, for a total of no more than 5 points; and (d) if application of the foregoing criteria results in a tie, priority will be given to the vessel from which the greatest amount of fish, by weight, was landed or transshipped in U.S. ports (including ports located in any of the U.S. States, commonwealths, territories, or possessions) starting in 1988 and ending in the year prior to the year in which the applied-for licensing period starts. If there is still a tie, priority will be given by a lottery conducted by the NMFS Pacific Islands Regional Administrator.

(2) With respect to joint venture licenses, NMFS will not pre-approve applications or prioritize applications using the system established for general licenses. Instead, NMFS will approve joint venture license applications on a first-come, first-served basis, based on the date of initial approval by the FFA.

(3) With respect to the interim procedures that are established for the 2011–2012 licensing period, NMFS will apply the same prioritization system and criteria as it would for subsequent licensing periods, but it will do so only after receiving the complete applications that will be due February 5, 2011.

(4) The final rule clarifies that application approvals from NMFS are not transferable among vessel owners or operators or applicants. It does, however, allow limited transferability of application approvals among vessels. Specifically, if a general or joint venture license has been issued to a vessel, and has been valid for at least 365 consecutive days, and all required fees to the FFA for the vessel have been paid, the vessel operators will be able to request that the license be transferred to a different vessel. Such a transfer will only be allowed if the ownership of the transferee vessel is identical to that of the licensed vessel, and the transferee vessel otherwise meets the requirements for licensing under 50 CFR part 300 and the SPTA.

VMS-Related Requirements

This final rule modifies the regulations at 50 CFR 300.45, which relate to the installation, carrying, and operation of VMS units on vessels licensed under the SPTA. Prior to this final rule, the regulations required that the VMS units installed and carried on board vessels consist of hardware and software that are type-approved by the Treaty Administrator. Those requirements were consistent with the terms of the Treaty, which mandates that the VMS units used on licensed vessels be of a type approved by the Treaty Administrator. The regulations are now modified to require that the hardware and software that constitute the VMS units be type-approved by both the Treaty Administrator and NMFS. The purpose of this change is to ensure that the VMS units used on licensed vessels are compatible with, and meet the technical standards of, the vessel monitoring system administered by NMFS, as well as the vessel monitoring system administered by the Treaty Administrator.

NMFS publishes separately lists of the VMS units that it has type-approved. The current type-approval lists can be obtained from the NOAA Office of Law Enforcement, 8484 Georgia Avenue, Suite 415, Silver Spring, MD 20910; by telephone at 888–210–9288; or by fax at 301–427–0049.

Comments and Responses

NFMS received one public comment on the proposed rule. It is summarized below, followed by a response from NMFS.

Comment: The regulations should have an allowance for a vessel owner to submit a complete license application after the February 5th deadline and to be able to receive a license if the allowable number of licenses has not been allocated to vessels that met the February 5th deadline. This procedure provides a process for the allocation of licenses up to the limit allowed under the treaty. Freezing the number of licenses to those submitted only by the February 5th deadline could cause a restriction to a level below the allowed limit, and it could take away an opportunity or opportunities for allocating licenses to owners who were not in a position to submit a complete application by the February 5th deadline.

Response: The commenter is correct that as written, the proposed rule would not allow a prospective license holder to receive a license if the application is received by NMFS after the specified due dates, even if a license is available. NMFS agrees that such a system could effectively limit the number of available licenses in any given licensing period to fewer than the number allowed under the Treaty, and thereby may unduly restrict opportunities to participate in the fishery. Consequently, the licensing procedures of the final rule have been clarified to allow an applicant to apply for a license for a given licensing period at any time up to May 15th within the licensing period (*i.e.,* 30 days before the end of the licensing period). That is, in order to be assured that an application will be considered for approval, a complete application must still be received by NMFS by the due date specified in this final rule. However, NMFS will consider for approval all applications received after the applicable due date established in this final rule if and as long as licenses remain available. Such applications will be considered on a first-come, first-served basis, based on the day of receipt. In the event that two or more complete applications are received on the same day, priority for approval will be given by lottery.

Changes From the Proposed Rule

As described above in NMFS' response to the public comment on the proposed rule, changes have been made in this final rule in order to provide for application approvals to be issued for "late applications" (*i.e.,* applications submitted after the due dates used for the purpose of allocating application approvals in the event that more applications are received than there are licenses available). The change allows NMFS to approve such "late applications" on a first-come, first-served basis, and only after giving preference to applicants that submitted their applications within the due dates, and only in the event that licenses remain available after the expiration of the application approval deadline.

Specifically, clarifications have been made to paragraphs (h) and (k) of § 300.32 to provide that an application submitted as late as May 15th within a given licensing period may be considered for approval if there are licenses remaining. However, in order to be considered for approval in the event that more applications are received than there are licenses available, the complete application must be received by NMFS by February 5th of the year in which the licensing period begins, or, in the case of the license approval becoming available after the initial issuance of approvals, at a specified later date. Paragraph (k) of § 300.32 has been clarified to provide for NMFS to consider "late applications" received no later than May 15th within the licensing period for approval on a first-come, first-served basis, and only after giving preference to expressions of interest and complete applications that were received within their respective due dates. Paragraph (k) of § 300.32 goes on to state that in the event that two or more "late applications" are received on the same day, priority will be given by lottery, which will be conducted by the NMFS Pacific Islands Regional Administrator.

A correction was made to the criteria specified in paragraph (k) of § 300.32 that would be used to determine first priority for pre-approvals. Under the proposed rule, first priority would be given to applications for vessels with valid licenses as of June 1st of the year preceding the year in which the subject licensing period begins; that is, to vessels with licenses for the licensing period two periods previous to the subject licensing period. However, an unintended effect of this lag is that a vessel that enters the fishery for the first time in the 2011–2012 licensing period would not receive first priority (*i.e.,* as a license renewal) for the 2012–2013 licensing period. Consequently, a correction was made to paragraph (k)(4)(i) of § 300.32 such that first priority for pre-approvals for a given licensing period will be given to vessels for which, as of June 1st of the year preceding the year in which the subject licensing period begins, application approvals have been issued by NMFS for the licensing period that precedes the subject licensing period. Because paragraph (n) of § 300.32, which specifies exceptional procedures to be used for the 2011–2012 licensing period, makes reference to paragraph (k)(4)(i) of § 300.32, appropriate technical corrections have been made to paragraph (n) of § 300.32 so that its meaning does not change. Specifically, it now states that for the 2011–2012 licensing period only, first priority will be given to vessels that, as of February 5, 2011, have valid licenses for the 2010–2011 licensing period.

A change has been made to the definition of "Regional Administrator" in § 300.31; the definition now includes a facsimile number that may be used for the purpose of submitting information and materials required under 50 CFR part 300, subpart D.

In addition to the substantive changes described above, a number of minor changes have been made in the regulations in order to clarify their meaning.

Classification

The NOAA Assistant Administrator for Fisheries has determined that this final rule is consistent with the SPTA and other applicable laws.

Executive Order 12866

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

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. NMFS received no comments disputing the basis for this certification.

Paperwork Reduction Act

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by the Office of Management and Budget (OMB) under control number 0648–0218. Public reporting burden for this collection of information, called "South Pacific Tuna Act," is estimated to average: (a) For the optional expressions of interest in vessel licenses, 15 minutes per response for license renewals and 120 minutes per response for initial licenses (with one optional response per year); (b) for the license application forms, 60 minutes per response (with one response per year); (c) for the FFA Regional Register applications/VMS registration forms, 45 minutes per response (with 1 response per year); (d) for the catch report forms, 60 minutes per response (with 5 responses per year); and (e) for the unloading logsheet, 30 minutes per response (with 6 responses per year). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (*see* **ADDRESSES**) and by e-mail to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: November 26, 2010.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart D—South Pacific Tuna Fisheries

■ 1. The authority citation for 50 CFR part 300, subpart D continues to read as follows:

Authority: 16 U.S.C. 973–973r.

■ 2. In § 300.31, the definitions for "Regional Administrator" and "Vessel Monitoring System Unit or VMS unit"

are revised and a new definition for "State" is added, to read as follows:

§ 300.31 Definitions.

* * * * *

Regional Administrator means the Regional Administrator, Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814, facsimile: 808–973–2941, or a designee.

State means each of the several States of the United States, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, American Samoa, the Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States.

* * * * *

Vessel Monitoring System Unit or *VMS unit,* sometimes known as a "mobile transmitting unit," means Administrator-approved and NMFS-approved VMS unit hardware and software that is installed on a vessel pursuant to § 300.45. The VMS units are a component of the regional vessel monitoring system administered by the FFA, as well as of the vessel monitoring system administered by NMFS, and as such are used to transmit information between the vessel and the Administrator and NMFS and/or other reporting points designated by NMFS.

■ 3. § 300.32 is revised to read as follows:

§ 300.32 Vessel licenses.

(a) Each vessel fishing in the Licensing Area must have a license issued by the Administrator for the licensing period being fished, unless exempted by § 300.39. Each licensing period begins on June 15 and ends on June 14 of the following year.

(b) Upon receipt, the license or a copy or facsimile thereof must be carried on board the vessel when in the Licensing Area or Closed Areas, and must be produced at the request of authorized officers, authorized party officers, or authorized inspectors. A vessel may be used to fish in the Licensing Area if the license has been issued but not yet received, provided that the license number is available on board.

(c) The total number of licenses that may be issued and valid at any point in time is 45, five of which shall be reserved for fishing vessels of the United States engaged in joint venture arrangements.

(1) For the purpose of this section, the licenses reserved for vessels engaged in joint venture arrangements are referred to as "joint venture licenses," and the remaining licenses are referred to as "general licenses."

(2) A joint venture arrangement is one in which the subject vessel and its operators are engaged in fishing-related activities designed to maximize the benefits generated for the Pacific Island Parties from the operations of fishing vessels licensed pursuant to the Treaty, as determined by the Administrator. Such activities can include the use of canning, transshipment, vessel slipping and repair facilities located in the Pacific Island Parties; the purchase of equipment and supplies, including fuel supplies, from suppliers located in the Pacific Island Parties; and the employment of nationals of the Pacific Island Parties on board such vessels.

(d) Licenses are issued by the Administrator. The Administrator will issue licenses only for applications that have been approved by the Regional Administrator. The Regional Administrator's approval is indicated by the signature of the Regional Administrator on the part of the application form labeled "Schedule 1." Upon approval by the Regional Administrator of a license application, the complete application will be forwarded to the Administrator for consideration. Except as provided in paragraph (n) of this section, prior to approving license applications for a given licensing period, the Regional Administrator will issue pre-approvals of license applications that serve the purpose of temporarily reserving approvals up until the time complete applications are due to be received by the Regional Administrator.

(e) The Regional Administrator, in his or her sole discretion, may approve fewer license applications than there are licenses available for any given licensing period or at any given time.

(f) A pre-approval or approval issued by the Regional Administrator pursuant to this section:

(1) Shall not confer any right of compensation to the recipient of such pre-approval or approval;

(2) Shall not create, or be construed to create, any right, title, or interest in or to a license or any fish; and

(3) Shall be considered a grant of permission to the recipient of the pre-approval or approval to proceed with the process of seeking a license from the Administrator.

(g) A pre-approval or approval issued by the Regional Administrator pursuant to this section is subject to being rescinded at any time if the Regional Administrator determines that an administrative error has been made in its granting, false information has been provided by the applicant, circumstances have changed such that the information provided by the applicant is no longer accurate, true or valid, or if the applicant or vessel no longer meets the requirements for licensing under this subpart or under the Act or other applicable law. NMFS will notify the applicant of its rescission of a pre-approval or approval within 14 days of the rescission. In the event that the Regional Administrator rescinds an approval after the license has been issued, NMFS will notify the Administrator of such, and request that the Administrator immediately revoke the license.

(h) *Application process for general licenses.*

(1) A vessel operator who satisfies the requirements for licensing under the Act and under this subpart may apply for a general license.

(2) In order for a general license to be issued for a vessel, an applicant must submit a complete application to, and obtain an application approval from, the Regional Administrator.

(3) Except for the 2011–2012 licensing period, prior to submitting a complete application, an applicant may request pre-approval of an application by the Regional Administrator by submitting an expression of interest. A pre-approval of an application establishes that the applicant is eligible to be considered for one of the available licenses following timely submission of a complete application. Although submission of an expression of interest is entirely voluntary, applications that have not been pre-approved might not be eligible for approval if the number of applications exceeds the number of available licenses for a given licensing period. A pre-approval will be deemed to be void if the applicant fails to submit a complete application by the date established in paragraph (h)(6) of this section.

(4) Except as provided in paragraph (n) of this section, in order to obtain a pre-approval for a given licensing period, either an expression of interest or a complete application must be submitted to and received by the Regional Administrator no later than June 1st of the year preceding the year in which the licensing period begins.

(5) An expression of interest must include the information listed below, which may be submitted by electronic or hard-copy correspondence following instructions provided by the Regional Administrator.

(i) If the expression of interest is for a vessel for which, as of the June 1st due date for submitting such expression of interest, NMFS has issued an application approval for the licensing period that starts that year (i.e., a

renewal of the license is being sought), the expression of interest shall include:

(A) The licensing period for which the license is being sought.

(B) The current name, IRCS, and annual USCG Certificate of Documentation number of the vessel.

(ii) For all other expressions of interest that do not meet the criteria in paragraph (h)(5)(i) of this section, the expression of interest shall include:

(A) The licensing period for which the license is being sought.

(B) The full name and address of each person who is, or who is anticipated to be, an operator of the vessel for which a license is sought, and for each such person, a statement of whether the person is, or is anticipated to be, owner, charterer, and/or master of the vessel.

(C) A statement of whether or not the vessel to be licensed is known, and if it is known, the current name, IRCS, and annual USCG Certificate of Documentation number, if any, of the vessel.

(D) A copy of the vessel's current USCG Certificate of Documentation. If the vessel has not been issued such a document, then a statement of whether application has been or will be made for a USCG Certificate of Documentation, including identification of all endorsements sought in such application.

(E) If the vessel is known, a list of the licensing periods, if any, during which a license for the vessel was issued under this section.

(F) If the vessel is known, a statement of the total amount, in metric tons, of any tuna species landed or transshipped from the vessel at United States ports, including ports located in any of the States, for each of the calendar years 1988 through the current year.

(6) A complete application for a given licensing period may be submitted to the Regional Administrator at any time up to May 15th within the licensing period, but in order to be considered for approval in the event that more applications are received by the Regional Administrator than there are licenses available, a complete application must be received by the Regional Administrator as follows:

(i) No later than February 5th of the year in which the licensing period begins; or

(ii) If a pre-approval of the application was issued in accordance with paragraphs (k)(8) or (k)(9) of this section, not later than the date specified by NMFS in the notification of such pre-approval (which will be calculated by NMFS to be no later than 194 days from the date of mailing of the notification of the pre-approval).

(7) License application forms, which include the "Schedule 1" form and the FFA Vessel Register application form, are available from the Regional Administrator. The complete application must be received by the Regional Administrator as specified in paragraph (h)(6) of this section. An application shall not be complete, and shall not be subject to processing, unless it contains all of the information specified on the "Schedule 1" form and all the items listed in paragraphs (h)(7)(i) through (h)(7)(x) of this section, as follows:

(i) The licensing period for which the license is requested.

(ii) The name of an agent, located in Port Moresby, Papua New Guinea, who, on behalf of the license holder, will receive and respond to any legal process issued in accordance with the Treaty.

(iii) Documentation from an insurance company showing that the vessel will be fully insured for the licensing period against all risks and liabilities normally covered by maritime liability insurance.

(iv) If the owner or charterer is the subject of proceedings under the bankruptcy laws of the United States, a statement that the owner or charterer will be financially able to fulfill any and all responsibilities under the Treaty, Act, and regulations, including the payment of any penalties or fines.

(v) A copy of the vessel's current annual USCG Certificate of Documentation.

(vi) Electronic versions of full color photographs of the vessel in its current form and appearance, including a bow-to-stern side-view photograph of the vessel that clearly and legibly shows the vessel markings, and a photograph of every area of the vessel that is marked with the IRCS assigned to the vessel.

(vii) A schematic stowage/well plan for the vessel.

(viii) A copy of the VMS unit installation certificate, issued by the Administrator-authorized person who installed the VMS unit, for the VMS unit installed on the vessel in accordance with § 300.45.

(ix) An FFA Vessel Register application form that includes all the applicable information specified in the form.

(x) In the case of an application for a vessel that does not meet the criteria in paragraph (h)(5)(i) of this section, any information under paragraph (h)(5)(ii) of this section that has not already been provided or that has changed since it was previously submitted.

(i) *Application process for joint venture licenses.*

(1) A vessel operator who satisfies the requirements for licensing under the Act and under this subpart may apply for a joint venture license.

(2) The applicant, in coordination with one or more Pacific Island Parties, shall contact the Administrator to determine the specific information and documents that are required by the Administrator in order to obtain an initial approval from the Administrator for a joint venture license. The applicant shall submit such required information and documents directly to the Administrator. Once an initial approval is obtained from the Administrator, the applicant shall submit a complete application package, as described in paragraph (h)(7) of this section, to the Regional Administrator, along with dated documentation of the Administrator's initial approval, and a letter or other documentation from the relevant national authority or authorities of the Pacific Island Party or Parties identifying the joint venture partner or partners and indicating the Party's or Parties' approval of the joint venture arrangement and its or their concurrence that a joint venture license may be issued for the vessel.

(j) *Appeals.*

(1) *Eligibility.* Any applicant who is denied a pre-approval or an approval under this section may appeal the denial. The appeal must be made in writing and must clearly state the basis for the appeal and the nature of the relief that is requested. The appeal must be received by the Regional Administrator not later than 14 days after the date that the notice of denial is postmarked.

(2) *Appeal review.* Upon receipt of an appeal, the Regional Administrator will appoint a designee who will review the basis of the appeal and issue an initial written decision. The written decision will be mailed to the applicant within 30 days of receipt of the appeal. If the appellant does not request a review within 10 days of mailing of the initial decision, the initial decision is the final administrative action of the Department of Commerce. If, within 10 days of mailing of the initial decision, the Regional Administrator receives from the appellant a written request for review of the initial decision, the Assistant Administrator or a designee will review the basis of the appeal and issue a final written decision. The final decision will be made within 30 days of receipt of the request for review of the initial decision. The decision of the Assistant Administrator or designee constitutes the final administrative action of the Department of Commerce.

(k) *Procedures used by the Secretary to review and process applications for general licenses.* The procedures in this

paragraph apply to the process used by NMFS, on behalf of the Secretary and in consultation with the Secretary of State, to review expressions of interest and complete applications, and to approve applications. For the purpose of this section, NMFS' approval of an application means the signing by the Regional Administrator of the "Schedule 1" part of the application form, indicating that the application is complete and that it meets the requirements of the Act and of this subpart for forwarding to the Administrator. For the purpose of this section, NMFS' pre-approval of an application means that the Regional Administrator has initially determined that the applicant is eligible for a general license, but that the application has not yet been approved for forwarding to the Administrator.

(1) NMFS will pre-approve no more applications for a given licensing period than there are licenses available for that licensing period. A pre-approval will be deemed to be void if the applicant fails to submit a complete application by the date established in paragraph (h)(6) of this section.

(2) NMFS will approve no more applications for a given licensing period than there are licenses available for that licensing period.

(3) NMFS will not approve a license application if it determines that:

(i) The application is not in accord with the Treaty, Act, or regulations;

(ii) The owner or charterer is the subject of proceedings under the bankruptcy laws of the United States, and reasonable financial assurances have not been provided to the Secretary that the owner or charterer will be financially able to fulfill any and all responsibilities under the Treaty, Act, and regulations, including the payment of any penalties or fines;

(iii) The owner or charterer has not established to the satisfaction of the Secretary that the vessel will be fully insured for the licensing period against all risks and liabilities normally covered by maritime liability insurance; or

(iv) The owner or charterer has not paid any final penalty assessed by the Secretary in accordance with the Act.

(4) Except as provided in paragraph (n) of this section, no later than July 16th of each year, NMFS will pre-approve applications from among the expressions of interest and complete applications that were received by June 1st of the current year for the licensing period that starts the following year as provided in this paragraph. If the number of expressions of interest and complete applications does not exceed the number of licenses available, all applications that meet the requirements of paragraphs (h)(4) and (h)(5) of this section and that satisfy the relevant requirements for licensing under the Act and this subpart will be pre-approved. If the number of expressions of interest and complete applications exceeds the number of licenses available, those that meet the requirements of paragraphs (h)(4) and (h)(5) of this section and that satisfy the relevant requirements for licensing under the Act and this subpart will be prioritized for pre-approval as follows:

(i) First priority will be given to expressions of interest and complete applications for vessels for which, as of June 1st of that year, application approvals have been issued by NMFS for the licensing period that starts that year (*i.e.,* anticipated license renewal applications), provided that such vessels continue to satisfy the requirements for licensing under the Act and this subpart, and provided such vessels have no unsatisfied civil penalties or fines assessed by the Secretary under the Act that have become final.

(ii) Second priority will be given to expressions of interest and complete applications scored using the following system, in descending order of the sum of the points assigned:

(A) 15 points will be assigned for a vessel that has been issued, or will be issued by the date complete applications are due to be received by the Regional Administrator under paragraph (h)(6) of this section, a valid USCG Certificate of Documentation with a fishery endorsement.

(B) 1 point will be assigned for each licensing period, starting with the 1988–1989 licensing period, in which a license had been issued for the vessel pursuant to the Act, for a total of no more than 10 points.

(C) 1 point will be assigned for each calendar year in which at least 3,000 metric tons of fish were landed or transshipped from the vessel in United States ports, including ports located in any of the States, as determined by the Regional Administrator. The applicable period shall run from 1988 through the last calendar year prior to the year in which the applied-for licensing period starts, and the total number of points assigned shall be no more than 5.

(D) In the event that two or more vessels receive the same sum number of points under paragraphs (k)(4)(ii)(A) through (k)(4)(ii)(C) of this section, priority will be given to the vessel from which the greatest amount of fish, by weight, was landed or transshipped in United States ports, including ports located in any of the States, starting in calendar year 1988 and ending in the year prior to the year in which the applied-for licensing period starts, as determined by the Regional Administrator. In the event that that does not resolve the tie, priority will be given by lottery, which will be conducted by the Regional Administrator.

(5) Except as provided in paragraph (n) of this section, no later than July 26th of each year, NMFS will send notifications by mail to all applicants that submitted expressions of interest or complete applications by June 1st of that year, indicating whether their applications (for the licensing period that starts the following year) have been pre-approved.

(6) No later than March 7th of each year, NMFS will approve applications (for the licensing period that starts that year) that satisfy all of the following conditions:

(i) The application was pre-approved;

(ii) The information associated with the application has not changed since the point of pre-approval in a way such that pre-approval would not have been made using the updated information;

(iii) The complete application was received by February 5th of the same year; and

(iv) The applicant satisfies the requirements for licensing under the Act and this subpart.

(7) No later than March 17th of each year, NMFS will notify all applicants (for the licensing period that starts that year) who submitted complete applications by February 5th of that year, whether their applications have been approved under paragraph (k)(6) of this section, and in cases where they have not, whether their applications are being considered for approval under paragraph (k)(8) of this section.

(8) In the event that additional licenses for a given licensing period are available after issuing the approvals under paragraph (k)(6) of this section, NMFS will, after final administrative action by the Department of Commerce on any appeals made under paragraph (j) of this section, do the following:

(i) If the number of outstanding expressions of interest (*i.e.,* expressions of interest that have not been pre-approved) received by June 1st of the year preceding the year in which the licensing period begins, plus the number of outstanding complete applications (*i.e.,* complete applications that have not been approved) received by February 5th of the year in which the licensing period begins, exceeds the number of licenses available, NMFS will review all such outstanding expressions of interest and complete applications

and apply the process described in paragraphs (k)(9)(i)(A) through (k)(9)(i)(C) of this section to pre-approve and approve applications from among that pool of applicants;

(ii) If the number of outstanding expressions of interest received by June 1st of the year preceding the year in which the licensing period begins, plus the number of outstanding complete applications received by February 5th of the year in which the licensing period begins, does not exceed the number of licenses available:

(A) No later than June 15th of the year in which the licensing period begins, NMFS will pre-approve all such outstanding expressions of interest and complete applications that satisfy the relevant requirements for licensing under the Act and this subpart;

(B) No later than June 25th of the year in which the licensing period begins, NMFS will notify all such outstanding applicants of the pre-approvals, and for those applicants that submitted expressions of interest but not complete applications, also notify them of the date by which a complete application must be received in order to be issued an application approval (which will be calculated by NMFS to be no later than 194 days from the date of mailing of the notification of the pre-approval);

(C) NMFS will review all complete applications received by the required date from applicants pre-approved under paragraph (8)(ii)(A) of this section, and within 30 days of such receipt, approve the application, if and as appropriate and if the applicant satisfies the requirements for licensing under the Act and this subpart; and

(D) If and as long as the number of approvals plus outstanding (not voided) pre-approvals does not exceed the total number of licenses available under paragraph (c) of this section, NMFS will review all complete applications received after February 5th of the year in which the licensing period begins and before May 16th within the licensing period and, as they are received and in the order they are received (based on the day of receipt), will approve those applications that satisfy the requirements for licensing under the Act and this subpart until no more approvals are available. In the event that two or more complete applications are received on the same day, priority for approval will be given by lottery, which will be conducted by the Regional Administrator.

(iii) Within 10 days of approving an application, NMFS will notify the applicant.

(9) If a license or application approval that has been issued for a given licensing period becomes available before or during that licensing period, NMFS will do the following:

(i) If there are any outstanding expressions of interest received by June 1st of the year preceding the year in which the licensing period begins or outstanding complete applications received by February 5th of the year in which the licensing period begins, NMFS will review all such outstanding expressions of interest and complete applications and pre-approve and approve applications for that license from among that pool as follows:

(A) Within 45 days of NMFS becoming aware of the availability of the license, NMFS will pre-approve an application using the prioritization criteria and point-assigning system described in paragraphs (k)(4)(i) and (k)(4)(ii) of this section;

(B) Within 55 days of NMFS becoming aware of the availability of the license NMFS will notify all active applicants as to whether their applications have been pre-approved, and for those applications that have been pre-approved, notify each applicant of the date by which a complete application, if not already received, must be received (which will be calculated by NMFS to be no later than 194 days from the date of mailing of the notification of the pre-approval); and

(C) Within 30 days of receiving a complete application that had been pre-approved, NMFS will approve the application, if and as appropriate and if the applicant satisfies the requirements of this subpart.

(ii) If there are no outstanding expressions of interest received by June 1st of the year preceding the year in which the licensing period begins and no outstanding complete applications received by February 5th of the year in which the licensing period begins, if and as long as the number of approvals plus outstanding (not voided) pre-approvals does not exceed the number of licenses available, NMFS will review all complete applications received after February 5th of the year in which the licensing period begins and before May 16th within the licensing period and, in the order they are received (based on the day of receipt), will approve those applications that satisfy the requirements for licensing under the Act and this subpart until no more approvals are available. In the event that two or more complete applications are received on the same day, priority for approval will be given by lottery, which will be conducted by the Regional Administrator.

(iii) Within 10 days of approving an application, NMFS will notify the applicant.

(l) *Procedures used by the Secretary to review and process applications for joint venture licenses.* NMFS, on behalf of the Secretary and in consultation with the Secretary of State, will review and approve applications for joint venture licenses as described in paragraph (k) of this section for general licenses, except that NMFS will not consider expressions of interest for joint venture licenses or pre-approve applications for joint venture licenses. In the event that NMFS receives for a given licensing period more applications for joint venture licenses than there are licenses available, it will approve the applications in the chronological order that the Administrator has provided its initial approval.

(m) *Transferability of application approvals.* Application approvals from NMFS are not transferable among vessel owners or operators or license applicants. Application approvals are transferable among vessels, subject to the following requirements:

(1) A vessel operator may seek to transfer a general or joint venture license to another vessel that meets the requirements for licensing under this subpart and the Act, only if the license has been valid for the vessel for at least 365 consecutive days and all the fees required by the Administrator for the current licensing period have been paid to the Administrator. The vessel operator may seek to transfer the license by submitting a written request to the Regional Administrator along with a complete application for the other vessel as described in paragraph (h)(7) of this section. Any such transfer may be subject to additional fees for the registration of the vessel on the FFA Vessel Register, as specified in paragraph (b) of § 300.45.

(2) Upon receipt of a request and complete application under paragraph (m)(1) of this section, the Regional Administrator, after determining that all the fees required for the vessel by the Administrator for the current licensing period have been paid, that the ownership of the licensed vessel and the ownership of the vessel to which the application approval would be transferred are identical, and that the transferee vessel meets the requirements for licensing under this subpart and the Act, will approve the application and notify the applicant of such within 10 days of the determination.

(3) If a licensed vessel is lost or destroyed, and the operators of the vessel apply for a license for another vessel for the licensing period during

which the vessel was lost, or for either of the two subsequent licensing periods, NMFS will consider the replacement vessel to have the license application approval status and history of the lost or destroyed vessel for the purpose of applying the prioritization criteria of paragraph (k)(4) of this section, provided that the ownership of the lost or destroyed vessel and the ownership of the replacement vessel, as determined by the Regional Administrator, are identical, and the replacement vessel meets the requirements for licensing under this subpart and the Act.

(n) *Procedures for 2011–2012 licensing period.* For the licensing period that starts June 15, 2011, and for that licensing period only, pre-approvals may not be sought and will not be issued by NMFS. NMFS will rank order those applications received by February 5, 2011, for the 2011–2012 licensing period by applying the criteria in paragraphs (k)(4)(i) and (k)(4)(ii) of this section, except that in lieu of using the criteria in (k)(4)(i), first priority will be given to applications for vessels that as of February 5, 2011, have valid licenses for the 2010–2011 licensing period.

■ 4. In § 300.45, paragraph (d) is revised to read as follows:

§ 300.45 Vessel monitoring system.

* * * * *

(d) *Hardware and software specifications.* The VMS unit installed and carried on board a vessel to comply with the requirements of this section must consist of hardware and software that is approved by the Administrator and approved by NMFS. A current list of hardware and software approved by the Administrator may be obtained from the Administrator. A current list of hardware and software approved by NMFS may be obtained from NMFS.

* * * * *

[FR Doc. 2010–30240 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 100510220–0581–04]

RIN 0648–AY90

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Fisheries Closure in the Gulf of Mexico Due to the Deepwater Horizon MC252 Oil Spill; Amendment 3

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

ACTION: Temporary emergency rule; amendment; request for comments.

SUMMARY: NMFS issues this temporary rule to revise the existing procedures for closing and reopening areas of the Gulf of Mexico (Gulf) exclusive economic zone (EEZ) for the royal red component of the Gulf shrimp fishery in response to a fishery interaction of the Gulf shrimp fishery with oil or oil byproducts from the Deepwater Horizon MC252 oil spill. The revisions to the procedures for closing and reopening allow for timely adjustment to the spatial and temporal scale of closed areas to fishing for royal red shrimp in response to new information regarding a fishery interaction with the Gulf shrimp fishery with sub-surface oil and oil byproducts. To facilitate timely notice to the public of such closures, the closed portions of Federal waters will be updated on a regular basis and announced to the public via NOAA Weather Radio, Fishery Bulletin, and NOAA Web site updates, or the public may obtain the information by calling the Deepwater MC252 Oil Spill Hotline at 800–627–6622. The action being taken pursuant to this temporary rule is to prohibit royal red shrimp fishing in a specific area of the Gulf in response to a known interaction of this component of the shrimp fishery with sub-surface oil and oil byproducts. This temporary rule would remain in effect for 10 days, unless superseded by subsequent rulemaking. The intended effect of this temporary rule is to promote seafood safety and consumer confidence in seafood products.

DATES: This rule is effective November 26, 2010 through December 4, 2010, unless superseded by subsequent rulemaking. Comments may be submitted by December 24, 2010.

ADDRESSES: You may submit comments on this rule, identified by "0648–AY90" by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.*
- *Fax:* 727–824–5308; Attention: Anik Clemens.
- *Mail:* Anik Clemens, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: No comments will be posted for public viewing until after the comment period. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-Rulemaking Portal: *http://www.regulations.gov,* enter "NOAA–NMFS–2010–0244" in the keyword search, then select "Send a Comment or Submission." NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the environmental assessment, signed on June 17, 2010, may be obtained from Susan Gerhart, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701–5505; telephone: 727–824–5305; e-mail: *Susan.Gerhart@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Anik Clemens, telephone: 727–824–5305, fax: 727–824–5308; e-mail: *anik.clemens@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) provides the legal authority for the promulgation of emergency regulations under section 305(c).

Background

NMFS responded to the April 20, 2010 Deepwater Horizon MC252 oil spill by closing a portion of the Gulf EEZ to all fishing through an emergency rule effective May 2, 2010 (75 FR 24822, May 6, 2010). Oil continued to leak from the Deepwater Horizon MC252 site and the spatial and temporal location of the oil in the Gulf EEZ continued to change. NMFS revised the closed area in a second emergency rule that became

effective May 7, 2010 (75 FR 26679, May 12, 2010). The dynamic situation regarding the Deepwater Horizon MC252 oil spill required a method to respond rapidly to changing conditions. Delaying the announcement of the new fishery closed area could have led to the possible harvest of adulterated seafood products. Therefore, NMFS issued a third emergency rule, effective May 11, 2010 (75 FR 27217, May 14, 2010) that allowed NMFS to revise the closed area as needed (on a daily or weekly basis) and announce the revised closed area via NOAA Weather Radio, Fishery Bulletin, and NOAA Web site updates, without the need to announce the new closure boundary coordinates in the **Federal Register.**

Procedures for Closing and Reopening Areas Affected by the Oil Spill

The third emergency rule also identified a procedure for reopening closed areas. Closed areas may be reopened if NMFS has determined that oil from the Deepwater Horizon MC252 oil spill has never been in those areas. Closed areas may also be reopened if NMFS has determined that fish and other marine species within the closed area meet FDA standards for public health and wholesomeness. The procedures did not specifically address fishery interactions with sub-surface oil or oil byproducts. This temporary rule revises the NMFS procedure by allowing for timely adjustment of the spatial and temporal scale of closed areas to fishing activities in response to new information regarding an interaction of the Gulf shrimp fishery with sub-surface oil and oil byproducts.

Need for This Temporary Rule

In response to this interaction, which occurred approximately 22 miles (35 km) from the Deepwater Horizon MC252 well head, NMFS is taking temporary action to prohibit royal red shrimp fishing in a specific area of the Gulf EEZ. The area of the Gulf EEZ currently closed to all fishing would continue to remain in effect.

The public may obtain the updated boundary coordinates for the fishery closed area by listening to NOAA Weather Radio, visiting various NOAA Web sites, reading the e-mailed or posted Fishery Bulletins, receiving a text message or a tweet that the closed area has been revised, or by calling the Deepwater Horizon MC252 oil spill hotline number (1–800–627–6622) to listen to a recorded message of the updated boundary coordinates. To improve public outreach, the fishery bulletins and the recorded messages are also available in Spanish and Vietnamese.

This rulemaking informs the public of the boundary coordinates of the current area closed to all fishing as well as the new area closed to royal red shrimp fishing only. The current area closed to all fishing related to the Deepwater Horizon MC252 oil spill, as of November 15, 2010, is bounded by rhumb lines connecting, in order, the following coordinates:

Point	North lat.	West long.
A	29°00′	88°30′
B	29°00′	88°00′
C	28°30′	88°00′
D	28°30′	88°30′
A	29°00′	88°30′

The area closed to royal red shrimp fishing only, as of 6 p.m. Eastern Time, on November 24, 2010, is bounded by rhumb lines connecting, in order, the following coordinates:

Point	North lat.	West long.
A	29°30′	LA State/EEZ boundary.
B	29°30′	87°30′
C	29°00′	87°30′
D	29°00′	88°30′
E	28°30′	88°30′
F	28°30′	89°00′
G	LA State/EEZ boundary	89°00′
From point G follow the state/EEZ boundary back to point A.		
A	29°30′	LA State/EEZ boundary.

Pursuant to second 305(c) of the Magnuson-Stevens Act, this rule will remain in effect for 10 days, unless superseded by subsequent rulemaking.

Classification

This action is issued pursuant to section 305(c) of the Magnuson-Stevens Act, 16 U.S.C. 1855(c).

This rulemaking is a "significant regulatory action" under section 3(f) of Executive Order 12866. The Department of Commerce has notified the Office of Management and Budget Office of Information and Regulatory Affairs (OMB/OIRA) under section 6(a)(3)(D) of the Executive Order, and OMB/OIRA agrees, that NOAA is promulgating this action in an emergency situation and that normal Executive Order review is not practicable at this time. For this reason, OMB/OIRA has not reviewed this notice under EO 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. Prior notice and the opportunity for public comment would be impracticable and contrary to the public interest, as delaying this action is a seafood safety concern and could result in compromised seafood products reaching the public. This action allows NMFS to close and reopen areas of the Gulf, as needed, in response to new information regarding the royal red shrimp component of the Gulf shrimp fishery with sub-surface oil and oil byproducts. This rule closes an area of the Gulf EEZ to royal red shrimp fishing in response to an interaction with the Gulf shrimp fishery and sub-surface oil and oil byproducts that occurred approximately 22 miles (35 km) from the Deepwater Horizon MC252 well head. The intent of this action is to prevent the harvest of adulterated seafood products. A timely response is needed to ensure seafood safety and consumer confidence in seafood products.

For the reasons stated above, the AA also finds good cause to waive the 30-day delay in effective date of this rule under 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.

List of Subjects in 50 CFR Part 622

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

Dated: November 24, 2010.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

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

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

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

■ 2. In § 622.34, paragraph (n) is removed and reserved and paragraph (o) is added to read as follows:

§ 622.34 Gulf EEZ seasonal and/or area closures.

* * * * *

(o) *Gulf EEZ area closure related to Deepwater Horizon oil spill.* Effective November 26, 2010, fishing is prohibited in the portion of the Gulf EEZ, and for the fishery components identified, in the map shown on the NMFS Web site: *http://sero.nmfs.noaa.gov/deepwater_horizon_oil_spill.htm.*

* * * * *

[FR Doc. 2010–30232 Filed 11–26–10; 4:15 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 100806332–0573–02]

RIN 0648–BA02

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Gag Grouper Management Measures

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final temporary rule.

SUMMARY: NMFS issues this final temporary rule to implement interim measures to reduce overfishing of gag in the Gulf of Mexico (Gulf). This final rule reduces the commercial quota for gag and, thus, the combined commercial quota for shallow-water grouper species (SWG), prohibits recreational harvest of gag, and suspends red grouper multi-use allocation in the Gulf grouper and tilefish individual fishing quota (IFQ) program, as requested by the Gulf of Mexico Fishery Management Council (Council). The intended effect of this final temporary rule is to reduce overfishing of the gag resource in the Gulf.

DATES: This rule is effective January 1, 2011 through May 31, 2011.

ADDRESSES: Copies of the final regulatory flexibility analysis (FRFA) may be obtained from Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Peter Hood, telephone: 727–824–5305, or e-mail: *Peter.Hood@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the fishery management plan (FMP). The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On October 18, 2010, NMFS published the proposed temporary rule and requested public comment (75 FR 63786).

This final temporary rule will reduce the commercial quota for gag, reduce the combined commercial SWG quota, prohibit recreational harvest of gag, and suspend red grouper multi-use allocation in the Gulf grouper and tilefish IFQ program. The purpose of this final temporary rule is to reduce overfishing of the gag resource in the Gulf. No changes were made to this final rule as a result of public comment.

Comments and Responses

The following is a summary of the comments NMFS received on the proposed rule and NMFS' respective responses. During the comment period, NMFS received 55 comments on the proposed rule.

Comment 1: A number of commenters questioned the scientific basis used to assess gag stocks and how scientific information was applied to support fishery management decisions. They indicated the data NMFS used were outdated, flawed, or anecdotal.

Response: Stock assessments are conducted under the scientifically peer-reviewed Southeast Data, Assessment, and Review (SEDAR) process which was initiated in 2002 to improve the quality and reliability of fishery stock assessments in the Gulf, South Atlantic, and U.S. Caribbean. SEDAR seeks improvements in the scientific quality of stock assessments and supporting information available to address existing and emerging fishery management issues. This process emphasizes constituent and stakeholder participation in assessment development, transparency in the assessment process, and a rigorous and independent scientific review of completed stock assessments. SEDAR is organized around 3 workshops. First, the data workshop documents, analyzes, and reviews datasets to be used for assessment analyses. Second, the assessment workshop develops and refines quantitative population analyses and estimates population parameters. The final workshop is conducted by a panel of independent experts who review the data and the assessment and recommend the most appropriate values of critical population and management quantities. The 2006 gag assessment and 2009 update assessment were both conducted within this SEDAR process. All workshops and Council-initiated meetings to review the assessment were open to the public and included constituent participation on the various SEDAR panels to ensure the transparency of the data and how it was applied in the assessments. In addition, the Council's Scientific and Statistical Committee reviewed the assessment results and made recommendations to the Council about the adequacy of the assessments and what level to set the acceptable biological catch. The data incorporated into the SEDAR assessment is derived from both fishery-dependent and fishery-independent data. Examples of fishery-dependent data include, but are not limited to: Logbook data, trip tickets, dockside sampling, dealer reports, and marine recreational fishing statistical surveys (MRFSS). Fishery-independent data sources consist of data provided through surveys and research conducted by Federal, state, and academic institutions. Furthermore, NOAA's Southeast Fisheries Science Center reviews and certifies that the actions contained in this rulemaking are based on the best available scientific information.

Comment 2: Several individuals doubted that red tide could be responsible for the 2005 mortality event modeled in the gag update assessment.

Response: Red tide may have contributed to the 2005 episodic mortality event. In the 2009 update assessment, 10 models were run that varied different parameters within the assessment. The model with the best fit took into account decreases in indices of abundance thought to have occurred because of the red tide event documented in 2005. Although the model cannot show a direct link between the red tide event and the

decrease in gag abundance, it does indicate a variable was present in 2005 that depressed the stock size.

Comment 3: Several commenters indicated that it was unfair to close the recreational sector while allowing some commercial harvest to continue. Comments indicated a complete closure of both sectors would be more fair and that commercial fishermen should be able to target other species with methods to minimize the bycatch of gag. One commenter disliked an implied reference to the opening of the recreational sector by the Council in subsequent rulemaking.

Response: The Council discussed a complete closure to all gag harvest pending the outcome of the review of the assessment, but determined it was more reasonable to allow some commercial harvest. This decision was expected to minimize the mortality of gag caught by the commercial sector while targeting other species, and ultimately maximize the extent of a recreational season in 2011.

The commercial sector has a lower overall allocation and harvest of gag, and likely a lower overall impact on the gag stock; nevertheless, the commercial sector has a higher discard mortality rate of the gag that are caught. Because the fish inadvertently caught by commercial operations are less likely to survive being caught, the Council decided the most reasonable action was to allow some retention of fish that would otherwise be discarded dead. The quota of 100,000 lb (45,359 kg) was believed to be low enough to discourage commercial vessels from fishing in areas with high gag catch, because of the high levels of discards in such areas, while still allowing some level of gag retention when gag were incidentally caught.

Although the recreational sector has a lower discard mortality rate, it has a higher discard rate, as well as a much larger allocation of the total allowable catch, thus resulting in a substantial number of dead discards by the recreational sector overall. Thus, allowing the recreational sector even a limited harvest of gag early in 2011 would result in large number of dead discards as well. If this temporary closure were not to occur for the recreational sector, projections indicate that gag harvest would likely close early in the 2011 fishing year, leading to a very abbreviated season. The Council's request is expected to discourage fishing in areas where gag catch is likely to occur, and minimize the number of gag dead discards until the Council can implement 2011 management measures through Amendment 32. Landing projections indicate the recreational season length could be maximized by moving the gag recreational season to the summer. Therefore, more restrictive measures early in the 2011 season are ultimately expected to result in greater season length later in the year and greater fishing opportunities for the recreational sector as a whole.

Comment 4: Several commenters indicated gag are plentiful and, therefore, further management measures are unnecessary. Other commenters indicated that although the gag population does seem depressed, the proposed management measures seem overly restrictive. Several commenters suggested alternative management measures including different seasonal closures, reduced bag limits, and changing the status of gag to a gamefish.

Response: The 2006 assessment and 2009 update assessment for gag used a variety of data including those from fishery-dependent and fishery-independent sources. Several models were used including models that took into account a 2005 episodic mortality event. These models consistently indicated the gag stock was depressed. The model recommended by the Council's Scientific and Statistical Committee (SSC) was the model taking into account the 2005 episodic mortality event. This model indicated the stock was overfished and undergoing overfishing, prompting NMFS to inform the Council of this condition and that action is needed to rebuild the stock.

In evaluating different management measures, the Council evaluated alternative seasonal closures, area closures, bag limits, and size limits. Because of the magnitude of discards by the recreational sector, only the seasonal closure alternatives would meet the required reductions, and these alternatives indicated a summer season would best maximize the time the sector could remain open. Given the uncertainty surrounding the reductions needed for gag resulting from issues with how dead discards were treated in the update assessment, and given the Council's recommendation that the recreational season could be maximized in the summer, the Council requested a temporary closure of the recreational sector until these issues could be resolved.

Comment 5: Several commenters stated that shifts in species abundance have negatively affected gag stocks. Specifically, an increased red snapper population has shifted gag away from their primary habitats and an increased goliath grouper population is feeding heavily on gag.

Response: Species interactions among Gulf reef fish species are poorly understood; models that examine the linkages between species are not yet adequate to determine the effects of management measures on species interactions. However, it is important to note that species such as red snapper and goliath grouper are managed by NMFS and the Council to improve their stock condition. Therefore, as these stocks improve, some interactions could occur through competition for food or habitat. With respect to goliath grouper, although they do feed on fish and will opportunistically prey upon fish caught with hook-and-line, they feed primarily on crustaceans. In one scientific study, conducted by Coleman and Koenig, over 200 goliath grouper were sampled from the Gulf, and no grouper species were found in the analysis of their stomach contents (*http://www.bio.fsu.edu/coleman_lab/goliath_grouper.php*).

Comment 6: Some commenters indicated that gag overharvest was due to the actions of the commercial sector. They suggested implementing measures to restrict commercial harvest such as banning longline gear, instead of reducing recreational harvest.

Response: When the allocation of gag harvest was developed for the recreational and commercial sectors in Amendment 30B, it was based on average landings between 1986 and 2005. The resultant allocation ratio is 61:39, respectively. Therefore, even if commercial harvest were prohibited, some restrictions on recreational harvest would still be necessary to allow the stock to rebuild. It is beyond the scope of this temporary rule to ban longline gear because such a ban would not end overfishing; however, recently implemented management measures taken through Amendment 31 (75 FR 21512; April 26, 2010) have reduced the number of longline vessels in the Gulf reef fish fishery and further limited where they can fish.

Comment 7: Several commenters indicated regionalized gag management should be considered to allow a greater proportion of the gag harvest to occur in areas where gag are more abundant.

Response: It is outside of the scope of this temporary rule to consider regionalized management because such an approach would not lead directly to ending overfishing. However, the Council continues to examine regionalized management for reef fish species. In the course of developing long-term management measures in Amendment 32, the Council is considering seasonal-area closures for grouper species which is considered an example of regionalized management.

Comment 8: Several commenters indicated fishing effort was reduced

because of current economic conditions and fishery closures resulting from the Deepwater Horizon MC252 oil spill.

Response: In developing fishing regulations to limit harvest, current and past fishing effort levels are taken into account. These levels would reflect trends in effort because of factors such as the economy and the oil spill. As shown in the environmental assessment for this action, gag effort, in 2009, was below the 2005–2009 average. However, these recent reductions in effort are likely less than what will be needed to end overfishing of gag and rebuild the stock.

NMFS is in the process of analyzing landings data to determine the effects of the spill on fishing effort. Oil from the Deepwater Horizon MC252 incident, at its maximum extent, affected approximately one-third of the Gulf EEZ, from western Louisiana east to the panhandle of Florida and south to Campeche Bay in Mexico. However, the affected areas are outside the west Florida Shelf where gag are primarily found. Most of the gag habitat was either not affected by fishery closures resulting from the oil spill, or the duration of the closures was limited. Therefore, the opportunity to harvest gag was minimally affected compared to the opportunity to harvest other species primarily harvested in the northern Gulf, such as red snapper.

Comment 9: One commenter suggested that the proposed prohibition on the recreational harvest of gag would do little to reduce the total number of gag killed by the Gulf reef fish fishery because recreational harvest would still result in gag bycatch and subsequent release mortality.

Response: The total number of gag caught and released under a recreational harvest prohibition would be less than if the harvest prohibition were not in place. Based on data from the 2006 SEDAR assessment, recreationally discarded fish have a lower discard mortality rate (~32 percent) than commercially discarded fish (~67 percent), and therefore the likelihood of survival for released fish is much higher for the recreational sector. This is because recreational effort primarily occurs in shallower waters where discard mortality rates are low.

Classification

The Regional Administrator, Southeast Region, NMFS, (RA) determined that the interim measures this final temporary rule will implement are necessary for the conservation and management of the Gulf gag resource. The RA has also determined that this final temporary rule is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws.

This final temporary rule has been determined to be not significant for the purposes of E.O. 12866.

A final regulatory flexibility analysis (FRFA) was prepared. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant economic issues raised by public comments, NMFS responses to those comments, and a summary of the analyses completed to support the action. A copy of the full analysis is available from NMFS (see **ADDRESSES**). A summary of the FRFA follows.

The Magnuson-Stevens Act provides the statutory basis for this final rule. No duplicative, overlapping, or conflicting Federal rules have been identified.

No comments received directly raised issues specific to the IRFA. However, many comments raised concerns regarding the Regulatory Impact Review (RIR) in the Environmental Assessment (EA). Some of these comments address issues indirectly related to the IRFA. While the IRFA analyzes the economic effects on small entities, a direct relationship exists between the RIR and the IRFA. Thus, all comments related to the RIR and IRFA are addressed here.

A number of public comments were received regarding the economic impact of the gag component of the reef fish fishery to the U.S. economy, most of which mentioned the economic impact of recreational sector. These comments stated that NMFS did not conduct an economic assessment of the affected economic environment, the assessment was incomplete, or the assessment was inaccurate.

Using the best available information, NMFS conducted an economic impact assessment of the gag component of the reef fish fishery to the U.S. economy. For the commercial sector, this assessment included information regarding the number of affected shareholders and vessels, their landings, gross revenue, shares and allocation of gag, and the distribution of longline endorsements. Information regarding the number of affected dealers, as well as the volume and value of their seafood purchases, was also included. The assessment also included information regarding the value of imported grouper. In addition, ex-vessel revenue was used to generate estimates of impacts to the U.S. economy in terms of output, income, and the number of full-time equivalent (FTE) jobs.

For the recreational sector, the analysis included estimates of losses in pounds and number of fish, which were used to estimate the loss in consumer surplus to all anglers. For the for-hire sector, the analysis also incorporated estimates of the number of adversely affected for-hire (charter and headboat) vessels, as well as the reduction in target trips for gag and net operating revenue by month and for the duration of the closure. In addition, estimates of adverse economic impacts to the U.S. economy in terms of lost output, value-added, and the number of full-time equivalent (FTE) jobs were also provided. Estimates of these adverse economic impacts were also broken down by State and mode. For these reasons, no changes were made to this final rule as a result of these comments.

This final temporary rule is expected to directly affect commercial harvesting and for-hire operations. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the U.S., including fish harvesters. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. For for-hire vessels, the other qualifiers apply and the receipts threshold is $7.0 million (NAICS code 713990, recreational industries).

This final temporary rule is expected to directly affect commercial fishing vessels whose owners possess gag fishing quota shares and for-hire fishing vessels that harvest gag. As of October 1, 2009, 970 entities owned a valid commercial Gulf reef fish permit and thus were eligible for initial shares and allocation in the grouper and tilefish IFQ program. Of these 970 entities, 908 entities initially received shares and allocation of grouper or tilefish, and 875 entities specifically received gag shares and an initial allocation of the commercial sector's gag quota in 2010. These 875 entities are expected to be directly affected by the actions to reduce the commercial quota for gag and disallow the conversion of red grouper allocation to multi-use allocation.

Of the 875 entities that initially received gag shares, 215 were not commercially fishing in 2008 or 2009 and thus had no commercial fishing revenue during these years. On average, these 215 entities received an initial allocation of 874 lb (397 kg) of gag in 2010. Eight of these 215 entities also received a bottom longline endorsement in 2010. These 8 entities received a much higher initial allocation of gag in 2010, with an average of 3,139 lb (1,427 kg).

The other 660 entities that initially received gag shares and allocations in 2010 were active in commercial fisheries in 2008 or 2009. The maximum annual commercial fishing revenue in 2008 or 2009 by an individual vessel with commercial gag fishing quota shares was approximately $606,000 (2008 dollars).

The average charterboat is estimated to earn approximately $88,000 (2008 dollars) in annual revenue, while the average headboat is estimated to earn approximately $461,000 (2008 dollars). Based on these values, all commercial and for-hire fishing vessels expected to be directly affected by this final temporary rule are determined for the purpose of this analysis to be small business entities.

Of the 660 commercial fishing vessels with commercial landings in 2008 or 2009, 139 vessels did not have any gag landings in 2008 or 2009. Their average annual gross revenue in these 2 years was approximately $50,800 (2008 dollars). The vast majority of these vessels' commercial fishing revenue is from a combination of snapper, mackerel, dolphin, and wahoo landings. On average, in 2010, these vessels received an initial allocation of 540 lb (245 kg) of gag quota.

The remaining 521 commercially active fishing vessels did have landings of gag in 2008 or 2009. Their average annual gross revenue from commercial fishing was approximately $71,000 (2008 dollars) between the two years. On average, these vessels had 2,375 lb (1,080 kg) and 1,300 lb (591 kg) of gag landings in 2008 and 2009 respectively, or 1,835 lb (834 kg) between the 2 years. Gag landings accounted for approximately 8 percent of these vessels' annual average gross revenue, and thus they are somewhat, though not significantly, dependent on revenue from gag landings. These vessels' average initial gag allocation in 2010 was 2,121 lb (964 kg). Therefore, on average, their 2008 gag landings were very near their 2010 gag allocation, but their 2009 gag landings were considerably less than their 2010 allocation.

Of these 521 vessels, 52 vessels also received a bottom longline endorsement in 2010. These particular vessels' average annual revenue was approximately $156,000 (2008 dollars) in 2008 and 2009. Revenue from gag landings decreased from approximately $15,900 to $8,400 in 2009 and thus they became relatively less dependent on gag landings. These vessels are highly dependent on revenue from red grouper landings, which accounted for 54 percent and 47 percent of their gross revenue in 2008 and 2009, respectively. Revenue from deep-water grouper (DWG) landings decreased only slightly, from approximately $36,000 in 2008 to $31,000 in 2009, and thus these vessels became relatively more dependent on revenue from DWG landings. Their average initial 2010 allocation of gag was approximately 5,507 lb (2,503 kg) while their average gag landings were 3,933 lb (1,788 kg) and 2,204 lb (1,002 kg) in 2008 and 2009, respectively. Thus, vessels that now have a bottom longline endorsement have been harvesting well below that allocation in recent years, particularly in 2009.

The for-hire fleet is comprised of charter vessels, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. The harvest of gag in the EEZ by for-hire vessels requires a charter vessel/headboat permit for Gulf reef fish. On March 23, 2010, there were 1,376 valid or renewable for-hire Gulf reef fish permits. A valid permit is a non-expired permit. Expired reef fish for-hire permits may not be actively fished, but are renewable for up to 1 year after expiration. Because of the extended permit renewal period, numerous permits may be expired but still renewable at any given time of the year during the renewal period after the permit's expiration. The majority (823, or approximately 60 percent) of the 1,376 valid or renewable permits were registered with Florida addresses. The registration address for the Federal permit does not restrict operation to Federal waters off that state; however, vessels would be subject to any applicable state permitting requirements. Although the permit does not distinguish between headboats and charter vessels, it is estimated that 79 headboats operate in the Gulf. The majority of these vessels (43, or approximately 54 percent) operate from Florida ports. Given that nearly 99 percent of target effort for gag and 97 percent of the economic impacts from the recreational sector for gag in the Gulf reef fish fishery are in west Florida, it is assumed that the 823 for-hire vessels (780 charter vessels and 43 headboats) in Florida are expected to be directly affected by the action to reduce the recreational bag limit for gag to zero.

The 215 entities with gag shares that did not participate in commercial fishing in 2008 or 2009 have no commercial fishing revenue and did not earn profit from commercial fishing in those 2 years. Under the action to decrease the commercial quota for gag, their allocation of gag in 2011 would be reduced, on average, from 874 lb (397 kg) to 61 lb (28 kg), or by approximately 813 lb (370 kg). Using the 2008 average price of $3.52 per lb, this loss in allocation could potentially represent an annual loss of nearly $2,900 in gross revenue per entity. For the eight entities with gag shares that also possess longline endorsements, their average annual allocation of gag would be reduced from 3,139 lb (1,427 kg) to 220 lb (100 kg), or by 2,919 lb (1,327 kg). Thus, their potential loss in gross revenue, estimated to be nearly $10,280, could be much higher. However, in general, this potential loss in gross revenue could only reduce profit if these entities not only become active in commercial fishing, but specifically intend to harvest gag in 2011 and at a level above their reduced allocation. Alternatively, these potential losses in gross revenue could be due to these entities' inability to sell the allocations they are losing under this action, though this possibility presumes that a demand for these allocations exists. Regardless, the significance of this potential loss in gross revenue to these 215 entities cannot be evaluated given the lack of information on potential gross revenue and profit from commercial fishing in general and specifically for gag.

Profit estimates are not currently available for the 139 entities with gag shares that participated in commercial fisheries other than gag. However, since these vessels did not have any gag landings, none of their gross revenue and thus none of their profit were the result of gag harvests. Under the action to decrease the commercial quota for gag, their average allocation of gag in 2011 would be reduced from 540 lb (245 kg) to 38 lb (17 kg), or by approximately 502 lb (228 kg). Using the 2008 average price of $3.52 per pound, this loss in allocation could potentially represent an annual loss of nearly $1,800 in gross revenue per entity. However, this potential loss in gross revenue could only lead to a loss in profit if these entities intend to become active in the gag component of the Gulf reef fish fishery in 2011 and at a level above their reduced allocation. Thus, for example, assuming these vessels intend to harvest gag in 2011 at a level equivalent to their 2010 allocation, and this harvest was in addition to, rather than in place of, their recent commercial fishing activities, the reduction in allocation could lead to a maximum loss of approximately three percent in gross revenue which could in turn reduce profit. Alternatively, these losses in gross revenue could be due to these entities' inability to sell the allocations they are losing under this action, though this possibility presumes

that a demand for these allocations exists.

Profit estimates are not currently available for the 521 entities with gag shares that participated in the commercial gag sector of the Gulf reef fish fishery in 2008 or 2009. Under the action to decrease the commercial gag quota, these vessels' gag allocations would be reduced from 2,121 lb (964 kg) to 148 lb (67 kg), or by approximately 1,973 lb (897 kg) on average. As these vessels have been harvesting at levels near their 2010 allocation in recent years on average, this reduction in gag allocation is likely to lead to a future reduction in gag landings and therefore gross revenue. Using the average 2008 price of $3.52 per pound, it is estimated that these vessels could lose nearly $6,950, or approximately 10 percent, in average annual gross revenue. A loss in gross revenue of this magnitude would likely lead to a reduction in profit.

However, for the 52 vessels with gag shares that were active in the gag component of the Gulf reef fish fishery and also received a bottom longline endorsement in 2010, their allocation of gag in 2011 would decrease from 5,707 lb (2,594 kg) to 400 lb (182 kg), or by approximately 5,307 lb (2,412 kg) under this action. This loss in landings is estimated to be valued at approximately $18,700 in gross revenue, or 12 percent of their average annual gross revenue. Such a loss in gross revenue would likely reduce their profit.

Under the action to suspend the conversion of red grouper allocation into multi-use allocation valid toward the harvest of red grouper or gag, minimal adverse economic effects are expected as a result of commercial fishing entities not being allowed to convert 4 percent of their red grouper allocation into multi-use allocation. Multi-use allocation that has been converted from red grouper allocation can only be used to possess, land, or sell gag after an entity's gag and gag multi-use allocation has been landed, sold, or transferred. As a result of this reduction in the commercial gag quota, it is likely these entities will exhaust their gag and gag multi-use allocations relatively early in 2011. Revenue from gag landings is greater than revenue from an equivalent amount of red grouper landings since gag commands a relatively higher market price. Thus, total commercial fishing revenue and, therefore, profit per vessel could be slightly less than if the multi-use conversion were allowed to continue.

Net operating revenues (NOR) are assumed to be representative of profit for for-hire vessels. It is assumed that 823 for-hire vessels, 780 charter vessels, and 43 headboats, participate in the recreational gag component of the Gulf reef fish fishery. Estimates of NOR from recreational fisheries other than gag, and thus across all fisheries in which these charter vessels and headboats participate, are not currently available. However, on average, NOR for charter vessels from trips targeting gag are estimated to be approximately $1.34 million per year while NOR for headboats from trips targeting gag are estimated to be $81,000 per year. NOR for all trips targeting gag are estimated to be approximately $1.35 million per year. The average annual NOR from trips targeting gag are estimated to be $1,716 per charter vessel and $1,881 per headboat.

When the length of the gag season is reduced by setting the recreational bag limit for gag at zero, some trips that formerly targeted gag will instead target other species while other trips that formerly targeted gag will be cancelled. Assuming the NOR per trip is constant regardless of the species targeted, for-hire operators will only lose NOR from trips cancelled as a result of the shortened season length. Information regarding the number of trips cancelled as a result of the shortened season is not current available. Thus, this analysis assumes that all of the current for-hire trips targeting gag will be cancelled. Because some of these trips would probably not be cancelled, this assumption is expected to overestimate the actual reduction in NOR associated with a shorter season. Thus, the following estimates of losses in NOR and profit for charter vessels and headboats should be considered maximum values.

Under the action to set the gag recreational bag limit for gag at zero, the losses in NOR from trips targeting gag for charter vessels and headboats are estimated to be approximately $750,000 and $43,000, respectively, if this final temporary rule is not extended for up to 186 days as allowed under the Magnuson-Stevens Act for interim measures. Thus, the losses in NOR from trips targeting gag are estimated to be $962 and $1,000 per charter vessel and headboat, respectively. These NOR losses represent a loss in profit from trips targeting gag of approximately 56 percent and 53 percent per charter vessel and headboat, respectively. However, if there is an extension of this final temporary rule, the losses in NOR for charter vessels and headboats are estimated to be approximately $1.34 million and $81,000, respectively. Thus, the losses in NOR are estimated to be $1,716 and $1,881 per charter vessel and headboat, respectively. These losses in NOR represent a loss in profit for all charter vessel and headboat trips targeting gag. This action is not expected to affect profit for charter vessels and headboats from trips not targeting gag. Vessel dependence on fishing for individual species cannot be determined with available data. Although some vessels are likely more dependent on trips that target gag than other vessels, overall, about three percent of for-hire anglers are estimated to target gag. As a result, while the action would be expected to substantially affect the NOR derived from gag trips, overall, gag trips do not comprise a substantial portion of total for-hire trips nor would they, by extension, be expected to account for a substantial portion of total for-hire NOR.

No additional economic effects would be expected to result from the revised SWG quota because the updated SWG quota simply reflects the reduction in the commercial gag quota, the effects of which have already been discussed.

Three alternatives, including the status quo, were considered for the action to reduce the commercial quota for gag from 1.49 million lb (0.68 million kg) to 100,000 lb (45,359 kg) in 2011. The first alternative, the status quo, would have maintained the commercial quota for gag at 1.49 million lb (0.68 million kg) in 2011. This alternative is not consistent with the goals and objectives of the Council's plan to manage gag to achieve the mandates of the Magnuson-Stevens Act. Specifically, selection of this alternative would be inconsistent with current National Standard 1 guidance because this quota would be above the allowable biological catch (ABC) recommended by the Council's SSC of 1.17 million lb (0.53 million kg) for 2011. In addition, this alternative would promote overfishing and slow recovery of the stock.

The second alternative would have set the commercial quota for gag at 390,000 lb (0.18 million kg), with one option to release the entire quota on January 1, 2011 and a second option to release 50 percent of the quota on January 1, 2001 and the remaining 50 percent on July 1, 2011. This quota is based on projected fishing mortality at optimum yield (F_{OY}) yield streams, 1.01 million lb (0.46 million kg) for 2011, and is consistent with the methods used by the Council in Amendment 30B for setting the annual catch target. This harvest level corresponds with the Council's initial request for an interim rule at its June 2010 meeting. The commercial quota for gag under this alternative is less than what the quota would be if based on the SSC's ABC recommendation ($F_{Rebuild}$

yield stream) of 1.17 million lb (0.53 million kg). Based on the SSC's recommendation, selecting this alternative would have a less than 50 percent chance of overfishing by the commercial sector and would provide a greater than 50 percent chance of rebuilding the stock if this yield stream is adhered to in future actions. However, recent discrepancies with the estimation of dead discards could affect how the assessment projects the status of the stock. If these discrepancies show a more pessimistic condition of the stock when the assessment is rerun, then selecting this alternative could result in harvest levels inconsistent with rebuilding the stock within the time frames outlined in the Magnuson-Stevens Act. Should these discrepancies result in a more optimistic condition of the stock, then the commercial quota for gag could be increased in subsequent actions.

The third alternative is the most conservative and would set the commercial quota for gag equal to zero. Under this alternative, any addition to the quota would be initiated through Amendment 32 or some other rulemaking vehicle. Closure of the commercial sector to gag would benefit the stock by ending overfishing as well as halt gag fishing during the primary gag spawning season. However, this alternative would not allow gag allocation holders to land gag that might be caught incidentally when fishing for other species. Instead, these fish would have to be released. Because the commercial sector generally operates in relatively deep waters, a large proportion of these fish would likely die from barotrauma (injuries sustained in response to the sudden pressure change when brought to the surface from depth) and from handling onboard the vessel. Release mortality has been estimated to be 67 percent on average for commercial discards. This high rate of discard mortality would contribute to overall mortality, thereby slowing recovery of the stock and thus is contrary to the Council's objectives.

Two alternatives, including the status quo, were considered for the action to suspend the ability of allocation holders to convert red grouper allocation into multi-use allocation valid toward the harvest of red grouper or gag. The first alternative, the status quo, would continue to allow 4 percent of the red grouper allocation to be converted into multi-use allocation. This alternative is expected to result in gag harvests that would exceed specified annual catch limits, promote overfishing, and therefore slow recovery of the stock, contrary to the Council's objectives. Further, this alternative is also expected to result in greater adverse economic effects stemming from the corrective measures that would be implemented to address the over-harvesting of gag.

The second alternative would allow a smaller percentage (1.6 percent) of red grouper allocation to be converted into multi-use allocation based on the buffer existing between the commercial annual catch limit (ACL) and quota for gag. This alternative is consistent with a gag commercial ACL of 1.76 million lb (0.8 million kg) and a 1.49 million lb (0.68 million kg) commercial quota for gag. Since this final rule will establish the commercial quota for gag at only 100,000 lb (45,359 kg), the percentage of red grouper allocation that could be converted to multi-use allocation is too high under this alternative as it is expected to result in gag harvests that would exceed specified ACLs, promote overfishing, and therefore slow recovery of the stock, contrary to the Council's objectives.

Two alternatives, including the status quo, were considered for the action to set the recreational bag limit at zero. The first alternative, the status quo, would maintain the recreational catch target at 2.20 million lb (1 million kg) as defined in Amendment 30B and thus maintain the current recreational bag limit of two gag within the four fish aggregate grouper bag limit. Selection of this alternative would be inconsistent with current National Standard 1 guidance because this level of harvest would be above the ABC recommended by the Council's SSC of 1.17 million lb (0.53 million kg) for 2011. In addition, this alternative would promote overfishing and slow recovery of the stock.

The second alternative would set the gag bag limit to zero on the date when 620,000 lb (0.28 million kg) of gag is projected to be landed by the recreational sector in 2011. This harvest level is consistent with the fishing mortality rate associated with the optimum yield (OY) used by the Council in Amendment 30B to set the recreational annual catch target. Under certain assumptions regarding the disposition of discards, this alternative is expected to result in a fishing season of 83 days. Given the closure of the SWG recreational sector annually from February 1 to March 31, fishing would be allowed for the month of January and from April 1 to May 22. However, this fishing season is dependent on achieving the same percentage reduction in dead discards as obtained from the harvest. If these levels of reduction are not met, then harvesting this amount of fish could exceed the reductions needed for the stock to recover under the rebuilding plan being developed in Amendment 32 which, in turn, could require deeper cuts in future harvests than those projected by the current assessment update.

Although, as specified by the Magnuson-Stevens Act, the actions in this final temporary rule do not need to end overfishing, they do need to reduce overfishing. This alternative could limit the types of long-term measures developed by the Council in Amendment 32 that could be applied to the 2011 fishing year since the 620,000 lb (0.28 million kg) catch target would likely be achieved before rulemaking from Amendment 32 is implemented. Therefore, the harvest for the rest of the fishing year could be zero and any long-term measures developed in Amendment 32 would not apply until 2012.

Further, recent discrepancies with the estimation of dead discards could affect how the assessment projects the status of the stock. If these discrepancies show a more pessimistic condition of the stock when the assessment is redone, then selecting this alternative could result in harvest levels inconsistent with rebuilding the stock within the time frames outlined in the Magnuson-Stevens Act. This potential outcome is particularly important for the recreational sector which harvests a greater proportion of the gag total catch than the commercial sector. Conversely, should these discrepancies result in a more optimistic condition of the stock, the recreational catch target and bag limit could be increased in subsequent actions.

This final temporary rule does not establish any new reporting, recordkeeping, or other compliance requirements.

List of Subjects in 50 CFR Part 622

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

Dated: November 24, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

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

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

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

§ 622.20 [Amended]

■ 2. In § 622.20, paragraph (b)(2)(iv)(A) is suspended.

■ 3. In § 622.34, paragraph (v) is added to read as follows:

§ 622.34 Gulf EEZ seasonal and/or area closures.

* * * * *

(v) *Closure of the recreational sector for gag.* The recreational sector for gag in the Gulf EEZ is closed. During the closure, all recreational harvest and possession of gag grouper in or from the Gulf EEZ is prohibited. Such fish caught in the Gulf EEZ must be released immediately with a minimum of harm.

■ 4. In § 622.39, paragraph (b)(1)(ii) is suspended, and paragraph (b)(1)(viii) is added, to read as follows:

§ 622.39 Bag and possession limits.

* * * * *

(b) * * *

(1) * * *

(viii) Groupers, combined, excluding goliath grouper, Nassau grouper, and gag—4 per person per day, but not to exceed 1 speckled hind or 1 warsaw grouper per vessel per day, or 2 red grouper per person per day. However, no grouper may be retained by the captain or crew of a vessel operating as a charter vessel or headboat. The bag limit for such captain and crew is zero.

* * * * *

■ 5. In § 622.42, paragraphs (a)(1)(iii)(A)(*3*) and (a)(1)(iii)(B)(*3*) are suspended, and paragraphs (a)(1)(iii)(A)(*4*) and (a)(1)(iii)(B)(*4*) are added, to read as follows:

§ 622.42 Quotas.

(a) * * *

(1) * * *

(iii) * * *

(A) * * *

(*4*) For fishing year 2011 and subsequent fishing years—4.83 million lb (2.19 million kg).

(B) * * *

(*4*) For fishing year 2011 and subsequent fishing years—100,000 lb (45,359 kg).

* * * * *

[FR Doc. 2010–30167 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 100803319–0565–02]

RIN 0648–BA04

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Red Grouper Management Measures

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement actions identified in a regulatory amendment to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico Fishery Management Council (Council). This final rule reduces the commercial quota for red grouper and, thus, the combined commercial quota for shallow water grouper (SWG) species, and requires vessels with valid commercial Gulf of Mexico (Gulf) reef fish permits to mark their buoy gear with the official vessel number. This rule also implements minor revisions to codified text, including a revised definition of buoy gear, re-codification of the commercial and recreational quotas for greater amberjack, revision of the recreational accountability measure for greater amberjack, and removal of outdated language for the red snapper individual fishing quota (IFQ) program. The intended effect of this final rule is to help prevent overfishing of red grouper while achieving optimum yield (OY) by reducing red grouper harvest, consistent with the findings of the recent stock assessment for this species, and to implement technical corrections to the regulations.

DATES: This rule is effective January 1, 2011, except for the amendment to § 622.42(a)(1)(iii)(A), which will be effective upon further notification in the **Federal Register.**

ADDRESSES: Copies of the regulatory amendment, which includes an environmental assessment and regulatory impact review, may be obtained from the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone 813–348–1630; fax 813–348–1171; e-mail *gulfcouncil@gulfcouncil.org;* or may be downloaded from the Council's Web site at *http://www.gulfcouncil.org/.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS by e-mail, *rich.malinowski@noaa.gov,* or the Office of Management and Budget (OMB), by e-mail to *OIRA Submission@omb.eop.gov,* or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Peter Hood, 727–824–5305.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On October 18, 2010, NMFS published a proposed rule for the red grouper regulatory amendment and requested public comment (75 FR 63780). The proposed rule and the regulatory amendment outline the rationale for the measures contained in this final rule. A summary of the provisions implemented by this final rule is provided below.

This final rule will reduce the red grouper commercial quota from 5.75 million lb (2.53 million kg) to 4.32 million lb (1.96 million kg), and thus the combined SWG commercial quota from 7.65 million lb (3.47 million kg), as specified in § 622.42(a)(1)(iii)(A) for 2011 and subsequent fishing years, to 6.22 million lb (2.82 million kg) for 2011 and subsequent fishing years, and require vessels with valid commercial Gulf reef fish permits to mark their buoy gear with the official vessel number. This final rule will also make minor revisions to the codified text, including a revised definition of buoy gear, re-codification of the commercial and recreational quotas for greater amberjack, revision of the recreational accountability measure for greater amberjack, and removal of outdated language for the red snapper IFQ program. The purpose of this final rule is to help prevent overfishing of red grouper while achieving OY by reducing red grouper harvest consistent with the findings of the recent stock assessment for this species.

Effective Dates

This rule is effective January 1, 2011, except for the commercial SWG quota contained in this final rule. NMFS is delaying, until a future notification in the **Federal Register,** the commercial quota for SWG species specified in

§ 622.42(a)(1)(iii)(A). This delay is necessary because the interim final rule to reduce overfishing of gag, which is published in this issue of the **Federal Register,** will also become effective January 1, 2011, and the SWG quota contained in that interim final rule takes into account the temporary reduction in the gag commercial quota, and is therefore a lower quota than contained in this rule. After termination or expiration of the interim final rule, the timing of which is currently uncertain, NMFS will announce the effective date of the SWG quota contained in this final rule, unless it is superseded by subsequent rulemaking. Compliance with all other provisions of this final rule are required beginning January 1, 2011, which is the start of the fishing year and the date that quota share is distributed to IFQ participants.

Comments and Responses

The following is a summary of the comments NMFS received on the proposed rule and the red grouper regulatory amendment, and NMFS respective responses. During the comment period, NMFS received 12 comments on the proposed rule. The submissions included one letter from a Federal agency and one letter from a non-governmental organization. The remaining submissions were unique letters from individuals.

Comment 1: Some commenters questioned the scientific basis used to assess red grouper stocks and how scientific information was applied to support fishery management decisions. They indicated the data used were outdated, flawed, or anecdotal.

Response: Stock assessments are conducted under the scientifically peer reviewed Southeast Data, Assessment, and Review (SEDAR) process, which was initiated in 2002 to improve the quality and reliability of fishery stock assessments in the Gulf, South Atlantic, and U.S. Caribbean. SEDAR seeks improvements in the scientific quality of stock assessments and supporting information available to address existing and emerging fishery management issues. This process emphasizes constituent and stakeholder participation in assessment development, transparency in the assessment process, and a rigorous and independent scientific review of completed stock assessments. SEDAR is organized around three workshops. First, the data workshop documents, analyzes, and reviews datasets to be used for assessment analyses. Second, the assessment workshop develops and refines quantitative population analyses and estimates population parameters. The final workshop is conducted by a panel of independent experts who review the data and the assessment and recommend the most appropriate values of critical population and management quantities. The 2006 red grouper assessment and 2009 update assessment were both conducted within this SEDAR process. All workshops and Council initiated meetings to review the assessment were open to the public and included constituent participation on the various SEDAR panels to ensure the transparency of the data and how it was applied in the assessments. The data incorporated into the SEDAR assessment is derived from both fishery-dependent and fishery-independent data. Examples of fishery-dependent data include, but are not limited to; logbook data, trip tickets, dockside sampling, dealer reports, and marine recreational fishing statistical survey (MRFSS). Fishery-independent data sources consist of data provided through surveys and research conducted by Federal, state, and academic institutions. In addition, the Council's Scientific and Statistical Committee reviewed the assessment results and made recommendations to the Council about the adequacy of the assessments and what level to set the acceptable biological catch.

Comment 2: One commenter questioned that red tide could be responsible for the 2005 mortality event modeled in the update assessment.

Response: Red tide is thought to have contributed to the 2005 episodic mortality event. In the 2009 update assessment, two models were run to estimate red grouper abundance. The model with the best fit was one that took into account decreases in indices of abundance thought to have occurred because of the red tide event documented in 2005. Although the model cannot show a direct link between the red tide event and the decrease in red grouper abundance, it does indicate a variable was present in 2005 that depressed the stock size.

Comment 3: Some commenters indicated that problems with the red grouper stock were due to the red grouper commercial harvest, particularly the longline component of the commercial sector. They suggested measures restricting commercial harvest such as banning or severely restricting longline gear use.

Response: Recent management measures implemented through Amendment 31 (75 FR 21512, April 26, 2010) have reduced the number of longline vessels in the Gulf reef fish fishery and further limited where they can fish. A ban on longline gear is outside the scope of this action because a gear ban is not currently authorized under the framework procedures within the FMP as a measure that may be implemented through a regulatory amendment. Additional management measures to rebuild the red grouper stock may be implemented through Amendment 32.

Comment 4: Several commenters were against lowering the red grouper total allowable catch (TAC), particularly because the stock is neither overfished nor undergoing overfishing. One commenter pointed out that if the commercial sector was harvesting red grouper at a level below the TAC, then there is no rationale for revising the current management measures. Commercial fishermen pointed out that by reducing the TAC, and thus the commercial quota, the amount of IFQ allocation they will receive will also be reduced making it harder to make a living commercial fishing.

Response: The 2009 update assessment for red grouper indicated that although the stock continues to be neither overfished nor undergoing overfishing, the stock has declined since 2005. As described in the assessment's discussion of the stock's status, this decline was attributed to a 2005 episodic mortality event resulting in over 20 percent additional mortality to the adult stock. Therefore, there is a need to improve the stock condition to a level where, at equilibrium, the stock can be harvested at OY. This goal is consistent with the Magnuson-Stevens Act, which requires NMFS and regional fishery management councils to prevent overfishing, and achieve, on a continuing basis, the OY from federally managed fish stocks. The TAC, and resultant commercial quota, that the Council proposed is based on recommendations from the SSC to allow the stock to recover to the equilibrium stock size where OY can be harvested.

Comment 5: One commenter indicated that the proposed buoy gear definition was still too ambiguous to be effectively enforced. The commenter stated that gangions should not be allowed as a method to attach hooks to buoy gear and that there should be a limited number of buoy gear rigs allowed for a vessel.

Response: The revised definition of buoy gear will enhance the enforceability of the use of this gear, both at sea and shoreside. By allowing the use of gangions for attaching hooks on buoy gear, reef fish fishermen who previously used longlines, but had to change their fishing methods because they did not qualify for a longline endorsement under actions

implemented through Amendment 31, will save money since they already possess gangions from their currently owned longline gear. A limit on the number of buoy gear rigs that can be carried on a vessel was not considered. The intent of the action was not to reduce the use of buoy gear, it was merely to more precisely identify the gear; thus measures limiting the amount of gear that could be used are beyond the scope of the issue being addressed.

Comment 6: Several commenters indicated regionalized red grouper management should be considered to allow a greater proportion of the red grouper harvest to occur in areas where red grouper are more abundant.

Response: Regionalized management was not considered as an alternative for this action because it will not prevent overfishing of red grouper. However, the Council continues to examine regionalized management for reef fish species. In the course of developing long-term management measures in Amendment 32, the Council is considering seasonal-area closures for grouper species, which is considered an example of regionalized management.

Comment 7: One commenter indicated fishing effort is reduced because of current economic conditions and, therefore, no management measures are required for the recreational sector.

Response: In developing fishing regulations to limit harvest, current and past fishing effort levels are taken into account. These levels would reflect trends in effort stemming from factors such as the economy. This was considered in the decision to not revise the recreational management measures for red grouper.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that this red grouper regulatory amendment is necessary for the conservation and management of Gulf reef fish and is consistent with the Magnuson-Stevens Act and other applicable laws.

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

A final regulatory flexibility analysis (FRFA) was prepared. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant economic issues raised by public comments, NMFS' responses to those comments, and a summary of the analyses completed to support the action. A copy of the full analysis is available from NMFS (see **ADDRESSES**). A summary of the FRFA follows.

The Magnuson-Stevens Act provides the statutory basis for this final rule.

No duplicative, overlapping, or conflicting Federal rules have been identified.

The preamble of this final rule and the previously published proposed rule provides a statement of the need for and objectives of this rule, and it is not repeated here.

No significant issues associated with the economic analysis were raised through public comment on the proposed rule. A summary of the comments received are provided in the previous section of this preamble. No changes were made in this final rule as a result of these comments.

This final rule is expected to directly affect commercial harvesting operations. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the U.S., including fish harvesters. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide.

This final rule is expected to directly affect commercial fishing vessels whose owners possess commercial Gulf reef fish permits or red grouper fishing quota shares. As of August 10, 2010, 951 entities possessed a valid or renewable Gulf reef fish permit. These 951 entities are expected to be directly affected by the action to require vessels to mark their buoy gear with their official vessel number.

This final rule will not alter existing reporting or record keeping requirements but will alter certain compliance requirements. Specifically, vessels with valid commercial Gulf reef fish permits will be required to mark their buoy gear with their official vessel number. The most significant burden imposed by this requirement is the time needed to mark the gear. Under the definition of buoy gear, the maximum number of buoys per vessel is expected to be 20. The time required to mark each buoy is estimated to be approximately 20 minutes. Thus, the annual time burden per vessel is approximately 6.67 hours. According to the most recent data from the Bureau of Labor Statistics (BLS), the average nominal wage for fishers and fishing related workers is $12.79, or $12.74 in 2008 dollars. This value is used as a monetary estimate of the opportunity cost of time on a per hour basis. Thus, the annual opportunity cost per vessel resulting from this requirement is estimated to be approximately $85. For the 951 vessels with valid or renewable commercial Gulf reef fish permits, the annual opportunity cost is estimated to be $80,812. Since opportunity costs impose no direct financial costs, this increase in opportunity costs is not expected to reduce profit for these vessels.

As of October 1, 2009, 970 entities owned a valid commercial Gulf reef fish permit, and thus, were eligible for initial shares and allocation in the grouper and tilefish IFQ program. Of these 970 entities, 908 entities initially received shares and allocation of grouper or tilefish, and 815 entities specifically received red grouper shares and an initial allocation of the commercial sector's red grouper quota in 2010. These 815 entities are expected to be directly affected by the action to reduce the red grouper commercial quota.

Of the 815 entities that initially received red grouper shares, 191 were not commercially fishing in 2008 or 2009 and thus had no commercial fishing revenue during these years. On average, these 191 entities received an initial allocation of 6,459 lb (2,936 kg) of red grouper in 2010. Eight of these 191 entities also received a bottom longline endorsement in 2010. These 8 entities received a much higher initial allocation of red grouper in 2010, with an average of approximately 44,000 lb (20,000 kg).

The other 624 entities that initially received red grouper shares and allocations in 2010 were active in commercial fisheries in 2008 or 2009. The maximum annual commercial fishing revenue in 2008 or 2009, by an individual vessel with a commercial Gulf reef fish permit or red grouper fishing quota shares was approximately $606,000 (2008 dollars). Based on this value, all commercial fishing vessels expected to be directly affected by this final rule are determined for the purpose of this analysis to be small business entities.

Of the 624 commercial fishing vessels with commercial landings in 2008 or 2009, 126 vessels did not have any red grouper landings in 2008 or 2009. Their average annual gross revenue in these 2 years was approximately $55,800 (2008 dollars). The vast majority of these vessels' commercial fishing revenue is from a combination of landings of snapper, mackerel, dolphin, and wahoo. However, as described in the regulatory amendment, in 2009, they did become relatively more dependent on landings of highly migratory species (HMS) and relatively less dependent on landings of deep-water grouper species. On average, in 2010, these vessels received an initial allocation of 2,524 lb (1,147 kg) of red

grouper quota. Five of these vessels also received a bottom longline endorsement in 2010.

The remaining 498 commercially active fishing vessels did have landings of red grouper in 2008 or 2009. Their average annual gross revenue from commercial fishing was approximately $66,000 (2008 dollars) between the two years. On average, these vessels had 9,425 lb (4,284 kg) and 6,734 lb (3,061 kg) of red grouper landings in 2008 and 2009 respectively, or 8,053 lb (3,660 kg) between the 2 years. Red grouper landings accounted for approximately 35 percent of these vessels' annual average gross revenue, and thus they are relatively dependent on revenue from red grouper landings. These vessels' average initial red grouper allocation in 2010 was 8,404 lb (3,820 kg). Therefore, on average, their 2008 and 2009 red grouper landings are very near their 2010 red grouper allocation, though their red grouper landings differed considerably between 2008 and 2009.

Of these 498 vessels, 49 vessels also received a bottom longline endorsement in 2010. These particular vessels' average annual revenue was approximately $156,000 (2008 dollars) in 2008 and 2009. Revenue from red grouper landings decreased from approximately $104,000 to $65,000 in 2009. Nonetheless, these vessels remain highly dependent on revenue from red grouper landings, which averaged approximately 36,000 lb (13,364 kg) in 2008 and 23,000 lb (10,455 kg) in 2009. Their average initial 2010 allocation of red grouper was approximately 42,000 lb (19,091 kg) and thus their recent year's harvest has been within that 2010 average allocation, particularly in 2009.

The 191 entities with red grouper shares that did not participate in commercial fishing in 2008 or 2009 have no commercial fishing revenue and did not earn profit from commercial fishing in those 2 years. Under the action to decrease the red grouper commercial quota, allocation of red grouper in 2011 will be reduced, on average, by approximately 1,608 lb (731 kg). Using the 2008 average price of $2.85 per lb, this loss in allocation could potentially represent an annual loss of nearly $4,600 in gross revenue per entity. For the eight entities with red grouper shares that also possess longline endorsements, the average annual allocation of red grouper will be reduced by nearly 11,000 lb (5,000 kg). Thus, the potential loss in gross revenue, estimated to be nearly $31,400, could be much higher. However, in general, this potential loss in gross revenue could only reduce profit if these entities not only become active in commercial fishing, but specifically intend to harvest red grouper in 2011, and at a level above their reduced allocation. It is important to note that the commercial sector has not harvested the commercial red grouper quota since the 2006 fishing year. Alternatively, these potential losses in gross revenue could be due to these entities' inability to sell the allocations they are losing under the action, though this possibility presumes that a demand for these allocations exists. Nevertheless, the significance of this potential loss in gross revenue to these 191 entities cannot be evaluated given the lack of information on potential gross revenue and profit from commercial fishing in general and specifically for red grouper.

Profit estimates are not currently available for the 126 entities with red grouper shares that participated in the commercial sector for species other than red grouper. However, since these vessels did not have any red grouper landings, none of their gross revenue and thus none of their profit were the result of red grouper harvests. Under the action to decrease the red grouper commercial quota, the average allocation of red grouper in 2011 will be reduced by approximately 629 lb (286 kg). Using the 2008 average price of $2.85 per pound, this loss in allocation could potentially represent an annual loss of nearly $1,800 in gross revenue per entity. However, this potential loss in gross revenue could only lead to a loss in profit if these entities intend to become active in the red grouper component of the Gulf reef fish fishery in 2011 and at a level above their reduced allocation. Thus, for example, assuming these vessels intend to harvest red grouper in 2011 at a level equivalent to their 2010 allocation, and this harvest was in addition to, rather than in place of, their recent commercial fishing activities, the reduction in allocation could lead to a maximum loss of approximately three percent in gross revenue which could in turn reduce profit. Alternatively, losses in gross revenue could be due to these entities' inability to sell the allocations being lost under the action, though this possibility presumes that a demand for the allocations exists.

Profit estimates are not currently available for the 498 entities with red grouper shares that participated in the commercial red grouper sector of the Gulf reef fish fishery in 2008 or 2009. Under the action to decrease the red grouper quota, these vessels' red grouper allocations will be reduced by approximately 2,092 lb (951 kg) on average. As these vessels have been harvesting at levels near their 2010 allocation in recent years on average, this reduction in red grouper allocation is likely to lead to a future reduction in red grouper landings and therefore gross revenue. Using the average 2008 price of $2.85 per pound, it is estimated that these vessels could lose nearly $6,000, or approximately 9 percent, in average annual gross revenue. A loss in gross revenue of this magnitude will likely lead to a reduction in profit.

However, for the 49 vessels with red grouper shares that were active in the red grouper component of the Gulf reef fish fishery and also received a bottom longline endorsement in 2010, their allocation of red grouper in 2011 will decrease by approximately 10,400 lb (4,727 kg) under the action. For these particular vessels, the loss in red grouper landings could range from zero to the full amount of the decrease in allocation, though the latter is unlikely given new regulations restricting the use of longline gear implemented through Amendment 31 (75 FR 21512, April 26, 2010). Even if these vessels intend to harvest red grouper in 2011 at levels comparable to 2008, prior to the implementation of regulations restricting the use of longline gear, they will only lose approximately 4,600 lb (2,091 kg) in red grouper landings rather than the full amount of their reduced allocation. This loss in landings is estimated to be valued at approximately $13,000 in gross revenue, or 8 percent of their average annual gross revenue. Such a loss in gross revenue will likely reduce their profit. However, if they intend to harvest at levels comparable to 2009, then their reduced allocation will still be above their intended landings. Therefore, the reduction in allocation will not lead to a reduction in landings from what they will have otherwise been and thus gross revenue and profit will also not be reduced.

Two alternatives, including the status quo, were considered for the action to reduce the red grouper commercial quota to 4.32 million lb (1.96 million kg). The first alternative, the status quo, will have maintained the red grouper commercial quota at the current level of 5.75 million lb (2.61 million kg). This alternative is not consistent with the goals and objectives of the Council's plan to manage red grouper to achieve the mandates of the Magnuson-Stevens Act. Specifically, this alternative will be inconsistent with current National Standard 1 guidance because the associated TAC of 7.57 million lb (3.43 million kg) will be above the allowable biological catch (ABC) of 6.31 million lb (2.86 million kg) recommended by the Council's SSC.

The second alternative would have set the red grouper commercial quota at 4.80 million lb (2.18 million kg). This amount is equal to 85 percent of the yield of the fishing mortality at maximum sustainable yield (F_{MSY}), which the SSC considered sufficient to reduce the probability that overfishing might occur in 2011. However, this alternative is inconsistent with the method established by the Council in Amendment 30B where the annual catch target will be based on the yield associated with the fishing mortality at OY (F_{OY}).

One alternative, the status quo, was considered for the action to require vessels with valid commercial Gulf reef fish permits to mark their buoy gear with the official vessel number. The Council and NMFS have determined that the current definition of buoy gear is ambiguous. This ambiguity has led to problems with monitoring and enforcement of buoy gear regulations and thus a clearer definition of this gear type is being implemented. By not requiring the marking of buoy gear, this alternative will not improve the monitoring and enforcement of buoy gear regulations since law enforcement personnel will not be able to determine which vessel deployed the gear if the gear is left unattended.

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) applicable to vessels in the Gulf reef fish fishery, namely, a requirement to mark buoy gear with the official vessel number (U.S. Coast Guard documentation number or state registration number).

This requirement has been approved by the OMB under control number 0648–0359. The public reporting burden for this collection-of-information is estimated to average 20 minutes per buoy. This estimate of the public reporting burden includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding the burden estimate or any other aspect of the collection-of-information requirement, including suggestions for reducing the burden, to NMFS and to OMB (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to, nor shall be subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 622

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

Dated: November 24, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

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

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

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

■ 2. In § 622.2, the definition of "buoy gear" is revised to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Buoy gear means fishing gear that fishes vertically in the water column that consists of a single drop line suspended from a float, from which no more than 10 hooks can be connected between the buoy and the terminal end, and the terminal end contains a weight that is no more than 10 lb (4.5 kg). The drop line can be rope (hemp, manila, cotton or other natural fibers; nylon, polypropylene, spectra or other synthetic material) or monofilament, but must not be cable or wire. The gear is free-floating and not connected to other gear or the vessel. The drop line must be no greater than 2 times the depth of the water being fished. All hooks must be attached to the drop line no more than 30 ft (9.1 m) from the weighted terminal end. These hooks may be attached directly to the drop line; attached as snoods (defined as an offshoot line that is directly spliced, tied or otherwise connected to the drop line), where each snood has a single terminal hook; or as gangions (defined as an offshoot line connected to the drop line with some type of detachable clip), where each gangion has a single terminal hook.

* * * * *

■ 3. In § 622.6, paragraph (b)(3) is added to read as follows:

§ 622.6 Vessel and gear identification.

* * * * *

(b) * * *

(3) *Buoy gear.* In the Gulf EEZ, if buoy gear is used or possessed, each buoy must display the official number of the vessel.

■ 4. In § 622.42, the first sentence of the introductory text is revised; paragraphs (a)(1)(i)(A) and (B) are removed; paragraphs (a)(1)(iii)(A) and (C) are revised; and paragraphs (a)(1)(v) and (a)(2)(ii) are added to read as follows:

§ 622.42 Quotas.

Quotas apply for the fishing year for each species or species group, unless accountability measures are implemented during the fishing year pursuant to § 622.49, due to a quota overage occurring the previous year, in which case a reduced quota will be specified through notification in the **Federal Register.** * * *

(a) * * *

(1) * * *

(iii) * * *

(A) *SWG combined*—6.22 million lb (2.82 million kg).

* * * * *

(C) *Red grouper*—4.32 million lb (1.96 million kg).

* * * * *

(v) Greater amberjack—503,000 lb (228,157 kg), round weight.

* * * * *

(2) * * *

(ii) *Recreational quota for greater amberjack.* The recreational quota for greater amberjack is 1,368,000 lb (620,514 kg), round weight.

* * * * *

■ 5. In § 622.49, the second sentence of paragraph (a)(1)(ii) is revised to read as follows:

§ 622.49 Accountability measures.

(a) * * *

(1) * * *

(ii) * * * In addition, if despite such closure, recreational landings exceed the quota, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the quota for that following year by the amount of the overage in the prior fishing year, and to reduce the length of the recreational fishing season for the following fishing year by the amount necessary to recover the overage from the prior fishing year. * * *

* * * * *

[FR Doc. 2010–30168 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100427197–0207–01]

RIN 0648–AW86

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Emergency Rule Extension, Pollock Catch Limit Revisions

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Temporary final rule; emergency action extension and request for comments.

SUMMARY: NMFS extends the pollock specifications implemented by a July 20, 2010, emergency rule, which is scheduled to expire on January 11, 2011. Specifically, this temporary rule maintains the new stock status determination criteria for pollock and associated increases in pollock catch limits under the Northeast (NE) Multispecies Fishery Management Plan (FMP), for an additional 186 days, in order to implement pollock catch limits through either the end of fishing year (FY) 2010 (i.e., through April 30, 2011) or until superseded by limits for FY 2011.

DATES: The effective date of the interim rule published July 20, 2010 (75 FR 41996), is extended through July 17, 2011, unless superseded by another action. NMFS will accept comments through January 3, 2011.

ADDRESSES: You may submit comments, identified by 0648–AW86, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-rulemaking portal: *http://www.regulations.gov.*
- *Mail:* Paper, disk, or CD–ROM comments should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930–2276. Mark the outside of the envelope: "Comments on NE Multispecies Pollock Emergency Rule Extension."
- *Fax:* (978) 281–9135.

Instructions: All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter "N/A" in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF formats only.

Copies of the small entity compliance guide are available from the Regional Administrator, NMFS, Northeast Regional Office, at the address above. Copies of the Environmental Assessment (EA) prepared for this rule may be found at the following Internet address: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Thomas A. Warren, Fishery Policy Analyst, (978) 281–9347, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

This temporary final rule extends the emergency rule published on July 20, 2010 (75 FR 41996), in order to extend the time period for which the revised pollock status determination criteria and catch limits are in effect through the end of FY 2010 (April 30, 2011). The July 2010 emergency final rule included detailed information on the background and reasons for the need to revise the pollock status determination criteria and catch limits. The public had an opportunity to comment on that rule, but no comments were submitted. NMFS will again accept public comment on both the appropriateness of the emergency action to date, and its extension.

The emergency specifications extended through this final rule include the revised pollock stock status determination and catch limits for FY 2010, as follows: The revised biomass target parameter (SSB msy; 91,000 mt); the maximum fishing mortality rate threshold (Fmsy; 0.25); Overfishing Levels (OFLs); Acceptable Biological Catches (ABCs); Annual Catch Limits (ACLs); ACL components; and incidental Total Allowable Catches (TACs) for special management programs. The ACL components included sub-ACLs for the common pool and sectors.

The pollock status determination criteria and catch specifications implemented by the initial emergency action were consistent with the best scientific information available, but were not evaluated by the New England Fishery Management Council's (Council) Scientific and Statistical Committee (SSC). The SSC met on August 25–26, 2010, subsequent to the July 20, 2010, publication of the emergency rule, to discuss catch limits for FY 2011, including pollock. Although the SSC did not discuss the FY 2010 catch specifications for pollock, it accepted the revised assessment of pollock (SAW 50) as a basis for revising ABC recommendations, and affirmed use of the control rule for setting the pollock ABC (catch associated with 75 percent of Fmsy), the method utilized in setting the FY 2010 pollock catch specifications. The SSC characterized the risk associated with the utilization of the pollock ABC control rule in conjunction with the SAW 50 stock assessment as follows: "Scenario analyses indicated that ABCs based on 75 percent Fmsy have low risk of overfishing and low risk of leading to an overfished stock by 2015 if the domed survey selectivity estimated by the SAW 50 assessment is true. However, if selectivity is actually flat-topped, ABCs based on the SAW 50 assessment and 75 percent Fmsy have high risk of overfishing (risk > 50 percent) and a moderate risk of leading to an overfished stock by 2015 (risk between 25 percent and 50 percent)."

The pollock catch limits are contained in Tables 1 and 2 below. Consistent with the FMP, the incidental catch TAC is divided between the Regular B DAS Program (84 percent) and the Closed Area I Hook Gear Haddock Special Access Program (14 percent).

TABLE 1—POLLOCK CATCH LEVELS FOR FY 2010

Pollock catch limit	Pollock specification (mt)
OFL of Catch	25,200
ABC	19,800
State Waters ACL subcomponent	1,188
Other ACL subcomponent	1,188
Groundfish sub-ACL	16,553
Sector sub-ACL	16,178
Common Pool sub-ACL	375
Incidental Catch TAC	7.5

TABLE 2—POLLOCK ACE BY SECTOR (mt)

Sector	Pollock ACE (mt)
Fixed Gear	1,290
NCCS	73
NEFS 2	2,034
NEFS 3	1,218
NEFS 4	934
NEFS 5	68
NEFS 6	529

TABLE 2—POLLOCK ACE BY SECTOR (mt)—Continued

Sector	Pollock ACE (mt)
NEFS 7	124
NEFS 8	106
NEFS 9	632
NEFS 10	239
NEFS 11	1,533
NEFS 12	9
NEFS 13	364
Port Clyde Community	707
Sustainable Harvest	6,309
Tri-State	9
Total	16,178

All ACE values for sectors assume that each sector member has a valid permit for FY 2010.

NCCS: Northeast Coastal Communities Sector; NEFS: Northeast Fishery Sectors.

This action will extend the pollock catch limits through July 17, 2011, or until FW 45 (which includes FY 2011 pollock specifications, and is currently being developed by the Council with an anticipated May 1, 2011, effective date) or other action supersedes this.

No comments were received on the initial emergency rule.

Classification

NMFS has determined that the emergency specifications extended by this temporary final rule are necessary and are consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable law.

The interim rule that this rule extends was determined to be not significant for purposes of E.O. 12866.

This rule is exempt from the procedures of the Regulatory Flexibility Act to prepare a regulatory flexibility analysis because the rule is issued without opportunity for prior public comment.

The EA prepared for the initial emergency rule analyzed the impacts of the emergency specifications for the duration of a year (Secretarial Emergency Action to Revise Fishing Year 2010 Catch Limits for Pollock; Environmental Assessment; May 28, 2010). Therefore, the impacts of this emergency action extension have been analyzed, and are within the scope of the Finding of No Significant Impact.

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

Dated: November 24, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–30236 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 75, No. 230
Wednesday, December 1, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1159; Directorate Identifier 2010–NM–006–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 747–400 and –400D Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Model 747–400 and –400D series airplanes. This proposed AD would require a general visual inspection to determine the routing of the wire bundles in the number two and number three engine pylons near the leading edge, and related investigative and corrective actions, if necessary. For certain airplanes, this proposed AD would also require certain concurrent actions. This proposed AD results from a report of a fuel leak from the drain line of the number two engine pylon. We are proposing this AD to detect and correct chafing of the main fuel feed tube and the alternating current motor-driven hydraulic pump wire bundle, which could lead to arcing from the exposed wire to the fuel feed tube, and could result in a fire or explosion.

DATES: We must receive comments on this proposed AD by January 18, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Tung Tran, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356, telephone (425) 917–6505; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1159; Directorate Identifier 2010–NM–006–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received a report of a Model 747–400 airplane arriving at a gate with a fuel leak from the drain line of the number two engine pylon. An investigation revealed that the alternating current motor-driven pump wire bundle was incorrectly routed and touching the fuel feed tube, which caused chafing of the fuel feed tube and the resultant leak. If not detected and corrected, chafing of the main fuel feed tube and the alternating current motor-driven hydraulic pump wire bundle could lead to arcing from the exposed wire to the fuel feed tube, and could result in a fire or explosion.

Related AD

We issued AD 92–27–13, amendment 39–8448 (58 FR 5920, January 25, 1993), on December 17, 1992, for Model 747–400 series airplanes. We issued that AD to require repetitive inspections to detect damage, chafing, and improper clearance between the electrical power feeder cables and engine fuel supply tube, and corrective actions, if necessary; and modification of the electrical power feeder cable installation.

Relevant Service Information

We have reviewed Boeing Service Bulletin 747–29A2114, Revision 1, dated July 15, 2010. The service bulletin describes procedures for a general visual inspection to determine the routing of the wire bundles in the number two and number three engine pylons near the leading edge, and related investigative and corrective actions if necessary. Related investigative actions include a general visual inspection for damage between the wire bundle and the fuel feed tube. Corrective actions include repairing the wire bundle, repairing or replacing the fuel feed tube where the wire bundle goes across the tube, and changing the routing configuration for the wire bundle to above the support bracket.

Boeing Service Bulletin 747–29A2114, Revision 1, dated July 15, 2010, refers to Boeing Alert Service Bulletin 747–24A2168, Revision 1, dated December 5, 1991; Boeing Alert Service Bulletin 747–24A2168, Revision 2, dated September 24, 1992; or Boeing Service Bulletin 747–24A2168, Revision 3, dated July 29, 1993; for actions that must be done prior to or concurrently with the actions specified in Boeing Service Bulletin 747–29A2114, Revision 1, dated July 15, 2010. Boeing Service Bulletin 747–24A2168, Revision 3, dated July 29, 1993, specifies, for certain airplanes, procedures for installing the cable support brackets in the number two and number three strut, and related investigative and corrective actions, if necessary. The related investigative action is a detailed inspection of the clearance between the bracket and an adjacent pneumatic duct. The corrective action is adjusting the pneumatic duct, if necessary. AD 92–27–13 refers to Boeing Alert Service Bulletin 747–24A2168, Revision 1, dated December 5, 1991; and Revision 2, dated September 24, 1992; as appropriate sources of service information for doing certain actions required by that AD.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD would affect 15 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

TABLE—ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per product	Number of U.S.-registered airplanes	Fleet cost
Inspection	1	$85	$0	$85	15	$1,275
Concurrent Inspection and Bracket Installation	6	85	0	510	15	7,650

The cost estimate figure discussed above is based on assumptions that no operator has yet accomplished any of the actions required by this proposed AD, and that no operator would accomplish those actions in the future if this AD were not adopted. However, we have been advised that the concurrent inspection and bracket installation have already been done on some affected airplanes. Therefore, the future economic cost impact of this rule on U.S. operators is expected to be less than the cost impact figure indicated above.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2010–1159; Directorate Identifier 2010–NM–006–AD.

Comments Due Date

(a) We must receive comments by January 18, 2011.

Affected ADs

(b) AD 92–27–13, Amendment 39–8448, affects this AD.

Applicability

(c) This AD applies to The Boeing Company Model 747–400 and -400D series airplanes, certificated in any category; as specified in Boeing Alert Service Bulletin 747–29A2114, Revision 1, dated July 15, 2010.

Subject

(d) Air Transport Association (ATA) of America Code 29: Hydraulic power.

Unsafe Condition

(e) This AD results from a report of a fuel leak from the drain line of the number two engine pylon. The Federal Aviation Administration is issuing this AD to detect and correct chafing of the main fuel feed tube and the alternating current motor-driven hydraulic pump wire bundle, which could lead to arcing from the exposed wire to the

fuel feed tube, and could result in a fire or explosion.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection

(g) Within 24 months after the effective date of this AD, do a general visual inspection to determine the routing of the wire bundles in the number two and number three engine pylons near the leading edge; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–29A2114, Revision 1, dated July 15, 2010. Do all applicable related investigative and corrective actions before further flight.

Concurrent Requirements

(h) For Model 747–400 series airplanes: Before or concurrently with accomplishing the requirements of paragraph (g) of this AD, install all applicable cable support brackets in the number two and number three engine pylon areas, and do all applicable related investigative and corrective actions, in accordance with Phase II of Boeing Service Bulletin 747–24A2168, Revision 3, dated July 29, 1993. Do all applicable related investigative and corrective actions before further flight. Doing the actions required by paragraph (c) of AD 92–27–13, Amendment 39–8488, is an acceptable method of compliance with the installation required by this paragraph.

Note 1: For the purposes of this AD, a detailed inspection is: "An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, *etc.,* may be necessary. Surface cleaning and elaborate procedures may be required."

Credit for Actions Accomplished in Accordance With Previous Service Information

(i) Actions accomplished before the effective date of this AD, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–29A2114, dated October 1, 2009, are considered acceptable for compliance with the corresponding actions specified in paragraph (g) of this AD.

(j) Actions accomplished before the effective date of this AD, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–24A2168, Revision 1, dated December 5, 1991; or Revision 2, dated September 24, 1992; are considered acceptable for compliance with the corresponding actions specified in paragraph (h) of this AD.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tung Tran, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356, telephone (425) 917–6505; fax (425) 917–6590. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Issued in Renton, Washington, on November 15, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–30134 Filed 11–30–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1162; Directorate Identifier 2010–NM–099–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310 Airplanes, and Airbus Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes)

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

Prompted by a reported in-service event, EASA issued AD 2009–0084 to prevent unwanted movement of pilot- or co-pilot seat in the horizontal direction which is considered as potentially unsafe, especially during the takeoff phase when the speed of the aeroplane is greater than 100 knots and until landing gear retraction.

* * * * *

Uncommanded movement of the pilot and co-pilot seats during takeoff or landing could interfere with the operation of the airplane and, as a result, could cause loss of control of the airplane. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by January 18, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1162; Directorate Identifier 2010–NM–099–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On May 15, 2009, we issued AD 2009–11–09, Amendment 39–15919 (74 FR 25399, May 28, 2009). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2009–11–09, the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0070, dated April 14, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> Prompted by a reported in-service event, EASA issued AD 2009–0084 [which corresponds to FAA AD 2009–11–09] to prevent unwanted movement of pilot- or co-pilot seat in the horizontal direction which is considered as potentially unsafe, especially during the takeoff phase when the speed of the aeroplane is greater than 100 knots and until landing gear retraction.
>
> AD 2009–0084 required the deactivation of the electrical power of SOGERMA pilot seats P/N 2510112 series and co-pilot seats P/N 2510113 series. Optional intermediate actions were also provided by AD 2009–0084 to allow partial or full restoration of seat adjustment functionality.
>
> Since AD 2009–0084 was issued, a permanent solution has been developed that terminates the de-activation requirement and invalidates the intermediate actions.
>
> Consequently, this AD retains requirements of EASA AD 2009–0084, which is superseded, and requires implementing the terminating action. In addition, this AD prohibits the (re)installation of unmodified pilot- and co-pilot seats on any aeroplane that has been modified in accordance with the requirements of this AD.

Uncommanded movement of the pilot and co-pilot seats during takeoff or landing could interfere with the operation of the airplane and, as a result, could cause loss of control of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued the service information specified in the following table.

TABLE—SERVICE INFORMATION

Document	Revision	Date
Airbus Mandatory Service Bulletin A300–25–6217	Original	August 31, 2009.
Airbus Mandatory Service Bulletin A310–25–2205	Original	August 31, 2009.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 132 products of U.S. registry.

The actions that are required by AD 2009–11–09 and retained in this proposed AD take about 2 work-hours per product, at an average labor rate of $85 per work hour. Based on these figures, the estimated cost of the currently required actions is $170 per product.

We estimate that it would take about 2 work-hours per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $5,000 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $704,880, or $5,340 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15919 (74 FR 25399, May 28, 2009) and adding the following new AD:

Airbus: Docket No. FAA–2010–1162; Directorate Identifier 2010–NM–099–AD.

Comments Due Date

(a) We must receive comments by January 18, 2011.

Affected ADs

(b) This AD supersedes AD 2009–11–09, Amendment 39–15919.

Applicability

(c) This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category; all serial numbers having SOGERMA 2510112 series pilot electrical seats or SOGERMA 2510113 series co-pilot electrical seats installed.

(1) Airbus Model A300 B4–601, A300 B4–603, A300 B4–620, and A300 B4–622, A300 B4–605R and A300 B4–622R; A300 F4–605R and A300 F4–622R; and A300 C4–605R Variant F airplanes.

(2) Airbus Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes.

Subject

(d) Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

Reason

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

Prompted by a reported in-service event, EASA issued AD 2009–0084 to prevent unwanted movement of pilot- or co-pilot seat in the horizontal direction which is considered as potentially unsafe, especially during the takeoff phase when the speed of the aeroplane is greater than 100 knots and until landing gear retraction.

* * * * *

Uncommanded movement of the pilot and co-pilot seats during takeoff or landing could interfere with the operation of the airplane and, as a result, could cause loss of control of the airplane.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Restatement of Requirements of AD 2009–11–09, With No Changes

(g) Within 15 days after June 12, 2009 (the effective date of AD 2009–11–09): Deactivate the electrical supply of SOGERMA 2510112 series pilot seats and SOGERMA 2510113 series co-pilot seats, in accordance with the instructions of Airbus All Operators Telex (AOT) A310–25A2203, Revision 02, dated March 2, 2009; or Airbus AOT A300–25A6215, Revision 02, dated March 2, 2009; as applicable.

(h) For optional intermediate action for restoration of the electrical adjustment of the vertical seat movement only: Deactivating the electrical powered horizontal movement of SOGERMA 2510112 series pilot seats or SOGERMA 2510113 series co-pilot seats, in accordance with the instructions of EADS SOGERMA Alert Service Bulletin A2510112–25–764, Revision 1, dated February 17, 2009, allows restoration of the vertical adjustment only.

(i) For optional intermediate action for restoration of the electrical adjustment of the vertical seat and horizontal seat movement: Inspecting the position of switch 'S4' and the related shim of SOGERMA 2510112 series pilot seats or SOGERMA 2510113 series co-pilot seats, in accordance with EADS SOGERMA Inspection Service Bulletin 2510112–25–807, dated February 20, 2009, allows reactivation of both horizontal and vertical electrical movements, provided the measurement results of the inspection are within the acceptable value indicated in the service bulletin, and provided that the inspection is repeated thereafter at intervals not to exceed 2 months. If the measurement result of any inspection is not within the acceptable value indicated in the EADS SOGERMA Inspection Service Bulletin 2510112–25–807, dated February 20, 2009, the horizontal movement must be deactivated before further flight.

(j) At the applicable time specified in paragraph (j)(1) or (j)(2) of this AD: Submit a report of the findings for the first inspection done in accordance with paragraph (i) of this AD to Airbus SAS–EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. The report must include a detailed fleet inspection report, including measurement values, and pin and serial numbers for each seat.

(1) If the inspection was done on or after June 12, 2009: Submit the report within 30 days after the inspection.

(2) If the inspection was accomplished prior to June 12, 2009: Submit the report within 30 days after June 12, 2009.

(k) Modifications made prior to June 12, 2009, in accordance with EADS SOGERMA Alert Service Bulletin A2510112–25–764, dated December 19, 2008, are considered acceptable for compliance with the applicable action specified in this AD.

New Requirements of This AD

(l) Within 12 months after the effective date of this AD: Install an enlarged shim for the horizontal switch actuation on each affected seat, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–25–6217 (for Model A300–600 airplanes) or A310–25–2205 (for Model A310 airplanes), both dated August 31, 2009. Doing the installation required by paragraph (l) of this AD terminates the requirements of paragraphs (g), (h), and (i) of this AD.

(m) As of the effective date of this AD, no person may install any SOGERMA 2510112 series pilot seat or SOGERMA 2510113 series co-pilot seat, on any airplane, unless that seat has been modified in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–25–6217 (for Model A300–600 airplanes) or A310–25–2205 (for Model A310 airplanes), both dated August 31, 2009; as applicable.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(o) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2010–0070, dated April 14, 2010; and the service information specified in Table 1 of this AD; as applicable; for related information.

TABLE 1—SERVICE INFORMATION

Document	Revision	Date
Airbus All Operators Telex A300–25A6215	02	March 2, 2009.
Airbus All Operators Telex A310–25A2203	02	March 2, 2009.
Airbus Mandatory Service Bulletin A300–25–6217	Original	August 31, 2009.
Airbus Mandatory Service Bulletin A310–25–2205	Original	August 31, 2009.
EADS SOGERMA Alert Service Bulletin A2510112–25–764	1	February 17, 2009.
EADS SOGERMA Inspection Service Bulletin A2510112–25–807	Original	February 20, 2009.

Issued in Renton, Washington, on November 18, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–30135 Filed 11–30–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1156; Directorate Identifier 2010–NM–128–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 777–200, –200LR, –300, and –300ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Model 777–200, –200LR, –300, and –300ER series airplanes. This proposed AD would require repetitive detailed inspections for disbonding and tearing and measurements for wear of the internal diameter (ID) of the Karon-lined bushings of the bulkhead support jackscrew fitting and of the jackscrew fitting of the horizontal stabilizer; repetitive installations of the horizontal stabilizer trim actuator (HSTA); and if necessary, replacement of the bushings with new bushings and all applicable related investigative and corrective actions. This proposed AD results from a report indicating that a Karon-lined bushing with the liner broken into five pieces was found during a scheduled inspection of the HSTA components; the broken liner had worn and disbonded from the bushing. We are proposing this AD to detect and correct discrepancies of the HSTA attachment locations, which could result in reduced structural integrity of the horizontal stabilizer and consequent loss of controllability of the airplane.

DATES: We must receive comments on this proposed AD by January 18, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1, fax 206–766–5680; e-mail *me.boecom@boeing.com*; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Duong Tran, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6452; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1156; Directorate Identifier 2010–NM–128–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received a report indicating that a Karon-lined bushing with the liner broken into five pieces was found during a scheduled inspection of the horizontal stabilizer trim actuator (HSTA) components; the broken liner had worn and disbonded from the bushing. The broken liner was found on a 777–200 airplane that had accumulated 35,145 total flight hours and 5,335 total flight cycles. Analysis by the manufacturer revealed that the broken liner was one of 149 bushings on which an early manufacturing process was used; that process has since been improved. Further investigation and analysis by the manufacturer shows that Karon-lined bushings in the HSTA and HSTA attachment locations on the airplane structure using both the early and the improved process are susceptible to wear in service. The analysis also shows that the wear may cause excessive joint clearance which could lead to fatigue cracking of the pins. This condition, if not corrected, could result in reduced structural integrity of the horizontal stabilizer and consequent loss of controllability of the airplane.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 777–55A0017, dated May 20, 2010, which describes procedures for:

- Repetitive detailed inspections for disbonding and tearing and measurements for wear of the internal diameter (ID) of the Karon-lined bushings of the bulkhead support jackscrew fitting; and replacement of the bushings with new bushings if necessary: The replacement includes related investigative and corrective actions, if necessary. The related investigative actions include a surface high-frequency eddy current inspection for cracking of the inner surface of the hole, and measurement of the ID, of the intermediate sleeve. The corrective action for cracking of the intermediate sleeve or measurements outside the ID specified in the service bulletin is replacement of the intermediate sleeve, including related investigative and corrective actions if necessary. The related investigative actions include a surface high-frequency eddy current inspection for cracking of the inner surface of the hole, and measurement of the ID of the hole of the bulkhead support jackscrew fitting. The corrective action for cracking of the bulkhead support jackscrew fitting or measurements outside the ID specified in the service bulletin is contacting Boeing.
- Repetitive detailed inspections for disbonding and tearing and measurements for wear of the internal diameter (ID) of the Karon-lined bushings of the jackscrew fitting of the horizontal stabilizer; and replacement of the bushings with new bushings if necessary.
- Repetitively installing either a known serviceable or overhauled HSTA.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Difference Between the Proposed AD and Service Information."

Difference Between the Proposed AD and Service Information

The service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Organization Designation Authorization whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD would affect 145 airplanes of U.S. registry. We also estimate that it would take about 7 work-hours per product to comply with the detailed inspection, measurement, and installation in this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $86,275, or $595 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2010–1156; Directorate Identifier 2010–NM–128–AD.

Comments Due Date

(a) We must receive comments by January 18, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 777–200, –200LR, –300, and –300ER series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 777–55A0017, dated May 20, 2010.

Subject

(d) Air Transport Association (ATA) of America Code 55: Stabilizers.

Unsafe Condition

(e) This AD results from a report indicating that a Karon-lined bushing with the liner broken into five pieces was found during a scheduled inspection of the horizontal stabilizer trim actuator (HSTA) components; the broken liner had worn and disbonded from the bushing. The Federal Aviation Administration is issuing this AD to detect and correct discrepancies of the HSTA attachment locations, which could result in reduced structural integrity of the horizontal stabilizer and consequent loss of controllability of the airplane.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection/Related Investigative and Corrective Actions

(g) Before the accumulation of 32,000 total flight cycles, or within 24 months after the effective date of this AD, whichever occurs later: Do a detailed inspection for disbonding and tearing, and a measurement for wear of the internal diameter (ID) of the Karon-lined bushings of the bulkhead support jackscrew fitting and of the jackscrew fitting of the horizontal stabilizer; replace bushings with new bushings, as applicable; do all applicable related investigative and corrective actions; and install either a known serviceable or overhauled HSTA. Do the actions in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777–55A0017, dated May 20, 2010, except as provided by paragraph (h) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the actions required by this paragraph thereafter at intervals not to exceed 16,000 flight cycles.

Exceptions to Corrective Actions

(h) If, during any inspection or measurement required by this AD, any damage is found, or the inner diameter is greater than the allowable hole diameter, and Part 1, Step 3.B.2.a.(1)(a)1)a) of the Accomplishment Instructions of Boeing Alert Service Bulletin 777–55A0017, dated May 20, 2010, specifies to contact Boeing for appropriate action: Before further flight, do the repair using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Duong Tran, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6452; fax (425) 917–6590. Or information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and the approval must specifically refer to this AD.

Issued in Renton, Washington, on November 15, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–30138 Filed 11–30–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1161; Directorate Identifier 2010–NM–152–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170 and ERJ 190 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

It has been found occurrence of screw units manufactured with metallographic non-conformity that may increase their susceptibility to brittle fracture. The screw failure may result in loss of the related balance washer causing a possible ram air turbine (RAT) imbalance event, which may result in RAT structural failure, which associated with an electrical emergency situation, could result in loss of power to airplane flight controls hydraulic back-up system.

* * * * *

Loss of power to the hydraulic back-up system for airplane flight controls could reduce the ability of the flightcrew to maintain the safe flight and landing of the airplane. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by January 18, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170–Putim–12227–901 São Jose dos Campos–SP–BRASIL; telephone: +55 12 3927–5852 or +55 12 3309–0732; fax: +55 12 3927–7546; e-mail: *distrib@embraer.com.br;* Internet: *http://www.flyembraer.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday,

except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Cindy Ashforth, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2768; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1161; Directorate Identifier 2010–NM–152–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directives 2010–06–04 and 2010–06–05, both dated July 26, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI state:

> It has been found occurrence of screw units manufactured with metallographic non-conformity that may increase their susceptibility to brittle fracture. The screw failure may result in loss of the related balance washer causing a possible ram air turbine (RAT) imbalance event, which may result in RAT structural failure, which associated with an electrical emergency situation, could result in loss of power to airplane flight controls hydraulic back-up system.
>
> * * * * *

Loss of power to the hydraulic back-up system for airplane flight controls could reduce the ability of the flightcrew to maintain the safe flight and landing of the airplane. Required actions include doing a general visual inspection to determine the model, part number, and serial number of the RAT, and to determine if a certain symbol is marked on affected RATs. Corrective actions include replacing the RAT balance screw and marking the RAT identification plate. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

EMBRAER has issued Service Bulletins 170–24–0048, Revision 01, dated May 12, 2010 (for Model ERJ 170 airplanes); and 190–24–0019, Revision 01, dated May 11, 2010 (for Model ERJ 190 airplanes). The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 241 products of U.S. registry. We also estimate that it would take about 9 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $184,365, or $765 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket No. FAA–2010–1161; Directorate Identifier 2010–NM–152–AD.

Comments Due Date

(a) We must receive comments by January 18, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes; and Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical power.

Reason

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

It has been found occurrence of screw units manufactured with metallographic non-conformity that may increase their susceptibility to brittle fracture. The screw failure may result in loss of the related balance washer causing a possible ram air turbine (RAT) imbalance event, which may result in RAT structural failure, which associated with an electrical emergency situation, could result in loss of power to airplane flight controls hydraulic back-up system.

* * * * *

Loss of power to the hydraulic back-up system for airplane flight controls could reduce the ability of the flightcrew to maintain the safe flight and landing of the airplane.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Within 1,200 flight hours or 6 months after the effective date of this AD, whichever occurs first: Do a general visual inspection to determine the RAT model, part number, and serial number, in accordance with Part 1 of the Accomplishment Instructions of EMBRAER Service Bulletin 170–24–0048, Revision 01, dated May 12, 2010; or EMBRAER Service Bulletin 190–24–0019, Revision 01, dated May 11, 2010; as applicable. A review of airplane maintenance records is acceptable in lieu of this inspection if the model, part number, and serial number of the RAT can be conclusively determined from that review.

Note 1: For the purpose of this AD, a general visual inspection (GVI) is: "A visual examination of an interior or exterior area, installation or assembly to detect obvious damage, failure or irregularity. This level of inspection is made from within touching distance, unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight or drop-light, and may require removal or opening of access panels or doors. Stands, ladders or platforms may be required to gain proximity to the area being checked."

(1) For any RAT not having a serial number identified in EMBRAER Service Bulletin 170–24–0048, Revision 01, dated May 12, 2010; or EMBRAER Service Bulletin 190–24–0019, Revision 01, dated May 11, 2010: No further action is required by this paragraph.

(2) For any RAT having a serial number identified in EMBRAER Service Bulletin 170–24–0048, Revision 01, dated May 12, 2010; or EMBRAER Service Bulletin 190–24–0019, Revision 01, dated May 11, 2010: Within 1,200 flight hours or 6 months after the effective date of this AD, whichever occurs first, inspect to determine if the symbol "24–5" is marked on the RAT identification plate. A review of airplane maintenance records is acceptable in lieu of this inspection if the RAT identification plate can be conclusively determined to be marked with "24–5" from that review.

(i) If the symbol "24–5" is marked on the RAT identification plate: No further action is required by this paragraph.

(ii) If the symbol "24–5" is not marked on the RAT identification plate: Within 1,200 flight hours or 6 months after the effective date of this AD, whichever occurs first, replace the RAT balance screw with a new balance screw, and mark the RAT identification plate with the symbol "24–5," in accordance with Part 2 of the Accomplishment Instructions of EMBRAER Service Bulletin 170–24–0048, Revision 01, dated May 12, 2010; or EMBRAER Service Bulletin 190–24–0019, Revision 01, dated May 11, 2010; as applicable.

(h) As of the effective date of this AD, no person may install a RAT identified in Part 1 of the Accomplishment Instructions of EMBRAER Service Bulletin 170–24–0048, Revision 01, dated May 12, 2010; or EMBRAER Service Bulletin 190–24–0019, Revision 01, dated May 11, 2010; as applicable; on any airplane, unless that RAT is identified with the symbol "24–5" on the identification plate.

Credit for Actions Accomplished in Accordance With Previous Service Information

(i) Actions accomplished before the effective date of this AD in accordance with EMBRAER Service Bulletins 170–24–0048 or 190–24–0019, both dated March 31, 2010, as applicable, are considered acceptable for compliance with the corresponding actions specified in this AD.

FAA AD Differences

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

(1) The Brazilian ADs apply to "airplanes equipped with Hamilton Sundstrand ram air turbine (RAT), Model ERPS37T, Part Number (P/N) 1703781 Series; with the serial numbers (S/N) contained in Embraer Service Bulletin[s 170–24–0048 or 190–24–0019]," and their first action is an inspection to determine if affected equipment is installed. This AD applies to all of the airplanes, with the first action in the AD being an inspection to determine if affected equipment is installed, because the affected part could be rotated onto any of the airplanes listed in the applicability.

(2) Although the MCAI states not to install the part identified in paragraph (h) of this AD after accomplishing the actions specified in paragraph (g)(2) of this AD, this AD prohibits installation of the part as of the effective date of this AD.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Cindy Ashforth, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2768; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(k) Refer to MCAI Brazilian Airworthiness Directives 2010–06–04 and 2010–06–05, both dated July 26, 2010; EMBRAER Service Bulletin 170–24–0048, Revision 01, dated May 12, 2010; and EMBRAER Service Bulletin 190–24–0019, Revision 01, dated May 11, 2010; for related information.

Issued in Renton, Washington, on November 18, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–30140 Filed 11–30–10; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–0113–201016(b); FRL–9234–3]

Approval and Promulgation of Implementation Plans; Georgia: Stage II Vapor Recovery

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Georgia State Implementation Plan (SIP), submitted by the Georgia Environmental Protection Division on September 26, 2006, with a clarifying revision submitted on November 6, 2006. The September 26, 2006, submittal includes multiple modifications to Georgia's Air Quality Rules found at Chapter 391–3–1. Previously, EPA took action on the majority of the September 26, 2006, submittal in an action published in the **Federal Register** on February 9, 2010. In today's action, EPA is addressing only the portion of the September 26, 2006, submittal that relates to revisions to Georgia's Stage II gasoline vapor recovery rule at 391–3–1–.02(zz). These revisions are part of Georgia's strategy to meet the national ambient air quality standards. EPA has preliminarily determined that these revisions are consistent with the December 12, 2006, EPA memorandum from Stephen D. Page entitled *Removal of Stage II Vapor Recovery in Situations Where Widespread Use of Onboard Refueling Vapor Recovery is Demonstrated.* EPA is proposing to approve Georgia's SIP revisions pursuant to section 110 of the Clean Air Act.

DATES: Written comments must be received on or before January 3, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number, "EPA–R04–OAR–2007–0113," by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: benjamin.lynorae@epa.gov.*
3. *Fax:* 404–562–9019.
4. *Mail:* "EPA–R04–OAR–2007–0113," Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Ms. Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Jane Spann, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9029. Ms. Spann can also be reached via electronic mail at *spann.jane@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules Section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

For additional information see the direct final rule which is published in the Rules Section of this **Federal Register**.

Dated: November 10, 2010.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2010–30122 Filed 11–30–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 168

[EPA–HQ–OPP2009–0607; FRL–8854–6]

RIN 2070–AJ53

Pesticides; Regulation To Clarify Labeling of Pesticides for Export; Notification to the Secretary of Agriculture

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification to the Secretary of Agriculture.

SUMMARY: This document notifies the public that the Administrator of EPA has forwarded to the Secretary of Agriculture a draft proposed rule as required by section 25(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). As described in the Agency's semi-annual Regulatory Agenda, the draft proposed rule intends to clarify, restructure, and add specificity to existing labeling regulations for the export of unregistered pesticide products and devices. EPA is also considering a minor new requirement for the labeling of unregistered pesticide products and devices shipped between establishments operated by the same producer to ensure that they are clearly marked as unregistered products intended for export in order to prevent them from inadvertently entering the U.S. market.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0607. All documents in the docket are listed in the docket index available in *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The

Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Vera Au, Field & External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington DC 20460–0001; *telephone number:* (703) 308–9069; *e-mail address: au.vera@epa.gov@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

This action is directed to the public in general. It simply announces the submission of a draft proposed rule to the United States Department of Agriculture (USDA) and does not otherwise affect any specific entities. This action may, however, be of particular interest to those who export a pesticide product, a pesticide device, or an active ingredient used in producing a pesticide. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding this action, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

II. What action is EPA taking?

Section 25(a)(2) of FIFRA requires the Administrator to provide the Secretary of Agriculture with a copy of any proposed regulation at least 60 days before signing it for publication in the **Federal Register**. The draft proposed rule is not available to the public until after it has been signed by EPA. If the Secretary comments in writing regarding the draft proposed rule within 30 days after receiving it, the Administrator shall include the comments of the Secretary and the Administrator's response to those comments in the proposed rule when published in the **Federal Register**. If the Secretary does not comment in writing within 30 days after receiving the draft proposed rule, the Administrator may sign the proposed regulation for publication in the **Federal Register** anytime after the 30-day period.

III. Do any statutory and executive order reviews apply to this notification?

No. This document is not a proposed rule, it is merely a notification of submission to the Secretary of Agriculture. As such, none of the regulatory assessment requirements apply to this document.

List of Subjects in 40 CFR Part 168

Environmental protection, Exports, Labeling, Pesticides and pests.

Dated: November 15, 2010.

Steven Bradbury,

Director, Office of Pesticide Programs.

[FR Doc. 2010–30222 Filed 11–30–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 2

[Docket No. USCG–2010–0245]

RIN 1625–ZA28

Updates to Vessel Inspection Fees

AGENCY: Coast Guard, DHS.

ACTION: Notice of inquiry; request for information.

SUMMARY: The Coast Guard seeks public comment on updating vessel inspection fees. The Coast Guard, by regulation, establishes inspection fees for U.S. commercial vessels required to maintain a Certificate of Inspection and foreign tankships and mobile offshore drilling units required to maintain a Certificate of Compliance. This includes overseas inspection and examination fees. The Coast Guard is considering options for updating and/or restructuring these inspection fees to ensure their adequacy and equity, and for adapting to changes that have occurred since they were last modified in 1998. The Coast Guard seeks information on factors to consider when updating these fees.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before March 1, 2011 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2010–0245 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Request for Information" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice of inquiry, call or e-mail Lieutenant Commander Alan Moore, U.S. Coast Guard, at telephone: 202–372–1231 or e-mail: *Alan.H.Moore@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, at telephone: 202–366–9826.

SUPPLEMENTARY INFORMATION:

Request for Information

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments and information: If you submit a comment, please include the docket number for this notice of inquiry (USCG–2010–0245), and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* enter "USCG–2010–0245" in the "Keyword" box, and click "Search." Then, click on the "Submit a Comment" link. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing comments and documents: To view comments, and other documents available in the docket, go to *http://www.regulations.gov,* enter "USCG–2010–0245" in the "Keyword" box, and click "Search." If you do not have access to the Internet, you may view the docket by visiting the Docket Management Facility in Room W12–140

on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of 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 a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Background and Purpose

In the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508, November 5, 1990) Congress amended 46 U.S.C. 2110 by removing long-standing prohibitions against imposing certain inspection fees. Congress also directed the Coast Guard to establish inspection fees to recover costs associated with providing Coast Guard vessel inspection services.

On December 18, 1991, the Coast Guard published a notice of proposed rulemaking (NPRM) (56 FR 65786) on Direct User Fees for Inspection or Examination of U.S. and Foreign Commercial Vessels. A correction to the proposed rule (56 FR 66766) was issued on December 24, 1991, adding Appendix A, a summary of the preliminary Regulatory Evaluation. Following publication of the NPRM, the Coast Guard received 1,092 written comments and 176 statements from participants at public meetings. All segments of the maritime industry generally objected to the proposed imposition of any inspection fees for the inspection of their vessels.

On March 13, 1995, the Coast Guard published a final rule on Direct User Fees for Inspection or Examination of U.S. and Foreign Commercial Vessels (60 FR 13550). Through this final rule, Coast Guard added a new subpart 2.10, Fees, to Title 46 Code of Federal Regulations (CFR), part 2.

On April 21, 1997, as required by the Coast Guard Authorization Act of 1996, the Coast Guard published an interim rule titled Vessel Inspection User Fees (62 FR 19229) that reduced annual vessel inspection fees for small passenger vessels and excluded publicly owned ferries from payment of vessel inspection fees. The interim rule also revised the existing discretionary exemption criteria to allow additional vessels to qualify for exemptions from the annual fee. The Coast Guard published the final rule (63 FR 59472) on November 4, 1998, adding several new definitions and amending the exemptions section to exclude inspection fees for qualifying vessels owned or operated by certain non-profit organizations.

Currently, the Coast Guard collects inspection fees to recover the costs of providing vessel inspection services in support of commercial vessels required to have Certificates of Inspection (COIs) (for U.S. vessels) or Certificates of Compliance (COCs) (for foreign vessels) in order to meet statutory and regulatory requirements. Additional fees are required for inspections and examinations conducted at overseas locations.

The inspection fee amounts have not been updated since 1998. Office of Management and Budget Circular Number A–25 directs a biennial review of inspection fees. The Coast Guard completed its last review on May 30, 2008. That review, which is available in the docket, accounted for various inflations and revealed that the cost associated with marine inspection services exceeds the inspection fees collected, which have not been adjusted since 1998. Based on this review, the Coast Guard is considering adjusting its vessel inspection fees.

Because there have been many changes since the last update to 46 CFR part 2, subpart 2.10, Fees, both in the maritime industry and in the Coast Guard's commercial vessel inspection program, the Coast Guard is seeking public input on any such update. This notice of inquiry and request for information seeks public comment and information to aid the Coast Guard in updating and/or restructuring vessel inspection fees.

With some exceptions, the current vessel inspection fees are assigned based on vessel service and length. The Coast Guard designed this fee structure based on these factors to offset the Coast Guard's cost of providing vessel inspection services. The vessel inspection and fee categories were derived from inspection activity data during the years 1987, 1988, 1989, and 1990, and included the contemporary program costs associated with conducting vessel inspection and examination activities by Coast Guard personnel. The current annual vessel inspection fee structure is shown in the table below, as set forth in 46 CFR 2.10–101. Section 2.10–101 covers U.S. vessel inspection fees plus other fees charged for foreign tankships and foreign mobile offshore drilling units trading in U.S. ports. Subpart 2.10 also sets forth fees for inspections conducted at overseas locations.

Certain inspection fees have been capped by statute; the Coast Guard Authorization Act of 1996 limited the amount of fees that may be charged to small passenger vessels as defined in Title 46 CFR 2.10–25, and the Omnibus Budget and Reconciliation Act of 1990 limited the annual vessel inspection fee for non-self propelled tank barges. In any update to 46 CFR part 2, subpart 2.10, the Coast Guard does not intend to make any changes to these capped fees or to any currently excluded or exempted category vessels despite being required to maintain a COI. For convenience, the table in 46 CFR 2.101 listing inspection fees has been reproduced below.

TABLE 2.10–101—ANNUAL VESSEL INSPECTION FEES FOR U.S. AND FOREIGN VESSELS REQUIRING A CERTIFICATE OF INSPECTION

Any inspected vessel not listed in this table	$1,030
Freight barges:	
Length not greater than 150 feet	495
More than 150 feet but not more than 300 feet	610
More than 300 feet	955
Freight ships:	
Length not greater than 100 feet	1,425
More than 100 feet but not more than 300 feet	1,870
More than 300 feet	5,410
Industrial Vessels:	
Length not greater than 200 feet	1,435
More than 200 feet	2,550
Mobile Offshore Drilling Units (MODUs):	
Drill ship MODUs	6,710

TABLE 2.10–101—ANNUAL VESSEL INSPECTION FEES FOR U.S. AND FOREIGN VESSELS REQUIRING A CERTIFICATE OF INSPECTION—Continued

Submersible MODUs	4,695
Self-elevating MODUs	4,695
Semi-submersible MODUs	8,050
Nautical School Vessels:	
Length not greater than 100 feet	835
More than 100 feet but not more than 200 feet	1,450
More than 200 feet	7,205
Oceanographic Research Vessels:	
Length not greater than 170 feet	840
More than 170 feet but not more than 240 feet	1,980
More than 240 feet	3,610
Offshore Supply Vessels:	
Length not greater than 140 feet	1,135
More than 140 feet	1,470
Offshore Supply Vessels: Alternate Reinspection Program	
Length not greater than 140 feet	940
More than 140 feet	1,260
Passenger Barges:	
Less than 100 gross tons and:	
Less than 65 feet in length	300
65 feet or more in length	600
100 gross tons or more and:	
Certified for fewer than 150 passengers	2,215
Certified for 150 or more passengers	2,525
Passenger Ships:	
Length not greater than 250 feet:	
Certified for fewer than 150 passengers	3,600
Certified for 150 or more passengers	4,050
More than 250 feet but not more than 350 feet	5,330
More than 350 feet but not more than 450 feet	6,835
More than 450 feet	14,650
Sailing School Vessels:	
Length not greater than 30 feet	530
More than 30 feet but not more than 65 feet	560
More than 65 feet	980
Sea-going Towing Vessels	2,915
Small Passenger Vessels:	
Less than 65 feet in length	300
65 feet or more in length	600
Tank Barges	500
Tankships:	
Length not greater than 100 feet	1,295
More than 100 feet but not more than 300 feet	2,310
More than 300 feet	5,805
Liquefied Gas Tankships	12,120

Fees generated by 46 CFR part 2, subpart 2.10 are deposited in the general fund of the U.S. Treasury as offsetting receipts of the Department of Homeland Security and are assigned generally to Coast Guard activities. The Coast Guard does not directly benefit from the collection of inspection fees. The Coast Guard's intent, during any update to subpart 2.10, is to consider viable options for updating and/or restructuring the inspection fees listed above to ensure their adequacy and equity, plus to adapt to changes that have occurred since inspection fee amounts were last modified in 1998. It is expected that any update to subpart 2.10 will ensure a more comprehensive, equitable, and current inspection fee structure.

Request for Information

Through this notice of inquiry, the Coast Guard asks for comments and information to consider in updating vessel inspection fees. Please consider the following questions when preparing comments:

- Should the Coast Guard restructure the current vessel inspection fees?
- What factors, such as length, tonnage, type of vessel, inspection time, type of service, number of crew, number of passengers, or length of operating season, should be considered in restructuring the vessel inspection fees?
- How often or at what frequency should inspection fees be adjusted?
- Should the fee be indexed based on economic measures?
- Should the fee be a direct bill based on the inspection type and frequency (to include and not be limited to separate fees for annual inspections, periodic inspections, re-examinations, hull examinations, and deficiency follow-ups) based on program costs and Coast Guard personnel hours incurred?
- Should the Coast Guard impose fees on a vessel based upon the number of visits to complete the inspection or examination?
- Should vessel owners or operators apply annually for exemptions and waivers?
- Should the Coast Guard apply inspection fees to new construction vessels and associated plan review?
- Should the Coast Guard apply inspection fees to vessels undergoing major alterations where new plan review and onsite verification is required?
- Should separate fees be developed for vessels enrolled in the Alternate Compliance and Streamlined Inspection

Programs under Title 46 CFR Part 8—Vessel Inspection Alternatives?

This notice of inquiry is issued under authority of 46 U.S.C. 3305, 46 U.S.C. 3306, Department of Homeland Security Delegation No. 0170.1.

Dated: September 10, 2010.

Kevin S. Cook,

Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.

[FR Doc. 2010–30151 Filed 11–30–10; 8:45 am]

BILLING CODE 9110–04–P

Notices

Federal Register

Vol. 75, No. 230

Wednesday, December 1, 2010

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Bureau for Democracy, Conflict and Humanitarian Assistance; Office of Food for Peace Announcement of Request for Applications for Title II Non-Emergency Food Aid Programs; Notice

Pursuant to the Food for Peace Act of 2008, notice is hereby given that the Request for Applications for Title II Non-Emergency Food Aid Programs will be available to interested parties for general viewing.

For individuals who wish to review, the Request for Applications for Title II Non-Emergency Food Aid Programs will be available via the Food for Peace Web site: *http://www.usaid.gov/our_work/humanitarian_assistance/ffp/progpolicy.html* on or about December 6, 2010. Interested parties can also receive a copy of the Request for Applications for Title II Non-Emergency Food Aid Programs by contacting the Office of Food for Peace, U.S. Agency for International Development, RRB 7.06–152, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

Juli Majernik,

Grants Manager, Policy and Technical Division, Office of Food for Peace, Bureau for Democracy, Conflict and Humanitarian Assistance.

[FR Doc. 2010–30195 Filed 11–30–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Forest Service

Medicine Bow-Routt National Forests and Thunder Basin National Grassland; Colorado and Wyoming; Medicine Bow-Routt National Forests and Thunder Basin National Grassland Invasive Plant Management Environmental Impact Statement

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Medicine Bow-Routt National Forests and Thunder Basin National Grassland (MBRTB) will prepare an environmental impact statement (EIS) to continue control of noxious weeds and other invasive plants through the integration of manual, mechanical, biological, and ground and aerial herbicide control methods. "Invasive species" are defined as alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health (Federal Executive Order 13112). Effects analysis of treatments of invasive plants, including cheatgrass (*Bromus tectorum*) and other invasive annual bromes, will be projected over the next 10–15 years.

The agency invites comments and suggestions on the 47scope of the analysis to be included in the draft environmental impact statement (DEIS). In addition, the agency gives notice of this environmental analysis and decision making process so that interested and affected people know how they may participate and contribute to the final decision.

When developing an invasive plant management strategy it is critical to consider all available resources and tools. Integrated pest management (IPM) strategies utilize various invasive plant management options that focus on the most economical and effective control of invasive plants. Anything that weakens the invasive plant, prevents spreading, or prevents seed production can be a valuable tool. Proposed methods to control invasive plants include a combination of ground and aerial application of herbicides, mechanical, biological, and cultural weed treatments.

The MBRTB is currently treating noxious weeds and invasive plants under decisions made in the 1996 Management of Noxious Weeds Environmental Assessment (EA). However, the EA and subsequent National Environmental Policy Act (NEPA) decisions for invasive plant control on the MBRTB need to be updated since they did not include analysis of the effects of new herbicides, new invasive plant populations, or aerial application of herbicides. This analysis will disclose the effects of the proposed treatments, including the application of an adaptive management strategy that would assess progress and alter management when adequate progress in not being achieved or as new methods of treatment are developed.

DATES: Comments concerning the scope of the analysis must be received by January 18, 2011. The draft environmental impact statement is expected May 2011 and the final environmental impact statement is expected April 2012.

ADDRESSES: Send written comments to Forest Supervisor, Medicine Bow-Routt National Forests and Thunder Basin National Grassland, 2468 Jackson Street, Laramie, Wyoming 82070. Comments may also be sent via e-mail to *comments-rocky-mountain-medicine-bow-routt@fs.fed.us* or via facsimile to 307–745–2398.

FOR FURTHER INFORMATION CONTACT: Direct questions about the proposed action and the EIS to Bob Mountain, Project Coordinator, 2468 Jackson Street, Laramie, Wyoming 82070, phone (307) 745–2411 or e-mail *bmountain@fs.fed.us.* Comments are not to be sent to this address; they need to be received as directed above.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Invasive plants are threatening or dominating areas of the Medicine Bow-Routt National Forests and Thunder Basin National Grassland (MBRTB) with negative impacts on native plant communities, big game winter ranges, sage-grouse habitat, soil and watershed resources, recreation, domestic livestock forage availability and aesthetic values. A shift from native vegetation to invasive plants alters wildlife habitats, decreases wildlife and livestock forage,

reduces species diversity, increases soil erosion due to a decrease in surface cover, and promotes undesirable monocultures. For these reasons it is imperative to aggressively manage invasive plants across the MBRTB.

Purpose and Need for Action: The purpose and need of the project is to prevent and reduce loss of native plant communities associated with the spread of invasive plant species. Specifically, the purposes of this project are to treat invasive plants within the Medicine Bow-Routt National Forests and Thunder Basin National Grassland (MBRTB) and to reduce the impacts from invasive plants on other resources.

These management activities would be administered by the Medicine Bow-Routt National Forests and Thunder Basin National Grassland in Colorado and Wyoming. The EIS would update the 1996 MBRTB Management of Noxious Weeds EA and comply with the three current land and resource management plans:

- Medicine Bow National Forest Revised Land and Resource Management Plan December 2003.
- Routt National Forest Land and Resource Management Plan February 1998.
- Thunder Basin National Grassland Land and Resource Management Plan—Northern Great Plains Management Plans Revision July 2002.

The purpose of the Forest Service proposal is to further movement towards desired conditions outlined in the above plans, by:

- Protecting the natural condition and biodiversity of the MBRTB by preventing or limiting the spread of aggressive, non-native plant species that displace native vegetation.
- Promptly eliminating new invaders (species not previously reported in the area) before they become established.
- Preventing or limiting the spread of established invasive plants into areas containing little or no infestation.
- Protecting sensitive and unique habitats including critical big game winter ranges, sage-grouse core areas and other important habitats.
- Reducing known and potential invasive plant seed sources along roads and trails, within powerline corridors, rights-of-ways, gravel and rock quarries, fuels reduction projects, previously-burned areas and beetle-killed forests.

The forest and grassland plans provide goals, objectives, standards and guidelines, and land allocations of the various activities that occur on the forest/grassland. Access to the project area and condition of private lands will be considered during the alternative development and when analyzing potential cumulative effects, but no activities are being proposed to occur on private lands. It is anticipated, however, that the Forest Service may receive requests from intermingled and adjacent landowners to be a willing and able partner on projects that might be proposed to treat invasive plant populations that are found on multiple land ownerships that include NFS lands.

Proposed Action: The Forest Service, through the application of an adaptive invasive plant treatment strategy, proposes to treat invasive plant species on the Medicine Bow-Routt National Forests and Thunder Basin National Grassland (MBRTB). The proposed action would broaden the current management based on the 1996 MBRTB Management of Noxious Weeds EA for control of noxious weeds to:

- Treat new infestations through adaptive management tools for assessing new treatments and new sites;
- Permit the use of newly developed, more species-specific, EPA registered herbicides;
- Continue the use of integrated treatment methods, including herbicides, within wilderness areas where approved in advance and necessary to maintain native vegetation consistent with wilderness values;
- Broaden control methods to include the use of aerial application of herbicides where effective ground application is not possible; and
- Maintain or improve protection measures for herbicide applications.

Table 1 identifies the invasive plants that are proposed for treatment or potential treatment should they be found, and priority of treatment on National Forest System Lands. The table includes invasive plants known to be present within the MBRTB and those not yet present but considered to be likely invaders in the near future. Briefly, Priority 1 indicates weeds of highest priority for treatment and eradication. Priority 2 indicates weeds that are increasing in numbers, Priority 3 are weeds that are so common and widespread that eradication is not possible while Priority 4 weeds are not currently known to occur. Due to the dynamic nature of invasive species, it is not possible for this list to include all invasive species that may be considered a threat to National Forest System lands. Management of species not listed here, yet determined to be a threat, will be addressed in the adaptive management strategy described below.

TABLE 1

Common name	Scientific name	Priority	Approximate infested acres
Dalmatian toadflax	Linaria dalmatica	1	1,907
Diffuse knapweed	Centaurea diffusa	1	260
Leafy spurge	Euphorbia esula	1	863
Russian knapweed	Acroptilon repens	1	9
Saltcedar	Tamarix complex	1	280
Spotted knapweed	Centaurea stoebe ssp micranthos	1	266
Squarrose knapweed	Centaurea virgata ssp squarrosa	1	3
Yellow toadflax	Linaria vulgaris	1	8,499
Black henbane	Hyoscyamus niger	2	36
Bull thistle	Cirsium vulgare	2	264
Cheatgrass	Bromus tectorum	2	97,461
Common tansy	Tanacetum vulgare	2	5
Hoary cress	Cardaria draba	2	1,374
Musk thistle	Carduus nutans	2	2,200
Russian olive	Elaeagnus angustifolia	2	350
Scentless chamomile	Tripleurospermum perforatum	2	254
Scotch thistle	Onopordum acanthium	2	21
St. Johnswort	Hypericum perforatum	2	2
Sulphur cinquefoil	Potentilla recta	2	1
Canada thistle	Cirsium arvense	3	44,598

TABLE 1—Continued

Common name	Scientific name	Priority	Approximate infested acres
Common burdock	Arctium minus	3	53
Common mullein	Verbascum thapsus	3	199
Curveseed butterwort	Ceratocephala testiculata	3	4
Field bindweed	Convolvulus arvensis	3	66
Houndstongue	Cynoglossum officinale	3	15,034
Ox-eye daisy	Leucanthemum vulgare	3	1,288
Dyers woad	Isatis tinctoria	4	0
Medusahead	Taeniatherum caput-medusae	4	0
Perennial pepperweed	Lepidium latifolium	4	0
Perennial sowthistle	Sonchus arvense	4	0
Plumeless thistle	Carduus acanthoides	4	0
Purple loosestrife	Lythrum salicaria	4	0
Quackgrass	Elymus repens	4	0
Skeletonleaf bursage	Ambrosia tomentosa	4	0

"Infested" acres vary widely, largely due to extreme variations of density of the invasive plants within that acre (from a few plants to a few dozen plants in some areas all the way to nearly solid monoculture stands in others). Currently, approximately 175,300 acres within the MBRTB are infested with invasive plants, which is about 6% of the total acres.

The proposed action would occur over the next 10–15 years and would treat a few thousand acres annually (recent efforts have been 2,000–3,000 acres), using a combination of manual, mechanical, biological, and aerial and ground herbicide applications. Adding the capability for aerial treatments is necessary to safely and effectively apply herbicides, in uniform applications, on the steeper slopes that characterize critical big game winter ranges. It is also needed to cooperate with integrated land ownership partners on the Grasslands that are experiencing extensive infestations of cheatgrass as a result of recent and severe drought (and that are negatively affecting native plant populations, especially those in critical sage-grouse habitat). An estimated average of an additional 1,000–5,000 acres might be treated annually for cheatgrass control in cooperation with intermingled-landownership partners, and involving partnership dollars as well.

Potential treatment areas include crucial big game winter ranges, sage-grouse core areas and other important habitats, fuels reduction projects, previously-burned areas, roads and trails, power lines, rights-of-ways, gravel and rock quarries, and beetle-killed forests where invasive weeds are already beginning to proliferate.

The proposed action would utilize a variety of tools, singularly or in combination, to implement an integrated strategy. Proposed control methods include the following:

- Mechanical methods, such as hand-pulling, mowing or cutting.
- Revegetation, where competitive vegetation is seeded to reduce invasive species, possibly after other treatments.
- Grazing with livestock.
- Biological control through the use of predators, parasites, and pathogens.
- Herbicide control using ground-based application methods.
- Herbicide control using aerial application methods.
- Prescribed fire in conjunction with other treatment methods.
- Education programs to inform people of the effects of invasive plant infestations, methods of spread and preventative management opportunities and practices.
- Prevention by using practices that reduce invasive plant spread, including a weed-free forage program and washing vehicles to remove seeds and plant parts.

The selection of control methods is not a choice of one tool over another, but rather selection of a combination of tools that would be most effective on target species for a particular location. The MBRTB proposes to use a combination of control methods based on site-specific conditions and circumstances, EPA labels, APHIS direction, and resource protection measures to ensure that treatment methods are properly used.

The proposed action contains the concept of adaptive management to deal with infestations that are constantly changing. An adaptive management strategy offers an avenue to describe and evaluate the consequences of changing or new infestations and new treatment options, while still addressing other resource concerns. As new infestations are discovered, and as new treatment methods are approved, personnel can evaluate treating those areas using all available methods. The adaptive management strategy consists of two principle components:

1. To quickly and effectively treat newly discovered infestations, a decision tree based on infestation size, location, site characteristics, and consultation with specialists would be used to select treatment methods.

2. To improve effectiveness and reduce impacts, new technology, biological controls, or herbicides would be evaluated for use.

Possible Alternatives: The Medicine Bow-Routt National Forests and Thunder Basin National Grassland will consider a reasonable range of alternatives, including a no action alternative. Other alternatives may examine various combinations of invasive plant treatment. Based on the issues gathered through scoping, the action alternatives may vary in the amount and location of acres considered for treatment and the number, type, and location of activity.

Responsible Official: The Forest Supervisor, Medicine Bow-Routt National Forests and Thunder Basin National Grassland is the Responsible Official for making the decision concerning this proposal.

Nature of Decision To Be Made: Given the purpose and need, the Responsible Official reviews the proposed action, the other alternatives, and the environmental consequences in order to make the following decisions:

- Whether to expand current efforts to control invasive plants;
- What control methods would be used;
- What herbicides would be used;
- What protection measures and monitoring measures would be required; and

• Whether to include an adaptive management approach to address future spread of invasive weeds.

If authorized, the decision would describe adaptive management options under specific settings and conditions.

The EIS is a project level analysis. The scope of the project is confined to issues and potential environmental consequences relevant to the decision. This analysis does not attempt to re-evaluate or alter decisions made at higher levels. The decision is subject to and would implement direction from higher levels.

National and regional policies and Forest Plan direction require consideration of effects of all projects on invasive plant spread and prescribe protection measures where practical to limit those effects. Reconsideration of other existing project level decisions or programmatically prescribing protection measures or standards for future Forest management activities (such as travel management, timber harvest, and grazing management) are beyond the scope of this document. Cumulative effects of the Project are addressed where appropriate in Chapter 3 combined with effects of other Forest activities.

Even with careful consideration, unforeseen events can occur that will require additional analyses. Unanticipated events can result in new information that could have a bearing on a decision. Forest Service procedures for addressing such new information, documents, and decisions are thoroughly explained in FSH 1909.15, Section 18.

Preliminary Issues: Key issues identified to date include:

• The current and potential impacts of invasive plants on natural resources such as big game winter habitat, native plant communities, wilderness values, watershed function, and threatened, endangered, or sensitive species and their habitats.

• Economics, effectiveness, and potential impacts of various control methods on natural resources.

• Potential effects on non-target native plants and associated values, wildlife and fish populations, and human health from the application of herbicides.

Scoping Process: This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. Public participation will be especially important at several points during the analysis, beginning with the scoping process (40 CFR 1501.7). The Forest Service will be seeking information, comments, and assistance from Federal, State, and local agencies, tribes, and other individuals or organizations who may be interested in or affected by the proposed project. This input will be used in preparation of the draft EIS. Continued scoping and public participation efforts will be used by the interdisciplinary team to identify new issues, determine alternatives in response to the issues, and determine the level of analysis needed to disclose potential biological, physical, economic, and social impacts associated with this project.

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by May 2011. The EPA will publish a notice of availability of the draft EIS in the **Federal Register**. The comment period on the draft EIS will be 45 days from the date the EPA notice appears in the Federal Register. At that time, copies of the draft EIS will be distributed to interested and affected agencies, organizations, and members of the public for their review and comment. It is important that those interested in this proposal on the Medicine Bow-Routt National Forests and Thunder Basin National Grassland participate at that time.

The final EIS is scheduled for completion by April 2012. In the final EIS, the Forest Service is required to respond to substantive comments received during the comment period for the draft EIS. The Forest Supervisor of the Medicine Bow-Routt National Forests and Thunder Basin National Grassland is the responsible official. The Forest Supervisor will decide which, if any, of the proposed project alternatives will be implemented. The decision and reasons for the decision will be documented in appropriate Records of Decision. Those decisions will be subject to Forest Service appeal regulations (36 CFR part 215).

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will become part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered, however anonymous comments will not provide the respondent with standing to participate in subsequent administrative review or judicial review.

Dated: November 23, 2010.

Steven R. Currey,

Acting Forest Supervisor.

[FR Doc. 2010–30196 Filed 11–30–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Alpine County Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Alpine County Resource Advisory Committee (RAC) will hold a meeting.

DATES: The meeting will be held on December 21st, 2010 and will begin at 6 p.m.

ADDRESSES: The meeting will be held in Alpine County at the Alpine Early Learning Center, 100 Foothill Road, Markleeville, CA 96120.

FOR FURTHER INFORMATION CONTACT: Daniel Morris, RAC Coordinator, USDA, Humboldt-Toiyabe National Forest, Carson Ranger District, 1536 S. Carson Street, Carson City, NV 89701 (775) 884–8140; E–MAIL *danielmorris@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Discussion of Forest Service Issues of interest to the public (2) Public Comment. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: November 22, 2010.

Genny E. Wilson,

Designated Federal Officer.

[FR Doc. 2010–30023 Filed 11–30–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

Background

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as

amended ("the Act"), the Department of Commerce ("the Department") and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for January 2011

The following Sunset Reviews are scheduled for initiation in January 2011 and will appear in that month's Notice of Initiation of Five-Year Sunset Reviews.

	Department contact
Antidumping Duty Proceedings	
Heavy Forged Hand Tools, With or Without Handles from the PRC (A–570–803) (3rd Review)	Jennifer Moats, (202) 482–5047.
Paper Clips from the PRC (A–570–826) (3rd Review)	Jennifer Moats, (202) 482–5047.
Fresh & Chilled Atlantic Salmon from Norway (A–403–801) (3rd Review)	Patricia Tran, (202) 482–1503.
Countervailing Duty Proceedings	
Fresh & Chilled Atlantic Salmon from Norway (C–403–802) (3rd Review)	Patricia Tran, (202) 482–1503.
Suspended Investigations	
No Sunset Review of suspended investigations is scheduled for initiation in January 2011.	

The Department's procedures for the conduct of Sunset Reviews are set forth in 19 CFR 351.218. Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3—*Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin,* 63 FR 18871 (April 16, 1998). The Notice of Initiation of Five-Year ("Sunset") Reviews provides further information regarding what is required of all parties to participate in Sunset Reviews.

Pursuant to 19 CFR 351.103(c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Please note that if the Department receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue. Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: November 23, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–30230 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–4697.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended ("the Act"), may request, in accordance with the Department of Commerce's ("the Department") regulations at 19 CFR 351.213, that the Department conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, the Department intends to select respondents based on U.S. Customs and Border Protection ("CBP") data for U.S. imports during the period of review ("POR"). We intend to release the CBP data under Administrative Protective Order ("APO") to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 20 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of the initiation **Federal Register** notice.

Opportunity to Request a Review: Not later than the last day of December 2010,[1] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in December for the following periods:

[1] Or the next business day, if the deadline falls on a weekend, Federal holiday or any other day when the Department is closed.

	Period to be reviewed
Antidumping Duty Proceedings	
Argentina: Honey A–357–812	12/1/09–11/30/10
Brazil:	
Certain Carbon Steel Butt-Weld Pipe Fittings A–351–602	12/1/09–11/30/10
Silicomanganese A–351–824	12/1/09–11/30/10
Chile: Certain Preserved Mushrooms A–337–804	12/1/09–11/30/10
India:	
Carbazole Violet Pigment 23 A–533–838	12/1/09–11/30/10
Certain Hot-Rolled Carbon Steel Flat Products A–533–820	12/1/09–11/30/10
Commodity Matchbooks A–533–848	6/2/09–11/30/10
Stainless Steel Wire Rod A–533–808	12/1/09–11/30/10
Indonesia: Certain Hot-Rolled Carbon Steel Flat Products A–560–812	12/1/09–11/30/10
Japan:	
Polychloroprene Rubber A–588–046	12/1/09–8/3/10
P.C. Steel Wire Strand A–588–068	12/1/09–11/30/10
Superalloy Degassed Chromium A–588–866	12/1/09–11/30/10
Welded Large Diameter Line Pipe A–588–857	12/1/09–11/30/10
Republic of Korea:	
Welded Astm A–312 Stainless Steel Pipe A–580–810	12/1/09–11/30/10
Socialist Republic of Vietnam: Uncovered Innerspring Units A–552–803	12/1/09–11/30/10
South Africa: Uncovered Innerspring Units A–791–821	12/1/09–11/30/10
Taiwan:	
Carbon Steel Butt-Weld Pipe Fittings A–583–605	12/1/09–11/30/10
Porcelain-On-Steel Cooking Ware A–583–508	12/1/09–11/30/10
Welded Astm A–312 Stainless Steel Pipe A–583–815	12/1/09–11/30/10
The People's Republic of China:.	
Carbazole Violet Pigment 23 A–570–892	12/1/09–11/30/10
Cased Pencils A–570–827	12/1/09–11/30/10
Hand Trucks and Parts Thereof A–570–891	12/1/09–11/30/10
Honey A–570–863	12/1/09–11/30/10
Malleable Cast Iron Pipe Fittings A–570–881	12/1/09–11/30/10
Porcelain-on-Steel Cooking Ware A–570–506	12/1/09–11/30/10
Silicomanganese A–570–828	12/1/09–11/30/09
Countervailing Duty Proceedings	
Argentina: Honey C–357–813	1/1/10–12/31/10
India:	
Carbazole Violet Pigment 23 C–533–839	1/1/09–12/31/09
Certain Hot-Rolled Carbon Steel Flat Products C–533–821	1/1/10–12/31/10
Commodity Matchbooks C–533–849	8/4/09–12/31/09
Indonesia: Certain Hot-Rolled Carbon Steel Flat Products C–560–813	1/1/09–12/31/09
Thailand: Certain Hot-Rolled Carbon Steel Flat Products C–549–818	1/1/09–12/31/09
Suspension Agreements	
None.	

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters.[2] If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Please note that, for any party the Department was unable to locate in prior segments, the Department will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), the Department has clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders. *See also* the Import

[2] If the review request involves a non-market economy and the parties subject to the review request do not qualify for separate rates, all other exporters of subject merchandise from the non-market economy country who do not have a separate rate will be covered by the review as part of the single entity of which the named firms are a part.

Administration Web site at *http://ia.ita.doc.gov.*

Six copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping/Countervailing Duty Operations, Attention: Sheila Forbes, in room 3508 of the main Commerce Building. Further, in accordance with 19 CFR 351.303(f)(3)(ii), a copy of each request must be served on the petitioner and each exporter or producer specified in the request.

The Department will publish in the **Federal Register** a notice of "Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation" for requests received by the last day of December 2010. If the Department does not receive, by the last day of December 2010, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct the CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures "gap" period, of the order, if such a gap period is applicable to the POR.

This notice is not required by statute but is published as a service to the international trading community.

Dated: November 23, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–30239 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–934]

1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Republic of China: Extension of the Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 1, 2010.

FOR FURTHER INFORMATION CONTACT: Shawn Higgins, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, *telephone:* (202) 482–0679.

SUPPLEMENTARY INFORMATION:

Background

On May 28, 2010, the Department of Commerce (the "Department") published a notice of initiation of an administrative review of the antidumping duty order on 1-hydroxyethylidene-1, 1-diphosphonic acid from the People's Republic of China.[1] The period of review is April 23, 2009, through March 31, 2010. The preliminary results of the administrative review are currently due no later than December 31, 2010.

Extension of Time Limit for Preliminary Results

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the "Act"), the Department shall make a preliminary determination in an administrative review of an antidumping duty order within 245 days after the last day of the anniversary month of the date of publication of the order. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time period to a maximum of 365 days.

Completion of the preliminary results of this review within the 245-day period is not practicable because the Department needs additional time to analyze information pertaining to the respondents' sales practices and factors of production, and to issue and review responses to supplemental questionnaires. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completing the preliminary results of the instant administrative review by 90 days until March 31, 2011. The final results continue to be due 120 days after the publication of the preliminary results.

This notice is published pursuant to sections 751(a) and 777(i) of the Act.

Dated: November 24, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–30234 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 29976 (May 28, 2010).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–822]

Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Frozen Warmwater Shrimp From Thailand

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 6, 2010, the Department of Commerce (the Department) initiated a changed circumstances review and published a notice of preliminary results of changed circumstances review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from Thailand. *See Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review: Certain Frozen Warmwater Shrimp from Thailand,* 75 FR 61702 (Oct. 6, 2010) (*Initiation and Preliminary Results*). In that notice, we preliminarily determined that A Foods 1991 Co., Limited (A Foods) is the successor-in-interest to May Ao Company Limited (May Ao) for purposes of determining antidumping duty cash deposits and liabilities. No interested party submitted comments on, or requested a public hearing to discuss, the *Initiation and Preliminary Results.* For these final results, the Department continues to find that A Foods is the successor-in-interest to May Ao.

DATES: *Effective Date:* December 1, 2010.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3874.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2010, A Foods requested that the Department conduct an expedited changed circumstances review under 19 CFR 351.221(c)(3)(iii) to confirm that A Foods is the successor-in-interest to May Ao for purposes of determining antidumping duty cash deposits and liabilities. On October 6, 2010, the Department initiated this changed circumstances review and published the notice of preliminary results, determining that A Foods is the successor-in-interest to May Ao. *See Initiation and Preliminary Results,* 75 FR at 61704. In the *Initiation and Preliminary Results,* we provided all interested parties with an opportunity to comment or request a public hearing regarding our finding that A Foods is the successor-in-interest to May Ao. We received no comments or requests for a public hearing from interested parties within the time period set forth in the *Initiation and Preliminary Results.*

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[1] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size. The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn *(Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp *(Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); (7) certain dusted shrimp; and (8) certain battered shrimp. Dusted shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp-based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Final Results of Changed Circumstances Review

For the reasons stated in the *Initiation and Preliminary Results,* and because we received no comments from interested parties to the contrary, the Department continues to find that A Foods is the successor-in-interest to May Ao. As a result of this determination, we find that A Foods should receive the cash deposit rate previously assigned to May Ao in the most recently completed review of the antidumping duty order on shrimp from Thailand. *See, e.g., Final Results of Antidumping Duty Changed Circumstances Review: Certain Circular Welded Non-Alloy Steel Pipe and Tube from Mexico,* 74 FR 41681, 41682 (Aug. 18, 2009). Consequently, the Department will instruct U.S. Customs and Border Protection to suspend liquidation of all shipments of subject merchandise produced/exported by A Foods and entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice in the **Federal Register** at 2.61 percent, which is the current antidumping duty cash-deposit rate for May Ao. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 75 FR 54847 (Sept. 9, 2010). This cash deposit requirement shall remain in effect until further notice.

We are issuing this determination and publishing these final results and notice in accordance with sections 751(b)(1) and 777(i)(1) and (2) of the Tariff Act of 1930, as amended, and 19 CFR 351.216 and 351.221(c)(3).

Dated: November 23, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–30233 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–DS–P

[1] "Tails" in this context means the tail fan, which includes the telson and the uropods.

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year ("Sunset") Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with section 751(c) of the Tariff Act of 1930, as amended ("the Act"), the Department of Commerce ("the Department") is automatically initiating a five-year review ("Sunset Review") of the antidumping duty orders listed below. The International Trade Commission ("the Commission") is publishing concurrently with this notice its notice of *Institution of Five-Year Review* which covers the same orders.

DATES: *Effective Date:* December 1, 2010.

FOR FURTHER INFORMATION CONTACT: The Department official identified in the *Initiation of Review* section below at AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission, at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

The Department's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3 —*Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders: Policy Bulletin,* 63 FR 18871 (April 16, 1998).

Initiation of Review

In accordance with 19 CFR 351.218(c), we are initiating the Sunset Review of the following antidumping duty orders: [1]

DOC case No.	ITC case No.	Country	Product	Department contact
A–821–801	731–TA–340–E	Russia	Solid Urea (3rd Review)	Dana Mermelstein, (202) 482–1391.
A–823–801	731–TA–340–H	Ukraine	Solid Urea (3rd Review)	Dana Mermelstein, (202) 482–1391.

Filing Information

As a courtesy, we are making information related to Sunset proceedings, including copies of the pertinent statute and Department's regulations, the Department schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on the Department's Internet Web site at the following address: "*http://ia.ita.doc.gov/sunset/*." All submissions in these Sunset Reviews must be filed in accordance with the Department's regulations regarding format, translation, service, and certification of documents. These rules can be found at 19 CFR 351.303.

Pursuant to 19 CFR 351.103 (c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Because deadlines in Sunset Reviews can be very short, we urge interested parties to apply for access to proprietary information under administrative protective order ("APO") immediately following publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The Department's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required From Interested Parties

Domestic interested parties defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b) wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the order without further review. *See* 19 CFR 351.218(d)(1)(iii).

If we receive an order-specific notice of intent to participate from a domestic interested party, the Department's regulations provide that all parties wishing to participate in the Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the Commission's information requirements. Please consult the Department's regulations for information regarding the Department's conduct of Sunset Reviews.[2] Please consult the Department's regulations at 19 CFR Part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218 (c).

Dated: November 24, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–30237 Filed 11–30–10; 8:45 am]

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[1] The Department was scheduled to initiate the sunset review of the antidumping order on raw pistachios from Iran (A–507–502) in December 2010. However, the recently enacted Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 includes a ban on all U.S. imports from Iran, including pistachios, effective September 29, 2010. *See* Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 111 Public Law 195, section 103(b); *see also Iranian Transactions Regulations,* 75 FR 59611 (Dept. of Treasury, September 28, 2010). While this import ban remains in effect, 19 U.S.C. 1675(c)(7) provides that the 5-year period from the date of the Department's prior determination to continue the order in effect is tolled. Accordingly, the Department may not initiate a sunset review of the antidumping order on raw pistachios from Iran until two months after the import ban on pistachios is lifted.

[2] In comments made on the interim final sunset regulations, a number of parties stated that the proposed five-day period for rebuttals to substantive responses to a notice of initiation was insufficient. This requirement was retained in the final sunset regulations at 19 CFR 351.218(d)(4). As provided in 19 CFR 351.302(b), however, the Department will consider individual requests to extend that five-day deadline based upon a showing of good cause.

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement (NAFTA), Article 1904 Binational Panel Reviews

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of decision of panel.

SUMMARY: On November 26, 2010, the binational panel issued its decision in the review of the United States International Trade Commission's (the Commission) final injury determination in Light-Walled Rectangular Pipe and Tube from China, Korea, and Mexico (NAFTA Secretariat File Number USA–MEX–2008–1904–04). The binational panel upheld in part and remanded in part the Commission's determination. The Commission is directed to issue its remand determination within sixty days from the date of this panel decision. Copies of the panel decision are available from the U.S. Section of the NAFTA Secretariat.

FOR FURTHER INFORMATION CONTACT: Valerie Dees, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement ("Agreement") establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* ("Rules"). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686). The panel review in this matter has been conducted in accordance with these Rules.

Dated: November 26, 2010.

Valerie Dees,

United States Secretary, NAFTA Secretariat.

[FR Doc. 2010–30231 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XY30

Takes of Marine Mammals Incidental to Specified Activities; Construction of the Parsons Slough Sill Project

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the NOAA Restoration Center, Southwest Region, to take, by Level B Harassment only, small numbers of harbor seals (*Phoca vitulina richardsi*) incidental to pile driving associated with the Parsons Slough Sill Project.

DATES: Effective November 24, 2010, through February 28, 2011.

ADDRESSES: A copy of the IHA, the application, and the associated Environmental Assessment and Finding of No Significant Impact are available by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910 or by telephoning the contact listed here (*see* **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Brian D. Hopper or Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289, or Monica DeAngelis, NMFS Southwest Region, (562) 980–3232.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorization published in the **Federal Register** for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

NMFS received an application on August 5, 2010, from the NOAA Restoration Center, Southwest Region, for the taking, by harassment, of marine mammals incidental to the construction of a partially submerged tidal barrier (sill) across the mouth of the Parsons Slough Channel. Parsons Slough is located on the southeast side of the Elkhorn Slough Estuary, which is situated 90 miles (145 km) south of San Francisco and 20 miles (32 km) north of Monterey in Monterey County, California. The application was determined to be complete on August 16, 2010. Pile driving during the project may result in harassment of Pacific

harbor seals (*Phoca vitulina richardsi*) located in the action area. In accordance with MMPA implementing regulations, NMFS issued a notice in the **Federal Register** on October 5, 2010 (75 FR 61432), requesting comments from the public on the proposed IHA.

The specified activities are also likely to result in the take by incidental harassment of southern sea otters (*Enhydra lutirs*). The US Fish and Wildlife Service (USFWS) has management jurisdiction over southern sea otters. NOAA received a separate MMPA Section 101(a)(5)(D) authorization for incidental take of sea otters from USFWS. The potential take of sea otters is not further addressed in this notice.

Description of the Specified Activity

A complete description of the specified activity may be found in NMFS' proposed IHA notice in the **Federal Register** (75 FR 61432) and a summary is provided here.

In order to reduce tidal scour, the NOAA Restoration Center, Southwest Region, proposes to construct a partially submerged tidal barrier (sill), similar to an underwater wall, across the mouth of Parsons Slough. The sill structure would prevent head cutting (*i.e.,* erosion in a channel caused by an abrupt change in slope) in Elkhorn Slough from migrating upstream into Parsons Slough, would retain sediment that accretes within Parsons Slough, and would reduce the tidal prism of Parsons Slough. This reduction in tidal prism would reduce current velocities between Parsons Slough and the mouth of Elkhorn Slough, thereby reducing tidal scour. The proposed project, which is referred to as the Parsons Slough Project, would also include establishment of artificial reefs to support populations of Olympia oysters (*Ostrea lurida*) in the northeastern part of the Parsons Slough Complex.

The sill structure would be constructed of steel sheet piles that would extend 270 ft (82.3 m) across the mouth of the Parsons Slough Channel. A 100 ft (30 m) wide lower area, located in the center of the structure, would allow water to flow between Parsons Slough and Elkhorn Slough. This portion of the structure would be submerged more than 99 percent of the time. The center of the lower part of the structure would include a notch approximately 25 ft (7.6 m) wide, with the top elevation of the sheet pile in this notch at an elevation of −5 ft (−1.5 m). The notch would provide for the passage of water at all tide levels and would facilitate the movement of fish and wildlife into and out of Parsons Slough. The top elevation of the sheet pile in the remaining 75 ft (23 m) of the central section of the base structure would be −2 ft (−0.6 m). The remaining portions of the sheet piles to the left and right of the center portion of the structure would have a top elevation of 9.6 ft (3 m).

All in-channel construction activities would be constructed from barges, and no heavy equipment would enter the channels. Most of these construction activities are in-water (e.g., installation of end-bearing piles and sheet piles, placement of rockfill buttress).

Installation of the sheet pile wall would be supported by two rows of seven end-bearing piles, as well as a single row of sheet pile located between the piles. The end-bearing piles would be driven through the soft soils to penetrate 10 ft (3 m) below the top of the dense sandy deposits that underlie the soft soils at an elevation of approximately −80 ft (−24.4 m). Additionally, up to 45 temporary end-bearing piles may be installed in the main channel of Elkhorn Slough at the Kirby Park staging site (approximately 2 mi (3.2 km) from the project site) to facilitate barge docking and loading (if the temporary dock is constructed on pilings, rather than temporary rock-fill). These piles, if necessary, would be removed after construction when the floating dock is disassembled. Pile driving at the staging site is not expected to result in any harbor seal takes. Harbor seals usually occur just beyond the mouth of Elkhorn Slough in the Moss Landing harbor and in the Salinas River channel south of the Moss Landing Bridge, and the lower portion of Elkhorn Slough extending up to Parsons Slough and Rubis Creek. Harbor seals do not typically use the part of the estuary that leads up to Kirby Creek and the nearest occupied areas and haul-out locations (approximately 2 mi (3.2 km to the south) are beyond the estimated distances to NMFS' current threshold sound levels from pile driving proposed at the Kirby Park staging area (*see* Table 3 and Table 4).

A vibratory hammer would be used to start driving all sheet pile and end-bearing piles, but an impact hammer may be required to complete driving. If an impact hammer is required during construction, cushioning blocks would be used to attenuate the sound. Vibratory hammers clamp onto the sheet pile; therefore, no cushioning blocks would be used during vibratory pile driving.

TABLE 1—TYPICAL NEAR-SOURCE (10 M) Underwater Noise Levels

Type of pile	Driving technique	RMS level
H-Pile	Impact Hammer.	183 dB.
H-Pile	Vibratory Hammer.	155 dB.
Sheet Pile	Impact Hammer.	175 dB.
Sheet Pile	Vibratory Hammer.	160 dB.

TABLE 2—AIRBORNE NOISE LEVEL (15 M)

Type of pile	Driving technique	L_{max}/rms level
H-Pile	Impact Hammer.	109 dBA.
H-Pile	Vibratory Hammer.	95 dBA.
Sheet Pile	Impact Hammer.	106 dBA.
Sheet Pile	Vibratory Hammer.	97 dBA.

The applicant anticipates that construction would last 11 to 15 weeks beginning around November 2010 and ending in February 2011. In-water construction would primarily occur during slack tide. Actual pile driving time during this work window will depend on a number of factors, such as sediments, currents, presence of marine mammals, and equipment maintenance; however, the applicant anticipates that it will take approximately 20 days to install the end-bearing piles and sheet pile during the 11 to 15 weeks of construction. Construction activities at night are also anticipated during this 11 to 15 week period but would not last for more than 5 hrs at a time (duration of a slack tide at night).

Comments and Responses

A notice of receipt and request for public comments on the application and proposed authorization was published on October 5, 2010 (75 FR 61432). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission) on the proposed IHA. No comments were received from any other members of the public.

Comment 1: The Commission recommended that NMFS require the applicant use location-specific environmental parameters to re-estimate safety zones and then use in-situ measurements to verify and, if need be, refine the safety zone prior to or at the beginning of sill construction.

Response: Because the estimated source levels of the vibratory pile drivers are 30–35 dB below 190 dB, NMFS is confident that the sound produced during vibratory pile driving will not approach the threshold for Level A harassment of pinnipeds (190 dB re: 1 microPa (rms)). Therefore, NMFS will not require a sound verification study during vibratory pile driving. However, with respect to impact pile driving, NMFS will require the applicant to conduct a sound verification study to ensure that the safety zone is adequate to prevent exposing pinnipeds to sound levels that may result in Level A harassment.

Comment 2: The Commission recommended that NMFS require that observations be made during all soft-starts to gather the data needed to analyze and report on its effectiveness as a mitigation measure.

Response: NMFS agrees that the NOAA Restoration Center, Southwest Region, needs to monitor for marine mammals during all soft-starts. PSOs will be on-site and monitoring for marine mammals at least 30 minutes prior to, during, and after all construction activities (including during soft-starts for pile driving). NMFS believes that these monitoring requirements will allow for adequate interpretation of how marine mammals behave in response to pile driving, including soft-starts.

Description of Marine Mammals in the Area of the Specified Activity

Marine mammals with confirmed occurrences in Parsons Slough are Pacific harbor seals and southern sea otters (*Enhydra lutirs*). However, southern sea otters are managed by the USFWS and will not be considered further in this IHA notice. Information on Pacific harbor seals was provided in the October 5, 2010 (75 FR 61432) **Federal Register** notice.

Potential Effects of the Specified Activity on Marine Mammals

Pile driving at the site of the proposed sill may temporarily impact marine mammal behavior within the action area due to elevated noise levels both in-air and in-water. A detailed description of potential impacts to marine mammals can be found in NMFS' October 5, 2010 **Federal Register** notice (75 FR 61432) and are summarized here.

Marine mammals produce sounds in various contexts and use sound for various biological functions including, but not limited to: (1) Social interactions; (2) foraging; (3) orientation; and (4) predator detection. Interference with producing or receiving these sounds may result in adverse impacts. Audible distance, or received levels (RLs) will depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor to the sound (Richardson *et al.,* 1995). Type and significance of marine mammal reactions to noise are likely to be dependent on a variety of factors including, but not limited to, the behavioral state (*e.g.,* feeding, traveling, *etc.*) of the animal at the time it receives the stimulus, frequency of the sound, distance from the source, and the level of the sound relative to ambient conditions (Southall *et al.,* 2007).

Hearing Impairment

Temporary or permanent hearing impairment is possible when marine mammals are exposed to very loud sounds. Temporary threshold shift (TTS) and permanent threshold shift (PTS). Relationships between TTS and PTS have not been studied in marine mammals, but are assumed to be similar to those in humans and terrestrial mammals. There is no empirical data for onset of PTS in any marine mammal, therefore, PTS-onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above those eliciting TTS-onset. NMFS presumes PTS to be likely if the threshold is reduced by ≥ 40 dB (i.e., 40 dB of TTS). Due to required mitigation measures and the fact that source levels of the impact and vibratory hammers are below the 190 dB injury threshold used by NMFS for pinniped species, NMFS does not expect that harbor seals will be exposed to levels that could elicit PTS or even mild TTS.

Behavioral Impacts

The source of underwater noise during construction would be pile driving to install the end-bearing piles and sheet pile tidal barrier. There are limited data available on the effects of non-pulse noise on pinnipeds in-water; however, field and captive studies to date collectively suggest that pinnipeds do not strongly react to exposure between 90–140 dB re 1 microPa.

Seals exposed to sound levels that exceed the Level B harassment threshold (120 dB for non-pulse; 160 dB for pulse) may exhibit temporary avoid behavior around the Union Pacific Railroad bridge, which may affect movement of seals under the bridge or inhibit them from resting at haul-out sites near the bridge. The estimated 11–15 weeks required for construction may result in the temporary abandonment of haul-out sites near the bridge and within Parsons Slough. Although harbor seals may temporarily abandon haul out sites, there are an abundance of other haul-out sites in the area. Additionally, the required mitigation measures restrict construction to the non-breeding season to avoid impacts to potentially sensitive mother-pup pairs. In general, ambient noise levels in the area are low; however, animals in the vicinity of the project site have been exposed to various types and levels of anthropogenic noise from recreational boating to the15–20 trains that pass daily over the Union Pacific Railroad bridge. Harbor seals have also been exposed to in-water construction activities at the site and animals are likely tolerant or habituated to anthropogenic disturbance, including pile driving. For example, in October 2002, the Union Pacific Railroad replaced the existing wooden pile trestle bridge spanning the Parsons Slough Channel with a 165 ft (50.3 m) slab girder bridge. Biological monitors reported that harbor seals were present during construction and came and went from the site without any visible signs of stress or undue harassment (MACTEC Engineering and Consulting, 2003).

Based on these studies and monitoring reports, NMFS has determined that harbor seals exposed to sound levels exceeding the Level B harassment thresholds (120 dB for non-pulse; 160 dB for pulse) may exhibit temporary avoidance behavior. The most likely impact to harbor seals from the sheet pile and end-bearing pile installation would be temporary disruption of resting patterns because individual harbor seals may abandon haul out sites and leave the area during construction activities. However, the scheduling of construction activities during the non-breeding season will avoid more severe effects, such as reduced pup survival due to mother-pup separation and interrupted suckling bouts. Temporary hearing loss is unlikely for those harbor seals that enter into the zone of Level B harassment because source levels from vibratory pile driving are not loud enough to induce TTS. Furthermore, the short duration of impact pile driving and close proximity to the source necessary to induce TTS makes it unlikely that harbor seals would be exposed to source levels loud enough to induce TTS. Permanent hearing loss or other harm is not anticipated due to monitoring and mitigation efforts (described below) and the low source levels of pile driving hammers to be used in this project; however, even without mitigation measures, it is unlikely that harbor seals would experience Level A harassment,

serious injury, or mortality because of the close proximity to the source necessary to induce these types of impacts and the avoidance behavior expected of harbor seals during pile driving activities.

Anticipated Effects on Habitat

A detailed description of the anticipated effects on habitat can be found in NMFS' October 5, 2010 **Federal Register** notice (75 FR 61432) and are summarized here.

The action would permanently alter habitat within the project footprint; however, harbor seals haul-out in many locations throughout the estuary, and the action is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual harbor seals or their population. Long-term operation of the sill is expected to result in the conversion of intertidal habitat to subtidal habitat, which will have no adverse effect and possibly a long-term beneficial effect on harbor seals by improving ecological function of the slough, such as higher species diversity, more species abundance, larger fish, and better habitat. It is unlikely that the sill structure itself, when completed, will result in long-term adverse effects on harbor seal movements through the slough because the sill structure allows for continued access to Parsons Slough by aquatic species, including harbor seals. Harbor seals and forage fish may occupy the same habitat, and harbor seal distributions within the estuary reflect foraging locations to some extent. Noise from pile-driving would result in degradation of in-water habitat; however, this impact would be short term and site-specific, and habitat conditions would return to their pre-disturbance state shortly after the cessation of in-water construction activities. NMFS has determined that the project is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or the food sources that they utilize.

Mitigation Measures

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

The applicant has proposed mitigation measures in their application for reducing impacts to environmental resources. For example, installing end-bearing piles and sheet pile with a vibratory hammer instead of an impact hammer will introduce less sound into the marine environment and prevent marine mammals from being exposed to injurious levels of sound. Some of the following mitigation measures were developed by the NOAA Restoration Center, Southwest Region, and accepted by NMFS while others were developed in discussions between the applicant and NMFS' Office of Protected Resources. These required mitigation measures are designed to eliminate the potential for injury and reduce Level B harassment of marine mammals.

Establishment of Safety Zones and Shut Down Requirements

Vibratory pile driving does not result in source levels that are at or above NMFS' harassment threshold for Level A harassment; therefore, shut down zones would not be required for vibratory pile driving. For impact pile driving, the isolpleth for the Level A harassment threshold (190 dB re 1 microPa rms) is modeled to be within 10 ft (3 m) of end-bearing piles driven with an impact hammer and 5 ft (1.5 m) of sheet piles driven with an impact hammer. The NOAA Restoration Center, Southwest Region, will delay impact pile driving if a harbor seal comes within 33 ft (10 m) of the pile being driven, which further reduces the risk of Level A harassment. In addition, if an impact hammer is required during construction, cushioning blocks will be used to help attenuate the sound. At the commencement of impact pile driving, the NOAA Restoration Center, Southwest Region, will conduct in-water acoustic monitoring for the purpose of verifying the estimated safety zones. Based on acoustic monitoring data collected during impact pile driving, the NOAA Restoration Center, Southwest Region, may establish a new safety zone where sound levels do not exceed 190 dB rms. Finally, under the terms of the IHA issued by the USFWS, in-air sound levels associated with construction activities will also be monitored.

Construction Timing

Pile driving is anticipated to occur during an 11 to 15 week period beginning in November 2010, and ending in February 2011. This work window was selected to coincide with the non-pupping season for harbor seals and avoid haul-out site abandonment during pupping season that may result in reduced pup survival due to mother/pup separation and interrupted suckling bouts. The work window also coincides with the USFWS' required construction work window to avoid the peak pupping period for sea otters (75 FR 42121, July 20, 2010). In addition, in-water construction activities such as pile driving will be conducted during high tide when haul-out sites are inaccessible, and harbor seals are largely absent from Parsons Slough (Maldini *et al.,* 2009).

Limited Use of Impact Hammer

All piles will be installed using a vibratory pile driver unless sufficient depth cannot be reached, at which point an impact hammer may be used. If an impact hammer is required, cushioning blocks will be used as an attenuation device to reduce hydroacoustic sound levels and avoid the potential for injury. These actions would also serve to reduce impacts to harbor seals.

Mitigation Monitoring

Monitoring during construction of the sill will occur from an observation post adjacent to the Union Pacific railroad bridge as well as from a zodiac. Monitoring will be conducted by qualified, NMFS-approved protected species observers (PSOs). On a daily basis, construction monitoring will begin 30 minutes prior to the initiation of construction activities and continue until 30 minutes after construction activities have ceased for the day. The PSO will maintain a log that documents numbers of marine mammals present before, during, and at the end of daily construction activities. In addition, the PSO will record basic weather conditions (ambient temperature, tidal activity, precipitation, wind, horizontal visibility, *etc.*), as well as marine mammal behavior.

The PSO will have the authority to cease construction if a harbor seal is detected within or approaching the safety zone or if an animal appears injured. Within 30 days of the completion of the sill construction, a report will be completed and submitted to NMFS that will include a summary of the daily log maintained by the PSO during construction. In addition, the report will include an assessment of the number of harbor seals that may have been harassed as a result of pile driving activities, based on direct observation of harbor seals observed in the area.

Soft Start to Pile Driving Activities

A "soft start" technique will be used at the beginning of each pile installation to allow any harbor seals that may be in the immediate area to leave before the

activity reaches its full energy. The soft start requires contractors to initiate pile driving with a vibratory hammer for 15 seconds at reduced energy followed by a 1-minute waiting period. This procedure will be repeated two additional times. Due to the short duration of impact pile driving (typically lasting between 1 and 10 minutes), the traditional ramp-up requirement does not apply because it actually increases the duration of noise emitted into the environment, and monitoring should effectively detect harbor seals within or near the proposed impact pile driving shut down zone. If any harbor seals are sighted within or approaching the 33 ft (10 m) shut down zone prior to pile driving, the construction contractor will delay pile-driving until the animal has moved outside and is on a path away from the safety zone or after 15 minutes have elapsed since the last sighting.

NMFS has carefully evaluated the applicant's mitigation measures. NMFS accepted some of the applicant's measures, such as the seasonal timing of construction, suggested additional mitigation measures like the establishment of a 33 ft (10 m) safety zone and hydroacoutic monitoring to measure sound pressure levels from pile driving, and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's measures, as well as other measures developed by NMFS in cooperation with the applicant, NMFS has determined that the required mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must, where applicable, set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

Monitoring during construction of the sill would occur from an observation post adjacent to the Union Pacific railroad bridge, as well as from a zodiac. Monitoring would be conducted by qualified, NMFS-approved PSOs. On a daily basis, construction monitoring would begin 30 minutes prior to the initiation of construction activities and continue until 30 minutes after construction activities have ceased for the day. The PSO would maintain a log that documents numbers of marine mammals present before, during, and at the end of daily construction activities. In addition, the PSO would record basic weather conditions (ambient temperature, tidal activity, precipitation, wind, horizontal visibility, *etc.*), as well as marine mammal behavior.

The PSO would have the authority to cease construction if a harbor seal is detected within or approaching the safety zone or if an animal appears injured. Within 30 days of the completion of the sill construction, a report would be completed and submitted to NMFS that would include a summary of the daily log maintained by the PSO during construction. In addition, the report would include an assessment of the number of harbor seals that may have been harassed as a result of pile driving activities, based on direct observation of harbor seals observed in the area.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal stock in the wild by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, breeding, feeding, or shelter [Level B harassment].

Based on the NOAA Restoration Center, Southwest Region's application and subsequent analysis, the impact of the described pile driving operations may result in, at most, short-term modification of behavior by small numbers of harbor seals within the action area. Harbor seals may avoid the area or halt any behaviors (*e.g.,* resting) when exposed to anthropogenic noise. Due to the abundance of suitable resting habitat available in the greater Elkhorn Slough estuary, the short-term displacement of resting harbor seals is not expected to affect the overall fitness of any individual animal.

Current NMFS practice regarding in-water exposure of marine mammals to anthropogenic noise is that in order to avoid the potential for injury of marine mammals (*e.g.,* PTS), pinnipeds should not be exposed to sounds of 190 dB rms or above. This level is considered precautionary as it is likely that more intense sounds would be required before injury would actually occur (Southall *et al.,* 2007). Potential for behavioral harassment (Level B) is considered to have occurred when marine mammals are exposed to sounds at or above 160 dB rms for impulse sounds (*e.g.,* impact pile driving) and 120 dB rms for non-pulse noise (*e.g.,* vibratory pile driving), but below the thresholds mentioned above. These levels are considered to be precautionary.

Current NMFS practice regarding in-air exposure of pinnipeds to noise generated from human activity is that the onset of Level B harassment for harbor seals is 90 dB rms re 20 microPa. In-air noise calculations from using an impact pile driver predict that noise levels will reach 90 dB rms re 20 microPa within 600 ft (183 m) for end-bearing piles and 450 ft (137 m) for sheet piles. For installation using a vibratory hammer, noise levels will reach 90 dB rms within 100 ft (30 m) of the end-bearing pile and 120 ft (36.6 m) for sheet pile. Harbor seals are known to haul-out on the mudflats 200 ft (61 m) east of the work site and 680 ft (207 m) west of the work site, therefore, in-air noise may contribute to harassment for the proposed action.

Estimated distances to NMFS' current threshold sound levels from pile driving during the Parsons Slough Sill Project are presented in Table 3 below. These estimates are based on the worst case scenario of driving the H-piles and sheet piles but would be carried over for all pile driving. Note that despite short distances to the Level A harassment isolpleth, the NOAA Restoration Center, Southwest Region, will implement a 10 m safety zone until empirical pile driving measurements can be made and distances to this threshold isopleths can be verified.

TABLE 3—UNDERWATER DISTANCES TO NMFS HARASSMENT THRESHOLD LEVELS DURING PILE DRIVING (dB RE: 1μPA RMS)

Pile type	Hammer type	Sound levels (rms)		
		190 dB	160 dB	120 dB
H-Piles	Impact	3 m (10 ft)	227 m (745 ft)	n/a.
H-Piles	Vibratory	0	n/a.	1,140 m (3,740 ft).
Sheet Pile	Impact	1.5 m (5 ft)	75 m (245 ft)	n/a.
Sheet Pile	Vibratory	0	n/a	2,256 m (7,400 ft).

TABLE 4—AIRBORNE DISTANCES TO NMFS HARASSMENT THRESHOLD LEVELS DURING PILE DRIVING (dB RE: 20μPA RMS)

Pile type	Hammer type	Sound level (rms)
		90 dB
H-Piles	Impact	600 m.
H-Piles	Vibratory	100 m.
Sheet Pile	Impact	450 m.
Sheet Pile	Vibratory	120 m.

It is difficult to estimate the number of harbor seals that could be affected by the installation of end-bearing piles and sheet pile because the animals only venture in the project areas to haul-out during the day when the tide is low. In-water construction will occur near several haul-out sites and, although the construction activities are planned to take place during slack tide (some of which will be on either side of high tide, when harbor seals are less likely to be present), there may still be animals exposed to sound from pile driving even if the number of individual harbor seals expected to be encountered is very low. These individuals would most likely be adult males and females, as well as juveniles. The NOAA Restoration Center, Southwest Region requests, and NMFS proposes, authorization to take 2,000 individual harbor seals incidental to pile driving activities over the course of the project (November XX, 2010 through February 28, 2011). This is an estimate based on the average number of harbor seals that occupy Parsons Slough during the day (100) multiplied by the total number of days the applicant expects pile driving activities to occur (20 days). NMFS considers this to be an over-estimate for the following reasons: (1) As mentioned above, haul-out sites are inaccessible to harbor seals during high tide, and NMFS would not expect harbor seals to be affected by pile driving activities during the days/times when pile driving and high tide events co-occur; (2) harbor seals are likely absent from Parsons Slough at night when they are likely foraging in Monterey Bay and will not be exposed to sound generated during pile driving that is proposed to take place in the evening hours (no more than 5 hrs at a time); and, (3) based on previous survey effort conducted in Parsons Slough, harbor seals would move out of the disturbance area when construction activities are initiated and move west (downstream) towards Seal Bend until the end of construction.

Negligible Impact and Small Numbers Analysis and Determination

The regulations implementing the MMPA found at 50 CFR 216.103 define "negligible impact" as: an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities (none of which would be authorized here); (2) the number and nature of anticipated injuries (none of which would be authorized here); and (3) the number, nature, and duration of Level B harassment, and the context in which the takes occur *(e.g.,* will the takes occur in an area or time of significance for harbor seals, are takes occurring to a small, localized population?).

As described above, harbor seals will not be exposed to activities or sound levels which will result in injury (*e.g.,* PTS), serious injury, or mortality. Takes will be limited to Level B behavioral harassment. Pile driving will take place in the relatively shallow estuarine waters of Elkhorn Slough and affect harbor seals that belong to a stock that occurs throughout California. Although two harbor seal haul-outs are located within 300–400 ft of the action area (waters around the Union Pacific Railroad bridge), the Parsons Slough Complex is not considered to be an important habitat for harbor seals compared to other sites in the area (*e.g.* Seal Bend). NMFS has determined that no injuries or mortalities are anticipated to occur as a result of the proposed action, and none are to be authorized. In addition, harbor seals in the area are not expected to incur hearing impairment (*i.e.,* TTS or PTS) or non-auditory physiological effects. Although it is possible for some individual harbor seals to be exposed to sounds from pile driving activities more than once, the extent of these multi-exposures are expected to be limited by the constant movement of harbor seals in and out of Elkhorn Slough and the timing of in-water construction to coincide with periods when the animals are less likely to be present.

Pacific harbor seals are not listed as depleted under the MMPA or threatened or endangered under the Endangered Species Act (ESA). Although populations of Pacific harbor seals were greatly depleted by the end of the 19th century due to commercial hunting, the population has increased dramatically during the last half of the 20th century and appears to be stabilizing at what may be their carrying capacity (Caretta *et al.,* 2009). The amount of take the NOAA Restoration Center, Southwest Region, requests, and NMFS authorizes is considered small (less than 6 percent) relative to the estimated population of 34,233 Pacific harbor seals.

Pacific harbor seals may be temporarily impacted by pile driving noise. However, these animals are expected to avoid the area, thereby reducing exposure and impacts. In addition, although the sill project is expected to take 11 to 15 weeks to complete, the installation of end-bearing piles and sheet pile would only occur for approximately 20 days. Further, the Union Pacific Railroad bridge that is located in the vicinity of the project site has approximately 15–20 trains passing over it each day and harbor seals haul-out on the mud flats located on either side of the bridge. During a previous project at this site involving pile driving, harbor seals were observed to be present during construction and reportedly entered and exited the area without any visible signs of stress or undue harassment (MACTEC Engineering and Consulting 2003). Therefore, animals are likely tolerant or habituated to anthropogenic disturbance, including pile driving. Finally, breeding and pupping occur outside of the proposed work window; therefore, no disruption to reproductive behavior is anticipated. There is no anticipated effect on annual rates of recruitment or survival of the affected harbor seal population.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS determined that the Parsons Slough sill project will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the Parsons Slough project will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Endangered Species Act (ESA)

No ESA-listed species under NMFS' jurisdiction are expected to be affected by these activities. Therefore, NMFS has determined that a section 7 consultation for issuance of the proposed IHA under the ESA is not required. The NOAA Restoration Center, Southwest Region, completed a formal consultation with the USFWS because the project is within the range of the southern sea otter, which is listed as threatened under the ESA. On October 6, 2010, the U.S. Fish and Wildlife Service issued a Biological Opinion and Incidental Take Statement to the NOAA Restoration Center, Southwest Regional pursuant to Section 7 of the ESA. The Biological Opinion concluded that impacts from the NOAA Restoration Center, Southwest Region's project would not jeopardize the continued existence of ESA-listed southern sea otters.

National Environmental Policy Act (NEPA)

Pursuant to NEPA, the general impacts associated with the design and construction phases of the proposed action are described in the Community-Based Restoration Program (CRP) Programmatic Environmental Assessment (PEA) and the Supplemental Programmatic Environmental Assessment (SPEA), which were prepared by the NOAA Restoration Center, Southwest Region. The NOAA Restoration Center, Southwest Region, completed a Targeted Supplemental Environmental Assessment (TSEA) to include all project-specific impacts not described in the CRP PEA/SPEA. NMFS considered the TSEA to be adequate and adopted it on November 22, 2010. On November 23, 2010, NMFS issued a Finding of No Significant Impact on the TSEA.

Authorization

As a result of these determinations, NMFS has issued an IHA to the NOAA Restoration Center, Southwest Region, for the take of marine mammals incidental to the Parsons Slough project, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: November 23, 2010.

P. Michael Payne,

Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–30235 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XAO61

Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops

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

ACTION: Notice of public workshops.

SUMMARY: Free Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops will be held in January, February, and March of 2011. Certain fishermen and shark dealers are required to attend a workshop to meet regulatory requirements and maintain valid permits. Specifically, the Atlantic Shark Identification Workshop is mandatory for all federally permitted Atlantic shark dealers. The Protected Species Safe Handling, Release, and Identification Workshop is mandatory for vessel owners and operators who use bottom longline, pelagic longline, or gillnet gear, and who have also been issued shark or swordfish limited access permits. Additional free workshops will be conducted during 2011.

DATES: The Atlantic Shark Identification Workshops will be held January 6, February 3, and March 10, 2011.

The Protected Species Safe Handling, Release, and Identification Workshops will be held January 11, January 13, January 24, February 16, February 23, March 16, and March 23, 2011.

See **SUPPLEMENTARY INFORMATION** for further details.

ADDRESSES: The Atlantic Shark Identification Workshops will be held in Vero Beach, FL; Norfolk, VA; and Corpus Christi, TX.

The Protected Species Safe Handling, Release, and Identification Workshops will be held in Portland, ME; Manahawkin, NJ; Daytona Beach, FL; Key Largo, FL; Ocean City, MD; Galveston, TX; and Clearwater, FL.

See **SUPPLEMENTARY INFORMATION** for further details on workshop locations.

FOR FURTHER INFORMATION CONTACT: Richard A. Pearson by phone: (727) 824–5399, or by fax: (727) 824–5398.

SUPPLEMENTARY INFORMATION: The workshop schedules, registration information, and a list of frequently asked questions regarding these workshops are posted on the Internet at: *http://www.nmfs.noaa.gov/sfa/hms/workshops/.*

Atlantic Shark Identification Workshops

Since January 1, 2008, Atlantic shark dealers have been prohibited from receiving, purchasing, trading, or bartering for Atlantic sharks unless a valid Atlantic Shark Identification Workshop certificate is on the premises of each business listed under the shark dealer permit which first receives Atlantic sharks (71 FR 58057; October 2, 2006). Dealers who attend and successfully complete a workshop are issued a certificate for each place of business that is permitted to receive sharks. These certificate(s) are valid for 3 years. Approximately 52 free Atlantic

Shark Identification Workshops have been conducted since January 2007.

Currently permitted dealers may send a proxy to an Atlantic Shark Identification Workshop. However, if a dealer opts to send a proxy, the dealer must designate a proxy for each place of business covered by the dealer's permit which first receives Atlantic sharks. Only one certificate will be issued to each proxy. A proxy must be a person who is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are offloaded from a vessel; and who fills out dealer reports. Atlantic shark dealers are prohibited from renewing a Federal shark dealer permit unless a valid Atlantic Shark Identification Workshop certificate for each business location which first receives Atlantic sharks has been submitted with the permit renewal application. Additionally, trucks or other conveyances which are extensions of a dealer's place of business must possess a copy of a valid dealer or proxy Atlantic Shark Identification Workshop certificate.

Workshop Dates, Times, and Locations

1. January 6, 2011, 12 p.m.–4 p.m., Leisure Square—TUFF Room, 3705 16th Street, Vero Beach, FL 32960.
2. February 3, 2011, 12 p.m.–4 p.m., La Quinta Inn (at Norfolk Airport), 1387 North Military Highway, Norfolk, VA 23502.
3. March 10, 2011, 12 p.m.–4 p.m., La Quinta Inn West, 10446 I–37 Access Road B, Corpus Christi, TX 78410.

Registration

To register for a scheduled Atlantic Shark Identification Workshop, please contact Eric Sander at *esander@peoplepc.com* or at (386) 852–8588.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring specific items to the workshop:

- Atlantic shark dealer permit holders must bring proof that the attendee is an owner or agent of the business (such as articles of incorporation), a copy of the applicable permit, and proof of identification.
- Atlantic shark dealer proxies must bring documentation from the permitted dealer acknowledging that the proxy is attending the workshop on behalf of the permitted Atlantic shark dealer for a specific business location, a copy of the appropriate valid permit, and proof of identification.

Workshop Objectives

The Atlantic Shark Identification Workshops are designed to reduce the number of unknown and improperly identified sharks reported in the dealer reporting form and increase the accuracy of species-specific dealer-reported information. Reducing the number of unknown and improperly identified sharks will improve quota monitoring and the data used in stock assessments. These workshops will train shark dealer permit holders or their proxies to properly identify Atlantic shark carcasses.

Protected Species Safe Handling, Release, and Identification Workshops

Since January 1, 2007, shark limited-access and swordfish limited-access permit holders who fish with longline or gillnet gear have been required to submit a copy of their Protected Species Safe Handling, Release, and Identification Workshop certificate in order to renew either permit (71 FR 58057; October 2, 2006). These certificate(s) are valid for 3 years. As such, vessel owners who have not already attended a workshop and received a NMFS certificate, or vessel owners whose certificate(s) will expire prior to the next permit renewal, must attend a workshop to fish with, or renew, their swordfish and shark limited-access permits. Additionally, new shark and swordfish limited-access permit applicants who intend to fish with longline or gillnet gear must attend a Protected Species Safe Handling, Release, and Identification Workshop and submit a copy of their workshop certificate before either of the permits will be issued. Approximately 100 free Protected Species Safe Handling, Release, and Identification Workshops have been conducted since 2006.

In addition to certifying vessel owners, at least one operator on board vessels issued a limited-access swordfish or shark permit that uses longline or gillnet gear is required to attend a Protected Species Safe Handling, Release, and Identification Workshop and receive a certificate. Vessels that have been issued a limited-access swordfish or shark permit and that use longline or gillnet gear may not fish unless both the vessel owner and operator have valid workshop certificates onboard at all times. The certificate(s) are valid for 3 years. As such, vessel operators who have not already attended a workshop and received a NMFS certificate, or vessel operators whose certificate(s) will expire prior to their next fishing trip, must attend a workshop to operate a vessel with swordfish and shark limited-access permits that uses with longline or gillnet gear.

Workshop Dates, Times, and Locations

1. January 11, 2011, 9 a.m.–5 p.m., Holiday Inn, 88 Spring Street, Portland, ME 04101.
2. January 13, 2011, 9 a.m.–5 p.m., Holiday Inn, 151 Route 72 East, Manahawkin, NJ 08050.
3. January 24, 2011, 9 a.m.–5 p.m., Holiday Inn, 137 AutoMall Circle, Daytona Beach, FL 32124.
4. February 16, 2011, 9 a.m.–5 p.m., Holiday Inn, 99701 Overseas Highway, Key Largo, FL 33037.
5. February 23, 2011, 9 a.m.–5 p.m., Princess Royale Oceanfront Hotel, 9100 Coastal Highway, Ocean City, MD 21842.
6. March 16, 2011, 9 a.m.–5 p.m., The Tremont House, 2300 Ships Mechanic Row, Galveston, TX 77550.
7. March 23, 2011, 9 a.m.–5 p.m., Holiday Inn Select, 3535 Ulmerton Road, Clearwater, FL 33762.

Registration

To register for a scheduled Protected Species Safe Handling, Release, and Identification Workshop, please contact Angler Conservation Education at (386) 682–0158.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring specific items with them to the workshop:

- Individual vessel owners must bring a copy of the appropriate swordfish and/or shark permit(s), a copy of the vessel registration or documentation, and proof of identification.
- Representatives of a business owned or co-owned vessel must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable swordfish and/or shark permit(s), and proof of identification.
- Vessel operators must bring proof of identification.

Workshop Objectives

The Protected Species Safe Handling, Release, and Identification Workshops are designed to teach longline and gillnet fishermen the required techniques for the safe handling and release of entangled and/or hooked protected species, such as sea turtles, marine mammals, and smalltooth sawfish. In an effort to improve reporting, the proper identification of protected species will also be taught at these workshops. Additionally,

individuals attending these workshops will gain a better understanding of the requirements for participating in these fisheries. The overall goal of these workshops is to provide participants with the skills needed to reduce the mortality of protected species, which may prevent additional regulations on these fisheries in the future.

Dated: November 26, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–30238 Filed 11–30–10; 8:45 am]

BILLING CODE 3510–22–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Sunshine Act Meeting Notice

The National Civilian Community Corps Advisory Board gives notice of the following meeting:

DATE AND TIME: Tuesday, December 7, 2010, 2 p.m.–3 p.m.

PLACE: Conference room #8312, 8th floor, Corporation for National and Community Service Headquarters, 1201 New York Avenue, NW., Washington, DC 20525.

STATUS: Open.

MATTERS TO BE CONSIDERED:

I. Meeting Convenes

II. Approval of Minutes

III. Director's Report

IV. Committee Reports:

- Projects and Partnership Committee
- Member Services Committee
- Policy and Operations Committee

V. Public Comment

Accommodations: Anyone who needs an interpreter or other accommodation should notify the Corporation's contact person by 5 p.m. Friday, December 3, 2010.

CONTACT PERSON FOR MORE INFORMATION: Erma Hodge, NCCC, Corporation for National and Community Service, 9th Floor, Room 9802B, 1201 New York Avenue, NW., Washington, DC 20525. Phone (202) 606–6696. Fax (202) 606–3459. TDD: (202) 606–3472. E-mail: *ehodge@cns.gov.*

Dated: November 26, 2010.

Thomas L. Bryant,

Acting General Counsel.

[FR Doc. 2010–30287 Filed 11–29–10; 4:15 pm]

BILLING CODE 6050–$$–P

DEPARTMENT OF EDUCATION

The Fund for the Improvement of Postsecondary Education (FIPSE) National Board

AGENCY: Department of Education.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming open meeting of the National Board (Board) of the Fund for the Improvement of Postsecondary Education. The notice also describes the functions of the Board. Notice of this meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend. This notice is published less than 15 days prior to the date of the meeting due to unexpected delays in finalizing arrangements for the meeting.

DATES: Monday, December 13, 2010.

Time: 9 a.m.–3:30 p.m. Eastern Standard Time.

ADDRESSES: Capital Hilton, Pan American Room, 1001 16th Street, NW., Washington, DC 20036, Telephone: (202) 393–1000.

FOR FURTHER INFORMATION CONTACT: Erin M. McDermott, U.S. Department of Education, 1990 K Street, NW., Washington, DC 20006–8544; telephone: (202) 502–7607; email: *erin.mcdermott@ed.gov.*

SUPPLEMENTARY INFORMATION: The National Board of the Fund for the Improvement of Postsecondary Education is established in Title VII, Part B, section 742 of the Higher Education Act of 1965, as amended (20 U.S.C. 1138a). The Board is authorized to advise the Director of the Fund and the Assistant Secretary for Postsecondary Education on (1) priorities for the improvement of postsecondary education, including recommendations for the improvement of postsecondary education and for the evaluation, dissemination, and adaptation of demonstrated improvements in postsecondary educational practice; and (2) the operation of the Fund, including advice on planning documents, guidelines, and procedures for grant competitions prepared by the Fund.

On Monday, December 13, 2010, from 9 a.m. to 3:30 p.m., Eastern Standard Time, the Board will meet in open session. The proposed agenda for the meeting will include discussion of the Fund's programs and special initiatives. Presentations will be made on behalf of projects administered by the Fund.

The meeting is accessible to individuals with disabilities. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FRS) at 1–800–877–8339, Monday through Friday between the hours of 8 a.m. and 8 p.m., Eastern Standard Time.

Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistance listening devices, or materials in alternative format) should notify Erin McDermott at (202) 502–7607, no later than December 8, 2010. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Members of the public are encouraged to submit written comments by submitting comments to the attention of Erin M. McDermott, 1990 K Street, NW., Room 6142, Washington, DC 20006–8544 or by e-mail at *erin.mcdermott@ed.gov.*

Records are kept of all Board proceedings and are available for public inspection at the office of the Fund for the Improvement of Postsecondary Education, 6th Floor, 1990 K Street NW., Washington, DC 20006–8544 from the hours of 8 a.m. to 4:30 p.m., Eastern Standard Time. (EST) from Monday through Friday.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Format (PDF), on the Internet at the following site: *http://www.ed.gov/fedregister/index.html.* To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll-free at 1–866–512–1800; or, in the Washington, DC area at (202) 512–0000.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2010–30204 Filed 11–30–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC10–555–001]

Commission Information Collection Activities (FERC–555); Comment Request; Submitted for OMB Review

November 24, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission or FERC) has submitted the information collection described below to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission issued a Notice in the **Federal Register** (75 FR 57744, 09/22/2010) requesting public comments. FERC received no comments on the FERC–555 and has made this notation in its submission to OMB.

DATES: Comments on the collection of information are due by January 3, 2011.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *oira_submission@omb.eop.gov* and include OMB Control Number 1902–0098 for reference. The Desk Officer may be reached by telephone at 202–395–4638.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission and should refer to Docket No. IC10–555–001. Comments may be filed either electronically or in paper format. Those persons filing electronically do not need to make a paper filing. Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help/submission-guide.asp.* To file the document electronically, access the Commission's Web site and click on Documents & Filing, E-Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

For paper filings, the comments should be submitted to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426, and should refer to Docket No. IC10–555–001.

Users interested in receiving automatic notification of activity in FERC Docket Number IC10–555 may do so through eSubscription at *http://www.ferc.gov/docs-filing/esubscription.asp.* All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the "eLibrary" link. For user assistance, contact *ferconlinesupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by e-mail at *DataClearance@FERC.gov,* by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–555, "Records Retention Requirements" (OMB No. 1902–0098), is used by the Commission to carry out its responsibilities in implementing the statutory provisions of sections 301, 304 and 309 of the Federal Power Act (FPA) (16 U.S.C. 825, 825c and 825h), sections 8, 10 and 16 of the Natural Gas Act (NGA) (15 U.S.C. 717–717w), and section 20 of the Interstate Commerce Act (ICA, 49 U.S.C. 20).

The regulations for preservation of records establish retention periods, necessary guidelines, and requirements for retention of applicable records for the regulated public utilities, natural gas and oil pipeline companies subject to the Commission's jurisdiction. These records will be used by the regulated companies as the basis for their required rate filings and reports for the Commission. In addition, the records will be used by the Commission's audit staff during compliance reviews, by enforcement staff during investigations, and for special analyses as deemed necessary by the Commission.

Action: The Commission is requesting a three-year extension of the current expiration date, with no changes to the record keeping requirements.

Burden Statement: In order to obtain a more accurate burden figure, Commission staff asked a small number of FERC–555 respondents to estimate the burden imposed by this data collection. The results show that the record retention requirements under FERC–555 were underestimated in the previous renewal of this information collection.[1] The following table portrays the updated burden estimate based on industry responses:

FERC data collection	Number of respondents annually (1)	Average Number of responses per respondent (2)	Average burden hours per response[2] (3)	Total annual burden hours (1) × (2) × (3)
FERC–555	475	1	4,968	2,359,800

The[2] estimated total annual cost burden to respondents includes labor costs associated with record retention ($65,597,025 or $152,423 per company) and both electronic and non-electronic record storage costs ($72,400,925 or $138,099 per company). The estimated total annual cost is $137,997,950; the

[1] The previous estimate reported average burden hours per response and total burden hours as 2,402 and 1,237,030 respectively. Further, the previous estimate reported the average annual cost per respondent and total annual cost as $141,045 and $72,638,045 respectively. Finally, the estimate for the number of respondents has decreased from 515 to 475.

[2] Record retention burden differs greatly by the size of the company and this figure captures an average across all jurisdictional companies. Thus a small company may require fewer than 1,000 hours per year to comply while a large company may require more than 10,000 hours per year to comply.

total annual cost per respondent is $290,522.[3]

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30255 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

[3] These cost estimates are based on the information received from contacting actual companies and asking for estimates of record retention costs. There is no specific rate used in these cost estimates.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13858–000]

Central Oregon Irrigation District; Notice of Competing Preliminary Permit Application Accepted for Filing and Soliciting Comments and Interventions

November 22, 2010.

On October 6, 2010, Central Oregon Irrigation District filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Cline Falls Hydroelectric Project located at the Cline Falls diversion dam on the Deschutes River in Deschutes County, Oregon. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following existing and proposed facilities: (1) The existing 300-foot-long, 5-foot-high diversion structure; (2) a pool upstream of the diversion structure with a storage capacity of approximately 2-acre-feet; (3) a wooded radial gate for diversion control; (4) a 400-foot-long lined canal and flume channel; (5) a 45-foot-long, 8-foot-diameter steel penstock; (6) a powerhouse containing one 750-kW turbine/generator; (7) a tailrace leading from the rock chamber located under the turbine and a short tailrace to the river; (8) and appurtenant facilities. The proposed project would have an average annual generation of 2 gigawatt-hours.

Applicant Contact: Steven C. Johnson, 1055 SW., Lake Court, Redmond, OR 97756; *phone:* (541) 548–6047, *e-mail: stevej@coid.org.*

FERC Contact: Kelly Wolcott (202) 502–6480.

Competing Applications: This application competes with Project No. 13686–000 filed March 23, 2010.

Deadline for filing comments and motions to intervene: 60 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 (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "eComment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–13858) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30247 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–25–000; PF10–7–000]

Questar Pipeline Company; Notice of Application

November 24, 2010.

Take notice that on November 10, 2010, Questar Pipeline Company (Questar), 180 East 100 South, Salt Lake City, Utah 84111, filed in the above referenced dockets an application pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, for an order granting a certificate of public convenience to construct and operate 24.6 miles of 24-inch diameter pipeline and related facilities in Uintah County, Utah (the Mainline 104 Extension Project), all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Specifically, the Mainline 104 Extension Project will enable to transport up to 160,000 Dth/d of natural gas from receipt points located near

Fidlar, to delivery points with Questar Gas Company and an interconnect with Kern River Gas Transmission Company on the west end of its southern system.

Any questions concerning this application may be directed to L. Bradley Burton, General Manager, Federal Regulatory Affairs and Chief Compliance Officer, Questar Pipeline Company, 180 East 100 South, P.O. Box 45360, Salt Lake City, UT 84145, at (801) 324–2459.

On February 4, 2010 the Commission staff granted Questar's request to utilize the Pre-Filing Process and assigned Docket No. PF10–7–000 to staff activities involved the Project. Now as of the filing the November 10, 2010 application, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP11–25–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process.

Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, 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: December 15, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30248 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP11–27–000; PF10–8–000]

Duke Energy Indiana, Inc.; Notice of Application

November 24, 2010.

Take notice that on November 10, 2010, Duke Energy Indiana, Inc. (DEI), 1000 East Main Street, Plainfield, Indiana 46168, filed an application in Docket No. CP11–27–000 pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity to construct and operate a single-use natural gas pipeline that will deliver natural gas to fuel electric power generating units at DEI's R. Gallagher Generating Station (Gallagher Station). DEI further requests a blanket certificate of public convenience and necessity under Part 157, Subpart F of the Commission's regulations authorizing certain construction and operation of additional facilities following the construction of the pipeline, as more fully detailed in the application. Specifically, DEI proposes to construct a 19.45-mile-long 20-inch diameter single-use pipeline which would extend from an interconnection with Texas Gas Transmission, LLC's mainline facilities in Kentucky across the Ohio River to the Gallagher Station in Indiana. The proposed project would enable DEI to be able to deliver natural gas to the Gallagher Station for its fuel needs at a peak flow rate of 5.6 million cubic feet per hour (MMcf/hr), and an off peak flow rate of 4.4 MMcf/hr. The application is on file with the Commission and open to public inspection. This filing is available for review at the Commission in the Public Reference Room or may 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions regarding this application should be directed to William J. Roth, Engineer III, Duke Energy Corporation, 139 East Fourth Street, Mail Code: 460 Annex, Cincinnati, OH 45202, or by calling (513) 287–1098 (telephone) or (513) 287–5229 (fax), *Bill.Roth@duke-energy.com.*

DEI states that by letter dated March 9, 2010, in Docket No. PF10–8–000, the Commission's Office of Energy Projects granted DEI's March 1, 2010, request to utilize the National Environmental Policy Act (NEPA) Pre-Filing Process for the Projects. DEI has also submitted an applicant-prepared Draft Environmental Assessment that was prepared during the Pre-Filing Process that was included with this application. Now, as of the filing of this application on November 10, 2010, the NEPA Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP11–27–000, as noted in the caption of this notice.

Pursuant to Section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, 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: December 15, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30249 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13820–000]

Logan City, UT; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, Protests, Recommendations, and Terms and Conditions

November 24, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 13820–000.

c. *Date filed:* July 29, 2010, and supplemented on November 5, 2010.

d. *Applicant:* Logan City, Utah.

e. *Name of Project:* DeWitt Pipeline Hydroelectric Project.

f. *Location:* The proposed DeWitt Pipeline Hydroelectric Project would be located on a flow control pipeline in Logan City's water distribution system located in Cache County, Utah. The land on which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a—825r.

h. *Applicant Contact:* Mr. Lance E. Houser, P.E., Assistant City Engineer, 290 North 100 West, Logan, Utah 84321; telephone (435) 716–9161.

i. *FERC Contact:* Linda Stewart, telephone (202) 502–6680, and e-mail address *linda.stewart@ferc.gov.*

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* Due to the small size and location of the proposed project in a closed system, as well as the resource agency consultation letters filed with the application, the 60-day timeframe specified in 18 CFR 4.43(b) for filing all comments, motions to intervene, protests, recommendations, terms and

conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of Project:* The proposed DeWitt Pipeline Hydroelectric Project would consist of: (1) An existing flow control building containing one turbine generating unit having an installed capacity of 200 kilowatts; and (2) appurtenant facilities. The project would have an estimated annual generation of 930,000 kilowatt-hours. The applicant plans to use the generated energy.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street, NE., Washington, DC 20426. The filing may also be viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number, here P–13820, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. Development Application—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

o. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a competing development application. A notice of intent must be served on the applicant(s) named in this public notice.

p. Protests or Motions to Intervene—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

q. All filings must (1) bear in all capital letters the title "PROTEST", "MOTION TO INTERVENE", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "COMMENTS", "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30257 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No.: 2183–078]

Grand River Dam Authority; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

November 23, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use of Project Lands and Waters.

b. *Project No.:* 2183–078.

c. *Date Filed:* October 26, 2010.

d. *Applicant:* Grand River Dam Authority.

e. *Name of Project:* Markham Ferry Hydroelectric Project.

f. *Location:* The project is located on the Grand River in Mayes County, Oklahoma. The project does not occupy any Federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Tamara E. Jahnke, Grand River Dam Authority, P.O. Box 409, Vinita, Oklahoma 74301–0409, (918) 256–5545 or by *e-mail: tjahnke@grda.com.*

i. *FERC Contact:* Any questions on this notice should be addressed to Lorance W. Yates at (678) 245–3084 or by *e-mail: Lorance.Yates@ferc.gov.*

j. *Deadline for filing motions to intervene and protests, and/or comments:* December 23, 2010.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments.

k. *Description of the Application:* The Grand River Dam Authority (GRDA), licensee for the Markham Ferry Hydroelectric Project, filed an application seeking Commission approval to grant an easement on GRDA property within the project boundary to permit the Town of Adair, Oklahoma, to build a 12-inch water line in order to obtain its water supply from a neighboring rural water district. The Town of Adair is requesting a temporary easement 20 foot in width and a permanent easement 20 foot in width. On one parcel, the 20-foot wide temporary easement would only affect .05 acres. On the second parcel, The Town of Adair is requesting approval for a 20-foot-wide permanent easement affecting 0.89 acres to bore a minimum of 4 feet under Rock Creek for the water line. All required authorizations would be acquired by the Town of Adair before implementation of the proposal.

l. *Location of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents: Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment application. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30157 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP11–24–000; PF10–18–000]

Ryckman Creek Resources, LLC; Notice of Application

November 23, 2010.

Take notice that on November 8, 2010, Ryckman Creek Resources, LLC (Ryckman), 3 Riverway, Suite 1110, Houston, TX 77056, filed in Docket No. CP11–24–000 an application pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 and 284 of the Commission's regulations seeking authorization construct and operate an underground natural gas storage facility to provide up to 35 billion cubic feet (Bcf) of working gas capacity in Uinta County, Wyoming, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. This filing may also be viewed on the web 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 at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Ryckman requests that the Commission issue an order granting it: (1) A certificate of public convenience and necessity to develop, construct, own, operate and maintain a new interstate natural gas storage facility to be developed from an existing partially depleted oil field in Uinta County, Wyoming; (2) a blanket certificate under Part 284, Subpart G, of the Commission's regulations authorizing Ryckman to provide open-access non discriminatory natural gas storage and related services with pre-granted abandonment of such services; (3) a blanket certificate under Part 157, Subpart F, of the Commission's regulations authorizing Ryckman to construct, acquire, operate and abandon certain facilities in accordance with the Commission's regulations; (4) authorization to charge market-based rates for the proposed natural gas storage and hub services, including interruptible wheeling services; (5) approval of the *pro forma* FERC Gas Tariff pursuant to which Ryckman will provide open-access, non-discriminatory natural gas storage and hub services, including interruptible wheeling services, consistent with the Commission's policies; and (6) waiver of certain Commission regulations and requirements that have been found to be inapplicable to storage providers granted market-based rate authority.

Any questions regarding this application should be directed to Thomas Wynne, Ryckman Creek Resources, LLC, 3 Riverway, Suite 1110, Houston, Texas 77056, telephone (713) 974–5600, or facsimile (713) 974–5601, or e-mail *twynne@peregrinempllc.com*.

On April 26, 2010, the Commission staff granted Ryckman's request to use the pre-filing process and assigned Docket No. PF10–18–000 for this proceeding during the pre-filing review of the Ryckman Creek Storage project. Now, as of the filing of Ryckman's application on November 8, 2010, the pre-filing process for this project has ended. From this time forward, Ryckman's proceeding will be

conducted in Docket No. CP11–24–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's regulations, 18 CFR 157.9, within 90 days of this Notice, the Commission's staff will either complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission's staff issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to reach a final decision on a request for federal authorization within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, 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. *See,* 18 CFR 385.2001(a)(1) (iii) and the instructions on the Commission's web site under the "e-Filing" link.

Comment Date: December 15, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30163 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13837–000]

City of Whittier; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

November 23, 2010.

On September 1, 2010, and supplemented on November 9, 2010, the City of Whittier filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Whittier Creek Hydroelectric Project (Whittier Creek project) to be located on Whittier Creek, in the Valdez-Cordova Borough, Alaska. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project will consist of the following: (1) An approximately 100-foot-long, 20-foot-high reinforced concrete dam; (2) a 0.5-acre reservoir with a storage capacity of 10 acre-feet; (3) a 2,280-foot-long, 0.83-foot-diameter high density polyethylene penstock; (4) a 30-foot-long, 25-foot-wide powerhouse containing a 250-kilowatt turbine/generator unit; (5) a 100-foot-long, 5-foot-diameter steel tailrace; (6) an approximately 1,000-foot-long transmission line with an anticipated voltage between 4 kilovolts (kV) and 69 kV, connecting the proposed powerhouse to an existing switchyard; and (7) appurtenant facilities. The estimated annual generation of the Whittier Creek project would be 1,750 megawatt-hours.

Applicant Contact: Ed Barrett, City of Whittier, Alaska, P.O. Box 608, Whittier, AK 99693; phone: (907) 472–2327.

FERC Contact: Jennifer Harper, (202) 502–6136.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number

(P–13837–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30159 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2232–586]

Duke Energy Carolinas, LLC; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

November 23, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-project use of project lands and waters.

b. *Project No.:* 2232–586.

c. *Date Filed:* November 15, 2010.

d. *Applicant:* Duke Energy Carolinas, LLC.

e. *Name of Project:* Catawba-Wateree Hydroelectric Project.

f. *Location:* The proposed non-project use would be located on Lake Wateree in Kershaw County, South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Kevin K. Reagan, Manager, Lake Services, P.O. Box 1006, Charlotte, NC 28201–1006; telephone (704) 382–9386.

i. *FERC Contact:* Hillary Berlin: (202) 502–8915; *e-mail: Hillary.Berlin@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* December 23, 2010.

All documents may be filed electronically via the Internet. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments.

k. *Description of Request:* The licensee is requesting authorization to lease 1.596 acres of project lands to Shaw Air Force Base for a commercial marina consisting of the following three areas: 0.297 acre for three courtesy docks and two boat ramps; 0.744 acre for a cluster dock with 12 docking locations; and 0.555 acre for one courtesy dock.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment application. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30158 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL ENERGY REGULATORY COMMISSION

[Docket Nos. CP11–33–000; PF10–15–000]

Leader One Energy, LLC; Notice of Application

November 23, 2010

Take notice that on November 15, 2010, Leader One Energy, LLC (Leader One), 4643 South Ulster Street, Suite 1100, Denver, Colorado 80237, filed in Docket No. CP11–33–000 an application pursuant to Section 7(c) of the Natural Gas Act (NGA) seeking authorization to construct and operate the Leader One Gas Storage Project in Adams County, Colorado. Specifically, Leader One requests authorization to: (1) Convert a depleted natural gas field to storage; (2) construct a new 18,000 horsepower (hp) compressor station comprising of four 4,500 hp electric driven compressors; and (3) construct a 22.4 mile header to interconnect with Colorado Interstate Gas Company. Additionally, Leader One requests a blanket certificates pursuant to parts 157 and 284 of the commission's regulations and authorization to provide storage and hub services at market based rates, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. This filing may also be viewed on the web 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 at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the application should be directed to Joseph S. Koury, Wright & Talisman, PC, 1200 G Street, NW., Suite 600, Washington, DC 20005, at (202) 393–1200 or *koury@wrightlaw.com.*

On March 31, 2010, the Commission staff granted Leader One's March 26, 2010, request to use the pre-filing process and assigned Docket No. PF10–15–000 for this proceeding during the pre-filing review of the Leader One Gas Storage Project. Now, as of the filing of Leader One's application on November 15, 2010, the pre-filing process for this project has ended. From this time forward, Leader One's proceeding will be conducted in Docket No. CP11–33–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's regulations, 18 CFR 157.9, within 90 days of this Notice, the Commission's staff will either complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission's staff issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to reach a final decision on a request for federal authorization within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, 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. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: December 14, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30154 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1894–203]

South Carolina Electric and Gas Company; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

November 24, 2010.

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission (Commission) and is available for public inspection:

a. *Application Type:* Application for non-project use of project lands and waters.

b. *Project No.:* 1894–203.

c. *Date Filed:* October 7, 2010.

d. *Applicant:* South Carolina Electric and Gas Company.

e. *Name of Project:* Parr Hydroelectric Project.

f. *Location:* The project is located on the Broad River in Fairfield and Newberry Counties, South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* William R. Argentieri, South Carolina Electric and Gas Company, Mail Code A221, 220 Operation Way, Cayce, South Carolina 29033–3701. Tel: (803) 217–9162.

i. *FERC Contact:* Any questions regarding this notice should be addressed to Joy Kurtz at (202) 502–6760, or e-mail *joy.kurtz@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* December 27, 2010.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-filing" link. The Commission strongly encourages electronic filings (e-filing).

In lieu of e-filing, all paper documents (original and eight copies) should be filed with: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–1894–203) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners

filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, it must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Application:* The Applicant, South Carolina Electric and Gas Company, is seeking Commission approval to allow for the withdrawal from, and discharge to, the Project's Monticello and Parr reservoirs to serve the construction and operation needs of two new nuclear generating plants at the V.C. Summer Nuclear Station. To facilitate this, the Applicant would construct a raw water intake facility that would withdraw approximately 2.2 million gallons of water per hour from Monticello reservoir, as well as a waste water facility that would discharge up to 0.6 million gallons of water per hour to Parr reservoir. Additionally, the Applicant would construct an offsite water treatment facility that would withdraw, on average, 1.7 million gallons of water per day from, and discharge up to 220,000 gallons of water per day to, Monticello reservoir. These facilities are key components to the cooling and blowdown processes associated with the new nuclear units.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field (P–1894) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the project number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30256 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–30–000]

Tennessee Gas Pipeline Company; Notice of Application

November 24, 2010.

Take notice that on November 12, 2010, Tennessee Gas Pipeline Company (Tennessee), 1001 Louisiana Street, Houston, Texas 77002, filed an application in Docket No. CP11–30–000 pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity to construct, and operate certain pipeline and compression facilities to be located in Pennsylvania and New York to increase its pipeline capacity by up to an additional 250,000 dekatherms per day (Dth/d) of firm natural gas transportation service. In addition to the certificate authority for the facilities identified above, Tennessee seeks authorization to lease pipeline capacity from Dominion Transmission, Inc. (Dominion), as more fully described in Tennessee's application. The application is on file with the Commission and open to public inspection. This filing is available for review at the Commission in the Public Reference Room or may 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The proposed project involves (1) installing approximately seven miles of a 30-inch pipeline loop segment in Bradford and Tioga Counties, Pennsylvania, (2) modifying Tennessee's wholly-owned facilities located on the Niagara Spur Line, including certain modifications to a compressor unit, modification of piping and valving at an existing check measurement facility at East Aurora, New York, and installation of chromatographs at four existing meter stations, and (3) increasing the capacity of an existing interconnection between Tennessee's 200 Line and Dominion's pipeline system by replacing an 8-inch tap with a 16-inch tap.

Dominion filed an application in Docket No. CP11–41–000 on November 19, 2010, for authorization to provide the proposed capacity lease to Tennessee.

Any questions concerning this application may be directed to Jacquelyne Rocan, Senior Counsel, Tennessee Gas Pipeline Company, 1001 Louisiana Street, Houston, Texas 77002, *phone:* (713) 420–4544, *fax:* (713) 420–1601, or *e-mail: jacquelyne.rocan@elpaso.com,* or Thomas Joyce, Manager, Rates and Regulatory Affairs, Tennessee Gas Pipeline Company, 1001 Louisiana Street, Houston, Texas 77002, *phone:* (713) 420–3299, *fax:* (713) 420–1605, *e-mail: tom.joyce@elpaso.com.*

Pursuant to Section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS)

or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, 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: December 15, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30250 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–37–002]

Washington 10 Storage Corporation; Notice of Baseline Filing

November 23, 2010.

Take notice that on November 19, 2010, Washington 10 Storage Corporation submitted a revised baseline filing of its Statement of Operating Conditions for services provided under section 311 of the Natural Gas Policy Act of 1978 (NGPA).

Any person desiring to participate in this rate proceeding must file a motion 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 and 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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 7 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 Friday, December 3, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30161 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Baseline Filings

November 24, 2010.

Centana Intrastate Pipeline, LLC	Docket No. PR10–84–001.
Centana Intrastate Pipeline, LLC	Docket No. PR10–85–001.
	Not Consolidated.

Take notice that on November 23, 2010, the applicants listed above submitted a revised baseline filing of their Statement of Operating Conditions for services provided under section 311 of the Natural Gas Policy Act of 1978 (NGPA).

Any person desiring to participate in this rate proceeding must file a motion 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 and 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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 7 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 Monday, December 6, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30258 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

November 23, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC11–22–000.
Applicants: Icahn Partners LP *et al.*
Description: Application of Icahn Partners LP *et al* for approval under the Federal Power Act Section 203.
Filed Date: 11/23/2010.
Accession Number: 20101123–5060.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 14, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1562–002, *ER10–2254–002.*
Applicants: Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc.
Description: Compliance filing of Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. in response to Order Addressing RTO Realignment Request.
Filed Date: 11/22/2010.
Accession Number: 20101122–5215.
Comment Date: 5 p.m. Eastern Time on Monday, December 13, 2010.

Docket Numbers: ER11–45–001.
Applicants: Deutsche Bank AG.
Description: Deutsche Bank AG submits their Application requesting a Waiver of the Quarterly Reporting requirements.
Filed Date: 11/22/2010.
Accession Number: 20101122–5212.
Comment Date: 5 p.m. Eastern Time on Thursday, December 2, 2010.

Docket Numbers: ER11–2083–000.
Applicants: Duke Energy Fayette II, LLC.
Description: Duke Energy Fayette II, LLC submits tariff filing per 35.15: Cancel Tariff Database to be effective 1/10/2011.
Filed Date: 11/12/2010.
Accession Number: 20101112–5012.
Comment Date: 5 p.m. Eastern Time on Friday, December 3, 2010.

Docket Numbers: ER11–2165–000.
Applicants: Midwest Independent Transmission System Operator Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): Cancel BREC Adj. BA Coord Agr to be effective 12/1/2010.
Filed Date: 11/22/2010.
Accession Number: 20101122–5113.
Comment Date: 5 p.m. Eastern Time on Monday, December 13, 2010.

Docket Numbers: ER11–2166–000.
Applicants: Planet Energy (USA) Corp.
Description: Planet Energy (USA) Corp. submits tariff filing per 35.1: Planet Energy USA MBR Application to be effective 11/22/2010.
Filed Date: 11/22/2010.
Accession Number: 20101122–5152.
Comment Date: 5 p.m. Eastern Time on Monday, December 13, 2010.

Docket Numbers: ER11–2167–000.
Applicants: Planet Energy (Pennsylvania) Corp.
Description: Planet Energy (Pennsylvania) Corp. submits tariff filing per 35.1: Planet Energy Pennsylvania MBR Application to be effective 11/22/2010.
Filed Date: 11/22/2010.
Accession Number: 20101122–5173.
Comment Date: 5 p.m. Eastern Time on Monday, December 13, 2010.

Docket Numbers: ER11–2168–000.
Applicants: Planet Energy (Maryland) Corp.
Description: Planet Energy (Maryland) Corp. submits tariff filing per 35.1: Planet Energy Maryland MBR Application to be effective 11/22/2010.
Filed Date: 11/22/2010.
Accession Number: 20101122–5176.
Comment Date: 5 p.m. Eastern Time on Monday, December 13, 2010.

Docket Numbers: ER11–2169–000.
Applicants: Duke Energy Carolinas, LLC.
Description: Duke Energy Carolinas, LLC submits a revised depreciation accrual rate and depreciation reserve imbalance amortization for one account for use in their formula rates wholesale power sales.
Filed Date: 11/22/2010.
Accession Number: 20101123–0201.
Comment Date: 5 p.m. Eastern Time on Monday, December 13, 2010.

Docket Numbers: ER11–2170–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits a Service Agreement for Conditional Long-Term Firm Point-to-Point Transmission Service with PacifiCorp and CEP Funding, LLC etc, to be effective 12/1/2010.
Filed Date: 11/23/2010.
Accession Number: 20101123–5031.
Comment Date: 5 p.m. Eastern Time on Tuesday, December 14, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a

compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–30136 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–22–000]

Magnum Gas Storage, LLC; Magnum Solutions, LLC; Notice of Availability of the Environmental Assessment for the Proposed Magnum Storage Project and Proposed Pony Express Resource Management Plan Amendment for the Bureau of Land Management

November 23, 2010.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the natural gas storage and pipeline facilities proposed by Magnum Gas Storage, LLC and Magnum Solutions, LLC (Magnum) in the above-referenced docket.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

The Bureau of Land Management (BLM), the State of Utah, Public Lands Policy Coordination Office, and Millard County, Utah participated as cooperating agencies in the preparation of the EA. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis. The BLM intends to adopt and use the EA to consider the issuance of right-of-way grants on federally administered lands as well as to amend the BLM's Salt Lake Field Office Pony Express Resource Management Plan (RMP) to establish a utility corridor. As such, the EA addresses the BLM's Proposed Pony Express Resource Management Plan Amendment (PRMPA). While the conclusions and recommendations presented in the EA were developed with input from the cooperating agencies, the BLM will present its own conclusions and recommendations in its respective Record of Decision for the project.

The EA/PRMPA addresses the potential environmental effects of the construction and operation of the following project facilities:

- Four natural gas storage caverns;
- Five water supply wells;
- Four cavern solution mining and natural gas injection/withdrawal wells;
- Numerous project-related facilities including pumping and compressor stations, gas handling equipment, associated valves and piping, electric generators, and other support buildings/systems;
- Three brine evaporation ponds;
- Several groundwater monitoring wells and other groundwater monitoring equipment; and
- A 61.6-mile-long, 36-inch-diameter natural gas transmission pipeline and associated facilities.

The EA/PRMPA has been placed in the public files of the FERC and is available for public viewing on the FERC's Web site at *http://www.ferc.gov* using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Copies of the EA/PRMPA have been mailed to Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; newspapers and libraries in the project area; and parties to this proceeding.

Any person wishing to comment on the EA/PRMPA may do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are properly recorded and considered prior to a Commission decision on the proposal, it is important that we receive your comments in Washington, DC on or before December 23, 2010. Comments specific to the PRMPA should be addressed to the BLM (see specific procedures in Attachment 1).

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP10–22–000) with your submission. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the *eComment* feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to *Documents and Filings*. An eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to *Documents and Filings*. With eFiling you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "*eRegister*." You will be asked to select the type of filing you are making. A comment on a particular project is considered a "Comment on a Filing"; or

(3) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

Although your comments will be considered by the Commission, simply filing comments will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC or on the FERC Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number excluding the last three digits in the Docket Number field (*i.e.*, CP10–22–000). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

The BLM will issue a separate Decision Record (DR) for this project. As part of the BLM decision-making process, certain additional steps must be completed. Details on how to participate in that process are provided below.

BLM Proposed Plan Amendment

The EA/PRMPA contains a Proposed Amendment of the Pony Express Resource Management Plan. The amendment would create a 250-foot-wide utility corridor. Pursuant to BLM's planning regulations at 43 CFR 1610.5–2, any person who participated in the planning process for this Proposed Plan Amendment and has an interest which may be adversely affected by the planning decision may protest approval of the planning decision within 30 days from the date this Notice of Availability for the EA/PRMPA is published in the **Federal Register**. For further information on filing a protest of the BLM planning decision, please see the accompanying protest regulations in the pages that follow (labeled as Attachment #1). The regulations specify the required elements of your protest. Take care to document all relevant facts. As much as possible, reference or cite the planning documents or available planning records (*e.g.,* meeting minutes or summaries, correspondence, etc.). If your protest does not include all of the elements outlined in 43 CFR 1610.5–2, the BLM will not respond to your protest.

E-mailed and faxed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the BLM's protest period. Under these conditions, the BLM will consider the emailed or faxed protest as an advance copy and will afford it full consideration. If you wish to provide the BLM with such advance notification, please direct faxed protests to the attention of Brenda Hudgens-Williams, BLM protest coordinator, at (202) 912–7212, and e-mailed protests to: *Brenda_Hudgens-Williams@blm.gov.*

All protests, including the follow-up letter to emails or faxes, must be in writing and mailed to one of the following addresses:

Regular mail	Overnight mail
Director (210) Attention: Brenda Williams P.O. Box 66538 Washington, DC 20035	Director (210) Attention: Brenda Williams 1620 L Street, NW., Suite 1075 Washington, DC 20036

Before including your address, phone number, e-mail address, or other personal identifying information in your protest, be advised that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

The BLM Director will make every attempt to promptly render a decision on each protest. The decision will be in writing and will be sent to the protesting party by certified mail, return receipt requested. The decision of the BLM Director shall be the final decision of the Department of the Interior. Responses to protest issues will be compiled and formalized in a Director's Protest Decision Report made available following issuance of the decisions. Upon resolution of all land use plan amendment protests, the BLM will issue an Approved RMP Amendment and DR.

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

Unlike land use planning decisions, implementation decisions included in this EA/PRMPA are not subject to protest under the BLM planning regulations, but are subject to an administrative review process, through appeals to the Office of Hearings and Appeals, Interior Board of Land Appeals pursuant to 43 CFR, part 4, subpart E. Implementation decisions generally constitute the BLM's final approval allowing on-the-ground actions to proceed. Where implementation decisions are made as part of the land use planning process, they are still subject to the appeals process or other administrative review as prescribed by specific resource program regulations once the BLM resolves the protests to land use planning decisions and issues an Approved RMP Amendment and DR. The BLM's Approved RMP Amendment and DR will therefore identify the implementation decisions made in the plan that may be appealed to the Office of Hearing and Appeals.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30162 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–38–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Filing

November 24, 2010.

Take notice that on November 18, 2010, Transcontinental Gas Pipe Line Company, LLC (Transco), Post Office Box 1396, Houston, Texas 77251, filed an abbreviated application, pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Rules and Regulations to amend its certificate issued on May 18, 2006, as amended on January 11, 2007 and October 23, 2007 authorizing Transco's Leidy to Long Island Expansion Project. The application is on file with the Commission and open for public inspection. This filing is available for review at the Commission in the Public Reference Room or may 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866)208–3676, or for TTY, contact (202) 502–8659.

Transco requests authorization to allow either of the existing compressor units at Compressor Station 207, each of which is currently certificated at 5,000 horsepower, to be operated up to 7,000 horsepower. This increase will not change the total horsepower used at Station 207 of 10,000 horsepower as certificated. The proposed operational change will not involve any construction activities or result in any incremental transportation capacity. No additional costs will be incurred.

Any questions regarding the application are to be directed to Scott Turkington, Director, Rates and Regulatory, Transcontinental Gas Pipe Line Corporation, P.O. Box 1396, Houston, Texas 77251–1396; phone number (713) 215–3391 or *scott.c.turkington@williams.com.*

Pursuant to section 157.9 of the Commission's regulations, 18 CFR 157.9, within 90 days of this Notice, the Commission's staff will either complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission's staff issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to reach a final decision on a request for Federal authorization within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, 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. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: December 8, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30251 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2069–000]

Duke Energy Lee II, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 23, 2010.

This is a supplemental notice in the above-referenced proceeding, of Duke Energy Lee II, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is December 13, 2010.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30156 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2166–000]

Planet Energy (USA) Corp.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 24, 2010.

This is a supplemental notice in the above-referenced proceeding, of Planet Energy (USA) Corp.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability is December 14, 2010.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30252 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2167–000]

Planet Energy (Pennsylvania) Corp.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 24, 2010.

This is a supplemental notice in the above-referenced proceeding, of Planet Energy (Pennsylvania) Corp.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability is December 14, 2010.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access

who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30253 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2168–000]

Planet Energy (Maryland) Corp.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 24, 2010.

This is a supplemental notice in the above-referenced proceeding, of Planet Energy (Maryland) Corp.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability is December 14, 2010.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St, NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30254 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR11–75–000]

American Midstream Onshore Pipelines, LLC; Notice of Petition for Rate Approval

November 24, 2010.

Take notice that on November 22, 2010, American Midstream Onshore Pipelines, LLC (AMOP) filed a petition pursuant to section 284.123(b)(2) of the Commission's regulations. AMOP proposes a maximum system-wide interruptible rate of $0.2315 per MMBtu plus actual lost and unaccounted for natural gas, not to exceed one-half percent.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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 7 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 Monday, December 6, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30259 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD11–1–000]

Reliability Monitoring, Enforcement and Compliance Issues; Notice Allowing Post-Technical Conference Comments

November 23, 2010.

On November 18, 2010, the Federal Energy Regulatory Commission (Commission) conducted a Commission-led technical conference to explore issues associated with reliability monitoring, enforcement and compliance. All interested persons are invited to file written comments that relate to the issues discussed during the technical conference.[1] Comments should be filed with the Commission in this docket, AD11–1–000, on or before December 9, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30160 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

[1] Reliability Monitoring, Enforcement and Compliance Issues; *Announcement of Panelists for Technical Conference,* 75 FR 70,752 (November 18, 2010).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–26–000]

Panhandle Eastern Pipe Line Company, LP; Notice of Request Under Blanket Authorization

November 23, 2010.

Take notice that on November 12, 2010, Panhandle Eastern Pipe Line Company, LP (Panhandle), Post Office Box 4967, Houston, Texas 77210–4967, filed a prior notice request pursuant to sections 157.205 and 157.216 of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act (NGA) and Panhandle's blanket certificate issued in Docket No. CP83–83–000, for authorization to abandon an inactive section of pipeline. Specifically, Panhandle seeks to abandon, in place, approximately 8,000 foot segment, 24-inch Houstonia 200 Standby Line (Standby Line) located in Cooper County, Missouri. Panhandle states that a portion of the pipe underlying Boller Lane will be grouted while the remainder of the segment will be filled with water. Additionally, Panhandle will retire and replace a tee and Main Line Valve 220–WS with a hot bend and reducer. Furthermore, a 24-inch block, siphon, and coupon holder will be installed at the end of the abandonment in accordance with DOT regulations, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web 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 at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding the application should be directed to Stephen Veatch, Director of Certificates and Tariffs, Panhandle Eastern Pipe Line Company, LP, 5444 Westheimer Road, Houston, Texas 77056, telephone no. (713) 989–2024, or fax (713) 989–118, or by e-mail *Stephen.veatch@sug.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–30164 Filed 11–30–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0014; FRL–8853–9]

Product Cancellation Order for Certain Pesticide Registrations; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: EPA issued a notice in the **Federal Register** of August 11, 2010, concerning the voluntary cancellation of multiple pesticide products. This document is being issued to rescind the cancellation of Sergeant's Pet Care Products' pesticide product, EPA Reg. No. 2517–79.

FOR FURTHER INFORMATION CONTACT: Maia Tatinclaux, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–0123; e-mail address: *tatinclaux.maia@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

The Agency included in the notice of August 11, 2010, a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0014. 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.

II. What does this correction notice do?

This notice rescinds the cancellation of Sergeant's Pet Care Products' pesticide product, EPA Reg. No. 2517–79 which appeared in FR Doc. 2010–19575 published in the **Federal Register** of August 11, 2010 (75 FR 154) (FRL–88399). The Cancellation Order was

issued following a notice announcing Sergeant's request to voluntarily cancel product 2517–79 published in the **Federal Register** of January 26, 2010. The 180-day comment period ended July 26, 2010, for all cancellation requests published in the notice. Sergeant's sent the Agency a letter dated July 23, 2010, requesting the withdrawal of the cancellation request of product 2517–79. Therefore, Sergeant's pesticide product 2517–79 should not have been included in the Cancellation Order published in the **Federal Register** of August 11, 2010.

List of Subjects

Environmental protection.

Dated: November 22, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–30223 Filed 11–30–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0887; FRL–8854–3]

DCNA (dicloran), Ziram, Diquat Dibromide, and Chloropicrin; Notice of Receipt of Requests to Voluntarily Amend Registrations to Terminate Certain Uses

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 requests by the registrants to voluntarily amend their DCNA (dicloran), ziram, diquat dibromide, and chloropicrin product registrations to terminate or delete uses. The requests would delete DCNA use on potatoes, ziram use on blackberries, diquat dibromide use on soybean and sorghum, and chloropicrin use on mushroom casing, potting soil, and small area seed beds when using hand-held fumigation devices. The requests would not terminate the last DCNA, ziram, diquat dibromide, and chloropicrin products registered for use in the United States. EPA intends to grant these requests 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 requests, or unless the registrants withdraw its requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the uses are deleted only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments on the proposed amendments to ziram, diquat dibromide and chloropicrin labels must be received on or before January 3, 2011. Comments on the proposed amendments to the DCNA label must be received on or before May 31, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0887, 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–2010–0887. 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* 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 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: *For pesticide specific information contact:* The Chemical Review Manager identified in the table below for the pesticide of interest.

Active ingredient	Chemical review manager, telephone Number, e-mail address
Chloropicrin ...	Andrea Carone, (703) 308–0122, *carone.andrea@epa.gov.*
DCNA	James Parker, (703) 306–0469, *parker.james@epa.gov.*
Diquat Dibromide.	Eric Miederhoff, (703) 347–8028, *miederhoff.eric@epa.gov.*
Ziram	Kelly Ballard, (703) 305–8126, *ballard.kelly@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 requests from several registrants requesting that EPA amend their registrations as follows:

In a letter dated September 20, 2010, Gowan requested EPA to amend its DCNA product registrations to delete a certain use which is identified in Table 1 of Unit III. DCNA is a pre- and post-harvest fungicide used on a variety of crops and ornamentals.

In a letter dated June 3, 2010, the Ziram Task Force comprised of Taminco, Inc. and United Phosphorus, Inc. requested EPA to delete a certain use of pesticide product registrations identified in Table 1 of Unit III. Ziram is a broad spectrum fungicide used on a variety of crops such as stone fruits, pome fruits, nut crops, vegetables and commercially grown ornamentals.

In a letter dated May 17, 2010, Source Dynamics, LLC requested that EPA amend its diquat dibromide product registration to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated July 12, 2010, Rotam North America, Inc. requested that EPA amend its diquat dibromide product registration to delete certain uses which are identified in Table 1 of Unit III.

In letters dated May 21, 2010, Sharda USA, LLC requested EPA amend its diquat dibormide product registrations to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated June 9, 2010 Nufarm Americas, Inc. requested that EPA amend its diquat dibromide product registration to delete certain uses which are identified in Table 1 of Unit III.

In letters dated July 30, 2010 Aceto Agricultural Chemicals Corp. requested that EPA amend its diquat dibromide product registrations to delete certain uses which are identified in Table 1 of Unit III. Diquat dibromide is a non-selective contact algicide, defoliant, desiccant and herbicide.

In a letter dated July 27, 2010, ICL–IP America, Inc. requested that EPA amend its chloropicrin product registration to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated July 28, 2010, Reddick Fumigants of NC, LLC requested that EPA amend its chloropicrin product registration to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated July 28, 2010, Arysta LifeScience North America, LLC requested that EPA amend its chloropicrin product registration to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated August 2, 2010, Cardinal Professional Products requested that EPA amend its chloropicrin product registration to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated August 2, 2010, Hendrix and Dail, Inc. requested that EPA amend its chloropicrin product registrations to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated August 2, 2010, Shadow Mountain Products Corporation requested that EPA amend its chloropicrin product registration to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated August 3, 2010, ASHTA Chemicals, Inc. requested that EPA amend its chloropicrin product registration to delete certain uses which are identified in Table 1 of Unit III.

In a letter dated August 17, 2010, Chemtura Corporation requested that EPA amend its chloropicrin product registration to delete certain uses which are identified in Table 1 of Unit III. Chloropicrin is a nonselective soil fumigant with fungicidal, herbicidal, insecticidal, and nematicidal properties.

This action on the registrants' requests will not terminate the last DCNA, ziram, diquat dibromide, and chloropicrin products registered in the United States, but will amend all pesticide products registered in the United States for these uses, which can be found in Table 1 of Unit III.

III. What action is the Agency taking?

This notice announces receipt by EPA of requests from registrants to delete certain uses of DCNA, ziram, diquat dibromide, and chloropicrin product registrations. The affected products and the registrants making the requests are identified in Tables 1 and 2 of this unit.

Unless a request is withdrawn by the registrant or if the Agency determines that there are substantive comments that warrant further review of this request, EPA intends to issue an order amending the affected registrations.

TABLE 1—DCNA, ZIRAM, DIQUAT DIBROMIDE, AND CHLOROPICRIN PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT

Registration No.	Product name	Active ingredient	Uses to be deleted
228–675	Nufarm Diquat SPC 2 L Herbicide.	Diquat Dibromide	Sorghum and soybean.
2749–530	Diquat dibromide 37.3% SL AG.	Diquat Dibromide	Sorghum and soybean (seed crop only).
2749–531	Diquat Manufacturing Concentrate.	Diquat Dibromide	Sorghum and soybean (seed crop only).
5785–17	Chlor-O-Pic	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.
8536–2	CHLOROPICRIN 100 FUMIGANT.	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.
8853–4	HD-PIC FUMIGANT	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.
8853–6	PIC PLUS FUMIGANT	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.
10163–189	Botran 75–W Fungicide	DCNA	Potato.
10163–226	Botran 5F Fungicide	DCNA	Potato.
10163–195	Botran Technical	DCNA	Potato.
45728–12	Ziram Granuflo Fungicide	Ziram	Blackberries.
58266–2	TRI-CLOR FUMIGANT	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.
62531–2	ASHTA Gold	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.
66330–47	TM–442	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.
70506–173	Ziram 76DF Fungicide	Ziram	Blackberries.
82542–15	Solear Diquat 2L Desiccant	Diquat Dibromide	Sorghum and soybean (seed crop only).
82633–2	Sharda Diquat Concentrate	Diquat Dibromide	Sorghum and soybean (seed crop only).
83529–13	Diquash Ag	Diquat Dibromide	Sorghum and soybean (seed crop only).
83979–2	Rowrunner Ag Herbicide	Diquat Dibromide	Sorghum and soybean.
85607–1	Reddick PIC C–100	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.
8622–43	Metapicrin	Chloropicrin	Mushroom casing soil, potting soil, and small area seed beds using handheld fumigation devices.

Table 2 of this unit includes the names and addresses of record for the registrants of the products listed in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS

EPA Company No.	Company name and address
228	Nufarm Americas, Inc., 150 Harvester Drive, Suite 200, Burr Ridge, IL 60527.
2749	Aceto Agricultural Chemicals Corporation, One Hollow Lane, Lake Success, NY 11042–1215.
5785	Chemtura Corporation, 1801 Highway 52 West, P.O. Box 2200, West Lafayette, IN 47906.
8536	Soil Chemicals Corporation dba Cardinal Professional Products, P.O. Box 782, 8770 Highway 25, Hollister, CA 95024–0782.
8622	ICL–IP America, Inc., 95 MacCorkle Avenue, SW., South Charleston, WV 25303.
8853	Hendrix and Dail, Inc., P.O. Box 648, Greenville, NC 27835–0648.
10163	Gowan Company, P.O. Box 5569, Yuma, AZ 85366–5569.
45728	Taminco, Inc., 21320 Sweet Clover Place, Ashburn, VA 20147.
58266	Shadow Mountain Products Corporation, 8770 Highway 25, P.O. Box 1327, Hollister, CA 95024–1327.
62531	ASHTA Chemicals Inc., 3509 Middle Road, P.O. Box 858, Ashtabula, OH 44005–0858.
66330	Arysta LifeScience North America, LLC, 15401 Weston Parkway, Suite 150, Cary, NC 27513.
70506	United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
82542	Source Dynamics, 10039 E. Troon North Drive, Scottsdale, AZ 85262.
82633	Sharda Worldwide Exports Pvt. Ltd., Domnic Holm, 29th Road, Bandra (West) Mumbai-400050.
83979	Rotam North America, Inc., 1400 NW. 107th Avenue, Suite 310, Miami, FL 33172.
85607	Reddick Fumigants of NC, LLC, 3002 W. Main Street, Williamston, NC 27892.

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**.

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, FIFRA section 6(f)(1)(C) 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 EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The ziram, diquat dibromide, and chloropicrin registrants have requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests. The DCNA registrant has not requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 180-day comment period on the proposed request to voluntarily cancel DCNA use on potatoes.

V. Procedures for Withdrawal of Requests

Registrants who choose to withdraw a request for product cancellation or use deletion should submit the withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the action. If the requests for amendments to delete uses are granted, the Agency intends to publish the cancellation order in the **Federal Register**.

In any order issued in response to these requests for amendments to delete uses, EPA proposes to include the following provisions for the treatment of any existing stocks of the products listed in Table 1 of Unit III.

For the chloropicrin products listed in Table 1 of Unit III registrants will be permitted to sell and distribute products under the previously approved labeling until December 1, 2010, provided the labels with the 2010 changes have not been accepted in all states, EPA may provide a revised date. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the deleted uses identified in Table 1 of Unit III, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of products whose labels include the deleted uses until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the deleted uses.

For the DCNA, ziram, and diquat dibromide products listed in Table 1 of Unit III, once EPA has approved product labels reflecting the requested amendments to delete uses, registrants will be permitted to sell or distribute products under the previously approved labeling for a period of 12 months after the date of **Federal Register** publication of the cancellation order, unless other restrictions have been imposed. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the deleted uses identified in Table 1 of Unit III, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of products whose labels include the deleted uses until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the deleted uses.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 24, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–30224 Filed 11–30–10; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE U.S.

[Public Notice 2010–0060]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB review and comments request.

Form Title: Broker Registration Form, EIB 92–79.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995. Our customers will be able to submit this form on paper or electronically.

This application is used by insurance brokers to register with Export Import Bank. The application provides Export Import Bank staff with the information necessary to make a determination of the eligibility of the broker to receive commission payments under Export Import Bank's credit insurance programs.

DATES: Comments should be received on or before January 3, 2011 to be assured of consideration.

ADDRESSES: Comments maybe submitted through *http://www.Regulations.Gov* or mailed to to Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20038 attn: OMB 3048–0024.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–79 Broker Registration Form.

OMB Number: 3048–0024

Type of Review: Regular

Need and Use: This application is used by insurance brokers to register with Export Import Bank. The application provides Export Import Bank staff with the information necessary to make a determination of the eligibility of the broker to receive commission payments under Export Import Bank's credit insurance programs.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 50.

Estimated Time per Respondent: 100 hours.

Government Annual Burden Hours: 200 hours.

Frequency of Reporting or Use: Once.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2010–30207 Filed 11–30–10; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

November 23, 2010.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment

on the following information collection. 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; (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; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC 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.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 3, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or the Internet at *Nicholas_A._Fraser@omb.eop.gov;* and to *the* Federal Communications Commission's PRA mailbox (e-mail address: *PRA@fcc.gov.*). Include in the e-mail the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below, or if there is no OMB control number, include the Title as shown in the **SUPPLEMENTARY INFORMATION** section. If you are unable to submit your comments by e-mail, contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-b.herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0741.

Title: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96–98, Second Report and Order and Memorandum Opinion and Order; Second Order on Reconsideration; CC Docket No. 99–273, First Report and Order.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 5,907 respondents; 573,767 responses.

Estimated Time per Response: 1 hour to 547,500 hours.

Frequency of Response: Annual, on occasion, and one time reporting requirements, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 153, 154, 201, 222 and 251.

Total Annual Burden: 574,448 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting respondents to submit confidential information to the Commission.

Needs and Uses: The Commission will submit this expiring information collection (IC) to the OMB during this comment period. There is no change in the reporting, recordkeeping and/or third party disclosure requirements. The Commission is reporting a 506,860 hourly increase in burden. The previous estimate for the annual hourly burden of providing public notice of network changes has been recalculated, and has decreased from 36,250 to 806 hours based on a recent count of actual filings. However, the previous estimate for the annual hourly burden of sharing directory listings has been recalculated, and has increased from 6,000 to 547,500 based on a reassessment of how responses to this information collection are currently being provided.

The estimate for the total annual burden reflects an increase in the approximate number of respondents. The estimate reflects the fact that respondents are now more likely to offer daily updates of directory listings in addition to their initial response to a request for directory listings. However, respondents are now more likely to be using advanced IT software, automation, and standardized business practices to respond to a request for the sharing of directory listings, which accounts for their ability to provide a greater number of responses each year with a reduced incremental burden.

In April 1996, the Commission issued a Notice of Proposed Rulemaking (NPRM) concerning certain provisions in the Telecommunications Act of 1996 ("the Act"), including section 251. Section 251 is designed to accelerate private sector development and deployment of telecommunications technologies and services by spurring competition. The Commission adopted rules and regulations designed to implement certain provisions of section 251, and to eliminate operational barriers to competition in the telecommunications services markets.

OMB Control Number: 3060–0798.

Title: FCC Application for Radio Service Authorization: Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau.

Form No.: FCC Form 601.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households; business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 253,120 respondents; 253,120 responses.

Estimated Time Per Response: .50 hours to 1.25 hours.

Frequency of Response: On occasion and once every 10 year reporting requirements, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 152, 154(i), 155(c), 157, 201, 202, 208, 214, 301, 302a, 303, 307, 308, 309, 310, 311, 314, 316, 319, 324, 331, 332, 333, 336, 534, and 535.

Total Annual Burden: 221,780 hours.

Total Annual Cost: $55,410,000.

Privacy Act Impact Assessment: Records may include information about individuals or households, *e.g.,* personally identifiable information or PII, and the use(s) and disclosure of this information is governed by the requirements of a system of records notice (SORN), FCC/WTB–1, "Wireless Services Licensing Records". There are no additional impacts under the Privacy Act.

Nature and Extent of Confidentiality: Respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules. Information on the FCC Form 601 is maintained in the Commission's SORN, FCC/WTB–1, "Wireless Services Licensing Records." These licensee records are publicly available and routinely used in accordance with subsection b. of the Privacy Act, 5 U.S.C. 552a(b), as amended. Material that is afforded confidential treatment pursuant to a request made under 47 CFR 0.459 of the Commission's rules will not be available for public inspection.

Needs and Uses: The Commission will submit this expiring information collection (IC) to the OMB during this comment period. There is no change in the reporting, recordkeeping and/or third party disclosure requirements. There are no changes to the Commission's previous burden estimates.

The Commission is seeking a revision for approval from the Office of Management and Budget (OMB) because the Commission will be requesting a certification and/or showing of compliance of narrowband equivalency as an attachment and correcting chief financial officers on Schedule B.

OMB Control Number: 3060–1058.

Title: FCC Application or Notification for Spectrum Leasing Arrangement or Private Commons Arrangement: Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau.

Form No.: FCC Form 608.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 991 respondents; 991 responses.

Estimated Time per Response: 5 hours.

Frequency of Response: On occasion reporting requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 154(i), 154(j), 155, 158, 161, 301, 303(r), 308, 309, 310, 332, and 503.

Total Annual Burden: 4,955 hours.

Total Annual Cost: $910,500.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this expiring information collection (IC) to the OMB during this comment period. There is no change in the reporting and/or recordkeeping requirements. The Commission is reporting a 3,200 hourly decrease in burden and a $423,606 decrease in annual costs. The decrease adjustments are due to fewer respondents than the last submission to the OMB and the estimates have been recalculated.

The Commission is seeking OMB approval for a revision for changes in the wording on the FCC Form 608 data elements, adding a question inquiring if filing is the lead application on the Main Form, and changing language in the instructions.

The required notifications and applications will provide the Commission with useful information about spectrum usage and help to ensure that licensees and lessees are complying with Commission interference and non-interference related policies and rules. Similar information and verification requirements have been used in the past for licensees operating under authorizations, and such requirements will serve to minimize interference, verify that lessees are legally and technically qualified to hold licenses, and ensure compliance with Commission rules.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–30183 Filed 11–30–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 10–147; DA 10–2008]

Auction of VHF Commercial Television Station Construction Permits Scheduled for February 15, 2011; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 90

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the procedures and minimum opening bids for the upcoming auction of certain VHF commercial TV construction permits (Auction 90). This document is intended to familiarize prospective bidders with the procedures and minimum opening bids for the auction.

DATES: Applications to participate in Auction 90 must be filed prior to 6 p.m. Eastern Time (ET) on December 15, 2010. Bidding for construction permits in Auction 90 is scheduled to begin on February 15, 2011.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* For legal questions: Howard Davenport or Lynne Milne at (202) 418–0660. For general auction questions: Jeff Crooks at (202) 418–0660 or Barbara Sibert at (717) 338–2829. *Media Bureau, Audio Division:* For licensing information and service rule questions: Shaun Maher or Adrienne Denysyk at (202) 418–2700. To request materials in accessible formats (Braille, large print, electronic files or audio format) for people with disabilities, send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 or (202) 418–0432 (TTY).

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 90 Procedures Public Notice,* which was released on November 1, 2010. The complete text of the *Auction 90 Procedures Public Notice,* including attachments, as well as related Commission documents, are available for public inspection and copying from 8 a.m. to 4:30 p.m. ET Monday through Thursday and from 8 a.m. to 11:30 a.m. ET on Friday in the FCC Reference Information Center, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Auction 90 Procedures Public Notice* and related Commission documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or Web site: *http://www.BCPIWEB.com,* using document number DA 10–2008 for the *Auction 90 Procedures Public Notice.* The *Auction 90 Procedures Public Notice* and related documents are also available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/90/.*

I. General Information

A. Introduction

1. The Wireless Telecommunications Bureau and Media Bureau (collectively, the Bureaus) announce the procedures and minimum opening bid amounts for the upcoming auction of two digital very high frequency (VHF) commercial television station construction permits. This auction, which is designated as Auction 90, is scheduled to commence on February 15, 2011. On September 8, 2010, the Bureaus released a public notice seeking comment on competitive bidding procedures to be used in Auction 90. Two parties submitted comments and reply comments in response to the *Auction 90 Comment Public Notice* 75 FR 59747, September 23, 2010.

i. Background

2. The Media Bureau recently amended the Post-Transition Table of DTV Allotments by allotting digital VHF commercial television channels in New Jersey and Delaware. The first allotment is channel 4 in Atlantic City, New Jersey and the second allotment is channel 5 in Seaford, Delaware.

ii. Construction Permits in Auction 90

3. Auction 90 will offer construction permits for two VHF commercial television stations. The Commission's competitive bidding rules will be used to select among mutually exclusive applications for these construction permits in Auction 90. When two or more short-form applications (FCC Forms 175) are accepted for filing for the same construction permit in Auction 90, mutual exclusivity exists for auction purposes. Once mutual exclusivity exists for auction purposes, even if only one applicant for a particular construction permit submits an upfront payment, that applicant is required to submit a bid in order to obtain the construction permit. Any applicant that submits a short-form application but fails to timely submit an upfront payment will retain its status as an applicant in Auction 90 and will remain subject to the Commission's rules concerning prohibited communications, but, having purchased no bidding eligibility, will not be eligible to bid.

4. A commenter asked that the Commission to amend the Post-Transition Table of DTV Allotments as set-out in 47 CFR 73.622(i) in order to allow the eventual winner of Auction 90 to license the VHF television station to any community in Delaware or New Jersey provided that such an allotment would not cause harmful interference to other VHF services. The proposal is beyond the scope of this proceeding, which is confined to establishing competitive bidding procedures for this auction of DTV construction permits. This proceeding is not an appropriate forum in which to challenge determinations made in the DTV allocation rulemaking proceeding. Accordingly, the Bureaus are unable to adopt this proposal.

B. Rules and Disclaimers

i. Relevant Authority

5. Prospective applicants must familiarize themselves thoroughly with the Commission's general competitive bidding rules, including recent amendments and clarifications, as well as Commission decisions in proceedings regarding competitive bidding procedures, application requirements, and obligations of Commission licensees. Potential applicants should also familiarize themselves with the Commission's rules relating to the Television Broadcast Service contained in 47 CFR Part 73.

6. The terms contained in the Commission's rules, relevant orders, and public notices are not negotiable. The Commission may amend or supplement the information contained in its public notices at any time, and will issue public notices to convey any new or supplemental information to applicants. It is the responsibility of all applicants to remain current with all Commission rules and with all public notices pertaining to this auction.

ii. Prohibited Communications and Compliance With Antitrust Laws

7. To ensure the competitiveness of the auction process, 47 CFR 1.2105(c) prohibits auction applicants for construction permits in any of the same geographic license areas from communicating with each other about bids, bidding strategies, or settlements unless such applicants have identified each other on their short-form applications (FCC Form 175) as parties with whom they have entered into agreements pursuant to 47 CFR 1.2105(a)(2)(viii).

a. Entities Subject to Section 1.2105

8. 47 CFR 1.2105(c)'s prohibition on certain communications will apply to any applicants that submit short-form applications seeking to participate in a Commission auction for construction permits in the same geographic license area. Thus, unless they have identified each other on their short-form applications as parties with whom they have entered into agreements under 47 CFR 1.2105(a)(2)(viii), applicants for any of the same geographic license areas must affirmatively avoid all communications with or disclosures to each other that affect or have the potential to affect bids or bidding strategy. In some instances, this prohibition extends to communications regarding the post-auction market structure. This prohibition applies to all applicants regardless of whether such applicants become qualified bidders or actually bid. The "geographic license area" is the market designation of the particular service. For the Television Broadcast Service, the market designation is the particular vacant DTV allotment (*e.g.,* Atlantic City, NJ, Channel DTV 4, MM–DTV012–4).

9. Applicants are also reminded that, for purposes of this prohibition on certain communications, 47 CFR 1.2105(c)(7)(i) defines applicant as including all officers and directors of the entity submitting a short-form application to participate in the auction, all controlling interests of that entity, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application. For example, where an individual served as an officer for two or more applicants, the Bureaus have found that the bids and bidding strategies of one applicant are necessarily conveyed to the other applicant, and, absent a disclosed bidding agreement, an apparent violation of 47 CFR 1.2105(c) occurs.

10. Individuals and entities subject to 47 CFR 1.2105(c) should take special care in circumstances where their employees may receive information directly or indirectly from a competing applicant relating to any competing applicant's bids or bidding strategies. The Bureaus have not addressed situations where non-principals (*i.e.,* those who are not officers or directors and thus not considered to be the applicant) receive information regarding a competing applicant's bids or bidding strategies and whether that information might be deemed to necessarily convey to the applicant. An exception to the prohibition on certain communications allows non-controlling interest holders to obtain interests in more than one competing applicant without violating 47 CFR 1.2105(c) provided specified conditions are met (including a certification that no prohibited communications have occurred or will occur), but that exception does not extend to controlling interest holders.

11. Moreover, Auction 90 applicants are encouraged not to use the same individual as an authorized bidder. A violation of 47 CFR 1.2105(c) could occur if an individual acts as the authorized bidder for two or more competing applicants, and conveys information concerning the substance of bids or bidding strategies between such applicants. Also, if the authorized bidders are different individuals employed by the same organization (*e.g.,* law firm or engineering firm or consulting firm), a violation similarly could occur. In such a case, at a minimum, applicants should certify on their applications that precautionary steps have been taken to prevent communication between authorized bidders and that applicants and their bidding agents will comply with 47 CFR 1.2105(c).

b. Prohibition Applies Until Down Payment Deadline

12. The 47 CFR 1.2105(c) prohibition on certain communications begins at the short-form application filing deadline and ends at the down payment deadline after the auction, which will be announced in a future public notice.

c. Prohibited Communications

13. Applicants should note that they must not communicate directly or

indirectly about bids or bidding strategy to other applicants in this auction. 47 CFR 1.2105(c) prohibits not only a communication about an applicant's own bids or bidding strategy, but also a communication of another applicant's bids or bidding strategy. While 47 CFR 1.2105(c) does not prohibit non-auction-related business negotiations among auction applicants, applicants must remain vigilant so as not to communicate directly or indirectly information that affects, or could affect, bids or bidding strategy, or the negotiation of settlement agreements.

14. The Commission remains vigilant about prohibited communications taking place in other situations. For example, the Commission has warned that prohibited communications concerning bids and bidding strategies may include communications regarding capital calls or requests for additional funds in support of bids or bidding strategies to the extent such communications convey information concerning the bids and bidding strategies directly or indirectly. Applicants are hereby placed on notice that public disclosure of information relating to bids, or bidding strategies, or to post auction market structures may violate 47 CFR 1.2105(c), including an applicant's use of the Commission's bidding system or a statement to the press, financial analysts or others.

d. Disclosure of Bidding Agreements and Arrangements

15. The Commission's rules do not prohibit applicants from entering into otherwise lawful bidding agreements before filing their short-form applications, as long as they disclose the existence of the agreement(s) in their short-form applications. If parties agree in principle on all material terms prior to the short-form application filing deadline, each party to the agreement must identify the other party or parties to the agreement on its short-form application under 47 CFR 1.2105(c), even if the agreement has not been reduced to writing. If the parties have not agreed in principle by the short-form filing deadline, they should not include the names of parties to discussions on their applications, and they may not continue negotiations, discussions or communications with any other applicants after the short-form application filing deadline.

e. Section 1.2105(c) Certification

16. By electronically submitting a short-form application, each applicant in Auction 90 certifies its compliance with 47 CFR 1.2105(c) and 73.5002. However, the Bureaus caution that merely filing a certifying statement as part of an application will not outweigh specific evidence that a prohibited communication has occurred, nor will it preclude the initiation of an investigation when warranted. The Commission has stated that it intends to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring. Any applicant found to have violated 47 CFR 1.2105(c) may be subject to sanctions.

f. Duty to Report Prohibited Communications: Reporting Procedure

17. 47 CFR 1.2105(c)(6) provides that any applicant that makes or receives a communication that appears to violate 47 CFR 1.2105(c) must report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs. The Commission has clarified that each applicant's obligation to report any such communication continues beyond the five-day period after the communication is made, even if the report is not made within the five-day period.

18. In addition, 47 CFR 1.65 requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission of any substantial change that may be of decisional significance to that application. Thus, 47 CFR 1.65 requires an auction applicant to notify the Commission of any substantial change to the information or certifications included in its pending short-form application. An applicant is therefore required by 47 CFR 1.65 to report to the Commission any communication the applicant has made to or received from another applicant after the short-form application filing deadline that affects or has the potential to affect bids or bidding strategy, unless such communication is made to or received from a party to an agreement identified under 47 CFR 1.2105(a)(2)(viii).

19. 47 CFR 1.65(a) and 1.2105(c) require applicants in competitive bidding proceedings to furnish additional or corrected information within five days of a significant occurrence, or to amend their short-form applications no more than five days after the applicant becomes aware of the need for amendment. These reporting requirements facilitate the auction process by making the information available promptly to all participants and enabling the Bureaus to act expeditiously on those changes when such action is necessary.

20. A party reporting any communication pursuant to 47 CFR 1.65, 1.2105(a)(2), or 1.2105(c)(6) must take care to ensure that any reports of prohibited communications do not themselves give rise to a violation of 47 CFR 1.2105(c). For example, a party's report of a prohibited communication could violate the rule by communicating prohibited information to other applicants through the use of Commission filing procedures that would allow such materials to be made available for public inspection.

21. 47 CFR 1.2105(c) requires parties to file only a single report and to file that report with Commission personnel expressly charged with administering the Commission auctions. This requirement is designed to minimize the risk of inadvertent dissemination of information in such reports. Pursuant to the amended rule, any reports required by 47 CFR 1.2105(c) must be filed consistent with the instructions set forth in the *Auction 90 Procedures Public Notice.* For Auction 90, such reports should be filed with the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available. Specifically, any such report should be submitted by e-mail to *auction90@fcc.gov* or delivered to the following address: Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW., Room 6423, Washington, DC 20554.

22. A party seeking to report such prohibited communications should consider submitting its report with a request that the report or portions of the submission be withheld from public inspection. Such parties also are encouraged to coordinate with the Auctions and Spectrum Access Division staff if they have any questions about the procedures for submitting such reports. Applicants must be aware that failure to comply with the Commission's rules can result in enforcement action.

g. Winning Bidders Must Disclose Terms of Agreements

23. Applicants that are winning bidders will be required to disclose in their long-form applications the specific terms, conditions, and parties involved in any bidding consortia, joint venture, partnership; or agreement, understanding, or other arrangement entered into relating to the competitive bidding process.

h. Additional Information Concerning Rule Prohibiting Certain Communications

24. A summary listing of documents issued by the Commission and the Bureaus addressing the application of 47 CFR 1.2105(c) may be found in Attachment D of the *Auction 90 Procedures Public Notice.*

i. Antitrust Laws

25. Applicants are also reminded that, regardless of compliance with the Commission's rules, they remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace. Compliance with the disclosure requirements of 47 CFR 1.2105(c) will not insulate a party from enforcement of the antitrust laws. For instance, a violation of the antitrust laws could arise out of actions taking place well before any party submitted a short-form application. If an applicant is found to have violated the antitrust laws or the Commission's rules in connection with its participation in the competitive bidding process, it may be subject to forfeiture of its upfront payment, down payment or full bid amount and may be prohibited from participating in future auctions, among other sanctions. *See* 47 CFR 1.2109(d).

iii. Due Diligence

26. Potential applicants are reminded that they are solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the construction permits for broadcast facilities they are seeking in this auction. Bidders are responsible for assuring themselves that, if they win a construction permit, they will be able to build and operate facilities in accordance with the Commission's rules. The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC construction permittee in a broadcast service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success. Applicants should perform their due diligence research and analysis before proceeding, as they would with any new business venture. Applicants are strongly encouraged to conduct their own research prior to Auction 90 in order to determine the existence of any pending administrative or judicial proceedings, including pending allocations rulemaking proceedings that might affect their decisions regarding participation in the auction. Participants in Auction 90 are strongly encouraged to continue such research throughout the auction. Applicants should perform due diligence to identify and consider all proceedings that may affect the construction permits being auctioned and that could have an impact on the availability of spectrum for Auction 90. Applicants are solely responsible for identifying associated risks and for investigating and evaluating the degree to which such matters may affect their ability to bid on, otherwise acquire, or make use of the construction permits available in Auction 90. In addition, potential applicants should review the *Auction 90 Procedures Public Notice* for additional guidance as they plan and undertake their due diligence efforts.

iv. Use of Integrated Spectrum Auction System

27. The Commission will make available a browser-based bidding system to allow bidders to participate in Auction 90 over the Internet using the Commission's Integrated Spectrum Auction System (ISAS or FCC Auction System). The Commission makes no warranty whatsoever with respect to the FCC Auction System. In no event shall the Commission, or any of its officers, employees, or agents, be liable for any damages whatsoever (including, but not limited to, loss of business profits, business interruption, loss of business information, or any other loss) arising out of or relating to the existence, furnishing, functioning, or use of the FCC Auction System that is accessible to qualified bidders in connection with this auction. Moreover, no obligation or liability will arise out of the Commission's technical, programming, or other advice or service provided in connection with the FCC Auction System.

v. Environmental Review Requirements

28. Permittees or licensees must comply with the Commission's rules regarding implementation of the National Environmental Policy Act and other Federal environmental statutes. The construction of a broadcast facility is a Federal action and the permittee or licensee must comply with the Commission's environmental rules for each such facility.

C. Auction Specifics

i. Auction Start Date

29. Bidding in Auction 90 will begin on Tuesday, February 15, 2011, as announced in the *Auction 90 Comment Public Notice.* The initial schedule for bidding will be announced by public notice at least one week before the start of the auction. Unless otherwise announced, bidding on all construction permits will be conducted on each business day until bidding has stopped on all construction permits.

ii. Bidding Methodology

30. The bidding methodology for Auction 90 will be simultaneous multiple round bidding. The Commission will conduct this auction over the Internet using the FCC Auction System, and telephonic bidding will be available as well. Qualified bidders are permitted to bid electronically via the Internet or by telephone. All telephone calls are recorded.

iii. Pre-Auction Dates and Deadlines

31. The following dates and deadlines apply:

Auction Tutorial Available (via Internet)—December 8, 2010
Short-Form Application (FCC Form 175) Filing Window Opens—December 8, 2010; 12 noon ET
Short-Form Application (FCC Form 175) Filing Window Deadline—December 15, 2010; prior to 6 p.m. ET
Upfront Payments (via wire transfer)—January 21, 2011; 6 p.m. ET
Mock Auction—February 11, 2011
Auction Begins—February 15, 2011

II. Short-Form Application (FCC Form 175) Requirements

A. General Information Regarding Short-Form Applications

32. An application to participate in an FCC auction, referred to as a short-form application or FCC Form 175, provides information used in determining whether the applicant is legally, technically, and financially qualified to participate in Commission auctions for licenses or permits. The short-form application is the first part of the Commission's two-phased auction application process. In the first phase of this process, parties desiring to participate in the auction must file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications. Each applicant must take seriously its duties and responsibilities and carefully determine before filing an application that the applicant has the legal, technical and financial resources to

participate in Auction 90, as well as construct and operate a broadcast station if the auction applicant becomes a licensee as a result of its participation in this auction. Eligibility to participate in bidding is based on the applicants' short-form applications and certifications as well as their upfront payments, as explained below. In the second phase of the process, winning bidders must file more comprehensive long-form applications.

33. Entities and individuals seeking construction permits available in Auction 90 must file a short-form application electronically via the FCC Auction System prior to 6 p.m. ET on December 15, 2010, following the procedures prescribed in Attachment B to the *Auction 90 Procedures Public Notice.* If an applicant claims eligibility for a bidding credit, the information provided in its FCC Form 175 will be used in determining whether the applicant is eligible for the claimed bidding credit. Applicants filing a short-form application are subject to the Commission's rules prohibiting certain communications beginning on the deadline for filing, as described above.

34. Applicants bear full responsibility for submitting accurate, complete and timely short-form applications. All applicants must certify on their short-form applications under penalty of perjury that they are legally, technically, financially, and otherwise qualified to hold a license. Applicants should read the instructions set forth in Attachment B to the *Auction 90 Procedures Public Notice* carefully and should consult the Commission's rules to ensure that all the information that is required under the Commission's rules is included with their short-form applications.

35. An entity may not submit more than one short-form application for a single auction. If a party submits multiple short-form applications, only one application may be accepted for filing.

36. Entities seeking to apply for a noncommercial educational station in the Auction 90 allotments should be aware that the Commission policy requires that an application for a noncommercial educational station that is mutually exclusive with any application for a commercial station will be returned as unacceptable for filing. Applications specifying the same television station construction permit are considered mutually exclusive.

37. Applicants also should note that submission of a short-form application (and any amendments thereto) constitutes a representation by the certifying official that he or she is an authorized representative of the applicant, that he or she has read the form's instructions and certifications, and that the contents of the application, its certifications, and any attachments are true and correct. Applicants are not permitted to make major modifications to their applications; such impermissible changes include a change of the certifying official to the application. Submission of a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution.

B. Permit Selection

38. An applicant must select the construction permits on which it wants to bid from the Eligible Permits list on its short-form application. Applicants will not be able to change their construction permit selections after the short-form application filing deadline. Applicants interested in participating in Auction 90 must have selected construction permit(s) available in this auction by the short-form application filing deadline. Applicants must review and verify their construction permit selections before the deadline for submitting short-form applications. The FCC Auction System will not accept bids from an applicant on construction permits that the applicant has not selected on its short-form application.

C. New Entrant Bidding Credit

39. To promote the objectives of section 309(j) and further its long-standing commitment to the diversification of broadcast facility ownership, the Commission adopted a tiered New Entrant Bidding Credit for broadcast auction applicants with no, or very few, other media interests.

40. The interests of the applicant and of any individuals or entities with an attributable interest in the applicant, in other media of mass communications are considered when determining an applicant's eligibility for the New Entrant Bidding Credit. In Auction 90, the bidder's attributable interests are determined as of the short-form application filing deadline. Thus, the applicant's maximum new entrant bidding credit eligibility will be determined as of the short-form application filing deadline. Applicants intending to divest a media interest or make any other ownership changes, such as resignation of positional interests, in order to avoid attribution for purposes of qualifying for the New Entrant Bidding Credit must have consummated such divestment transactions or have completed such ownership changes by no later than the short-form filing deadline. Prospective bidders are reminded, however, that events occurring after the short-form filing deadline, such as the acquisition of attributable interests in media of mass communications, may cause diminishment or loss of the bidding credit, and must be reported immediately.

41. Under traditional broadcast attribution rules, those entities or individuals with an attributable interest in a bidder include: (1) All officers and directors of a corporate bidder; (2) Any owner of 5 percent or more of the voting stock of a corporate bidder; (3) All partners and limited partners of a partnership bidder, unless the limited partners are sufficiently insulated; and (4) All members of a limited liability company, unless sufficiently insulated.

42. In cases where an applicant's spouse or close family member holds other media interests, such interests are not automatically attributable to the bidder. The Commission decides attribution issues in this context based on certain factors traditionally considered relevant. Applicants should note that the mass media attribution rules were revised in 1999.

43. Bidders are also reminded that, by the *New Entrant Bidding Credit Reconsideration Order,* the Commission further refined the eligibility standards for the New Entrant Bidding Credit, judging it appropriate to attribute the media interests held by very substantial investors in, or creditors of, an applicant claiming new entrant status. Specifically, the attributable mass media interests held by an individual or entity with an equity and/or debt interest in an applicant shall be attributed to that bidder for purposes of determining its eligibility for the New Entrant Bidding Credit, if the equity and debt interests, in the aggregate, exceed 33 percent of the total asset value of the applicant, even if such an interest is non-voting.

44. In the *Diversity Order,* the Commission relaxed the equity/debt plus ("EDP") attribution standard, to allow for higher investment opportunities in entities meeting the definition of eligible entities. An eligible entity is defined in Note 2(i) of 47 CFR 73.3555. Pursuant to the *Diversity Order,* the Commission will now allow the holder of an equity or debt interest in the applicant to exceed the above-noted 33 percent threshold without triggering attribution provided (1) the combined equity and debt in the eligible entity is less than 50 percent; or (2) the total debt in the eligible entity does not exceed 80 percent of the asset value, and the interest holder does not hold any equity interest, option, or promise

to acquire an equity interest in the eligible entity or any related entity.

45. Generally, media interests will be attributable for purposes of the New Entrant Bidding Credit to the same extent that such other media interests are considered attributable for purposes of the broadcast multiple ownership rules. However attributable interests held by a winning bidder in existing low power television, television translator or FM translator facilities will not be counted among the bidder's other mass media interests in determining its eligibility for a New Entrant Bidding Credit. A medium of mass communications is defined in 47 CFR 73.5008(b). *Full service noncommercial educational stations, on both reserved and nonreserved channels, are included among media of mass communications as defined in 47 CFR 73.5008(b).*

D. Application Requirements

46. In addition to the ownership information required pursuant to 47 CFR 1.2112, applicants seeking a New Entrant Bidding Credit are required to establish on their short-form applications that they satisfy the eligibility requirements to qualify for the bidding credit. In those cases, a certification under penalty of perjury must be provided in completing the applicant's short-form application. An applicant claiming that it qualifies for a 35 percent New Entrant Bidding Credit must certify that neither it nor any of its attributable interest holders have any attributable interests in any other media of mass communications. An applicant claiming that it qualifies for a 25 percent New Entrant Bidding Credit must certify that neither it nor any of its attributable interest holders has any attributable interests in more than three media of mass communications, and must identify and describe such media of mass communications.

i. Bidding Credits

47. Applicants that qualify for the New Entrant Bidding Credit, as specified in the applicable rule, are eligible for a bidding credit that represents the amount by which a bidder's winning bid is discounted. The size of a New Entrant Bidding Credit depends on the number of ownership interests in other media of mass communications that are attributable to the bidder-entity and its attributable interest-holders: (1) A 35 percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, has no attributable interest in any other media of mass communications, as defined in 47 CFR 73.5008; (2) A 25 percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, has an attributable interest in no more than three mass media facilities, as defined in 47 CFR 73.5008; and (3) No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the broadcast station proposed in the auction, as defined in 47 CFR 73.5007(b), or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, has attributable interests in more than three mass media facilities.

48. Bidding credits are not cumulative; qualifying applicants receive either the 25 percent or the 35 percent bidding credit, but not both. Attributable interests are defined in 47 CFR 73.3555 and note 2 of that section. Applicants should note that unjust enrichment provisions apply to a winning bidder that utilizes a bidding credit and subsequently seeks to assign or transfer control of its license or construction permit to an entity not qualifying for the same level of bidding credit.

E. Disclosure of Bidding Arrangements

49. Applicants will be required to identify in their short-form application all parties with whom they have entered into any agreements, arrangements, or understandings of any kind relating to the construction permits being auctioned, including any agreements relating to post-auction market structure.

50. Applicants also will be required to certify under penalty of perjury in their short-form applications that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified in the application, regarding the amount of their bids, bidding strategies, or the particular construction permits on which they will or will not bid. If an applicant has had discussions, but has not reached an agreement by the short-form application filing deadline, it should not include the names of parties to the discussions on its application and may not continue such discussions with any applicants after the deadline.

51. After the filing of short-form applications, the Commission's rules do not prohibit a party holding a non-controlling, attributable interest in one applicant from acquiring an ownership interest in or entering into a joint bidding arrangement with other applicants, provided that: (i) The attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has entered into a joint bidding arrangement; and (ii) the arrangements do not result in a change in control of any of the applicants. While 47 CFR 1.2105(c) of the rules does not prohibit non-auction-related business negotiations among auction applicants, applicants are reminded that certain discussions or exchanges could touch upon impermissible subject matters because they may convey pricing information and bidding strategies. Such subject areas include, but are not limited to, issues such as management sales, local marketing agreements, rebroadcast agreements, and other transactional agreements. Further, compliance with the disclosure requirements of 47 CFR 1.2105(c) will not insulate a party from enforcement of the antitrust laws.

F. Ownership Disclosure Requirements

52. All applicants must comply with the uniform Part 1 ownership disclosure standards and provide information required by 47 CFR 1.2105 and 1.2112. Specifically, in completing the short-form application, applicants will be required to fully disclose information on the real party- or parties-in-interest and ownership structure of the applicant, including both direct and indirect ownership interests of 10 percent or more. The ownership disclosure standards for the short-form application are prescribed in 47 CFR 1.2105 and 1.2112. Each applicant is responsible for information submitted in its short-form application being complete and accurate.

53. In certain circumstances, an applicant's most current ownership information on file with the Commission, if in an electronic format compatible with the short-form application (FCC Form 175) (such as information submitted in an on-line FCC Form 602 or in an FCC Form 175 filed for a previous auction using ISAS) will automatically be entered into the applicant's short-form application. Applicants are responsible for ensuring that the information submitted in their short-form application for Auction 90 is complete and accurate. Accordingly, applicants should carefully review any information automatically entered to confirm that it is complete and accurate as of the deadline for filing the short-form application.

G. Provisions Regarding Former and Current Defaulters

54. Current defaulters or delinquents are not eligible to participate in Auction 90, but former defaulters or delinquents can participate so long as they are otherwise qualified and make upfront payments that are fifty percent more than the normal upfront payment amounts. An applicant is considered a current defaulter or a current delinquent when it, any of its affiliates, any of its controlling interests, or any of the affiliates of its controlling interests, are in default on any payment for any Commission construction permits or licenses (including down payments) or are delinquent on any non-tax debt owed to any Federal agency as of the filing deadline for short-form applications. An applicant is considered a former defaulter or a former delinquent when it, any of its affiliates, any of its controlling interests, or any of the affiliates of its controlling interests, have defaulted on any Commission construction permit or license or been delinquent on any non-tax debt owed to any Federal agency, but have since remedied all such defaults and cured all of the outstanding non-tax delinquencies.

55. On the short-form application, an applicant must certify under penalty of perjury that it, its affiliates, its controlling interests, and the affiliates of its controlling interests, as defined by 47 CFR 1.2110 are not in default on any payment for a Commission construction permit or license (including down payments) and that it is not delinquent on any non-tax debt owed to any Federal agency. Each applicant must also state under penalty of perjury whether it, its affiliates, its controlling interests, and the affiliates of its controlling interests, have ever been in default on any Commission construction permit or license or have ever been delinquent on any non-tax debt owed to any Federal agency. Prospective applicants are reminded that submission of a false certification to the Commission is a serious matter that may result in severe penalties, including monetary forfeitures, license revocations, exclusion from participation in future auctions, and/or criminal prosecution. These statements and certifications are prerequisites to submitting an application to participate in an FCC auction.

56. Applicants are encouraged to review the Bureaus' previous guidance on default and delinquency disclosure requirements in the context of the short-form application process. For example, it has been determined that, to the extent that Commission rules permit late payment of regulatory or application fees accompanied by late fees, such debts will become delinquent for purposes of 47 CFR 1.2105(a) and 1.2106(a) only after the expiration of a final payment deadline. Therefore, with respect to regulatory or application fees, the provisions of 47 CFR 1.2105(a) and 1.2106(a) regarding default and delinquency in connection with competitive bidding are limited to circumstances in which the relevant party has not complied with a final Commission payment deadline. Parties are also encouraged to consult with the Commission's Office of Managing Director or the Wireless Telecommunications Bureau's Auctions and Spectrum Access Division staff if they have any questions about default and delinquency disclosure requirements.

57. The Commission considers outstanding debts owed to the United States Government, in any amount, to be a serious matter. The Commission adopted rules, including a provision referred to as the red light rule, that implement the Commission's obligations under the Debt Collection Improvement Act of 1996, which governs the collection of claims owed to the United States. Under the red light rule, the Commission will not process applications and other requests for benefits filed by parties that have outstanding debts owed to the Commission. In the same rulemaking order, the Commission explicitly declared, however, that the Commission's competitive bidding rules are not affected by the red light rule. As a consequence, the Commission's adoption of the red light rule does not alter the applicability of any of the Commission's competitive bidding rules, including the provisions and certifications of 47 CFR 1.2105 and 1.2106, with regard to current and former defaults or delinquencies.

58. Applicants are reminded, however, that the Commission's Red Light Display System, which provides information regarding debts currently owed to the Commission, may not be determinative of an auction applicant's ability to comply with the default and delinquency disclosure requirements of 47 CFR 1.2105. Thus, while the red light rule ultimately may prevent the processing of long-form applications by auction winners, an auction applicant's lack of current "red light" status is not necessarily determinative of its eligibility to participate in an auction or of its upfront payment obligation.

59. Moreover, prospective applicants in Auction 90 should note that any long-form applications filed after the close of bidding will be reviewed for compliance with the Commission's red light rule, and such review may result in the dismissal of a winning bidder's long-form application.

H. Optional Applicant Status Identification

60. Applicants owned by members of minority groups and/or women, as defined in 47 CFR 1.2110(c)(3), and rural telephone companies, as defined in 47 CFR 1.2110(c)(4), may identify themselves regarding this status in filling out their short-form applications. This applicant status information is collected for statistical purposes only and assists the Commission in monitoring the participation of designated entities in its auctions.

I. Minor Modifications to Short-Form Applications

61. After the deadline for filing initial applications, an Auction 90, applicant is permitted to make only minor changes to its application. Permissible minor changes include, among other things, deletion and addition of authorized bidders (to a maximum of three) and revision of addresses and telephone numbers of the applicants and their contact persons. An applicant is not permitted to make a major modification to its application (*e.g.,* change their construction permit selections, change control of the applicant, change the certifying official, claim eligibility for a higher percentage of bidding credit or change their identification of the application's proposed facilities as noncommercial educational) after the initial application filing deadline. Thus, any change in control of an applicant, resulting from a merger for example, will be considered a major modification to the applicant's application, which will consequently be dismissed.

62. If an applicant wishes to make permissible minor changes to its short-form application, such changes should be made electronically to its short-form application using the FCC Auction System whenever possible. Applicants are reminded to click on the SUBMIT button in the FCC Auction System for the changes to be submitted and considered by the Commission. After the revised application has been submitted, a confirmation page will be displayed that states the submission time, submission date, and a unique file number.

63. An applicant cannot use the FCC Auction System outside of the initial and resubmission filing windows to make changes to its short-form application other than administrative

changes (*e.g.* changing certain contact information or the name of an authorized bidder). If these or other permissible minor changes need to be made outside of these windows, the applicant must submit a letter briefly summarizing the changes and subsequently update its short-form application in ISAS once the system is available. Moreover, after the filing window has closed, ISAS will not permit applicants to make certain changes, such as the applicant's legal classification and the identification of the application's proposed facilities as noncommercial educational.

64. Any letter describing changes to an applicant's short-form application should be submitted by e-mail to *auction90@fcc.gov.* The e-mail summarizing the changes must include a subject or caption referring to Auction 90 and the name of the applicant.

65. Any application amendment and related statements of fact must be certified by (1) the applicant, if the applicant is an individual; (2) one of the partners if the applicant is a partnership; (3) an officer, director, or duly authorized employee, if the applicant is a corporation; (4) a member who is an officer, if the applicant is an unincorporated association; (5) the trustee, if the applicant is an amateur radio service club; or (6) a duly elected or appointed official who is authorized to make such certifications under the laws of the applicable jurisdiction, if the applicant is a governmental entity.

66. Applicants must not submit application-specific material through the Commission's Electronic Comment Filing System (ECFS), which was used for submitting comments regarding Auction 90.

J. Maintaining Current Information in Short-Form Applications

67. 47 CFR 1.65 and 1.2105(b) require an applicant to maintain the accuracy and completeness of information in its pending application and to furnish additional or corrected information to the Commission within five days of a significant occurrence, or to amend its short-form application no more than five days after the applicant becomes aware of the need for amendment. Changes that cause a loss of or reduction in the percentage of bidding credit specified on the originally submitted application must be reported immediately. For example, if ownership changes result in the attribution of new interest holders that affect the applicant's qualifications for a new entrant bidding credit, such information must be clearly stated in the applicant's amendment. Events occurring after the application filing deadline, such as the acquisition of attributable interests in media of mass communications, may also cause diminishment or loss of the bidding credit, and must be reported immediately. If an amendment reporting substantial changes is a major amendment, as defined by 47 CFR 1.2105, the major amendment will not be accepted and may result in the dismissal of the application. After the application filing deadline, applicants may make only minor changes to their applications.

68. After the application filing deadline, applicants may make only minor changes to their applications. Applicants must click on the SUBMIT button in the FCC Auction System for any changes to be submitted and considered by the Commission. If a submission in compliance with 47 CFR 1.65 is needed outside of the initial and resubmission filing windows, applicants must submit a brief letter summarizing the changes in accordance with the instructions specified in the *Auction 90 Procedures Public Notice.*

III. Pre-Auction Procedures

A. Online Auction Tutorial—Available December 8, 2010

69. On Wednesday, December 8, 2010, the Commission will post an educational auction tutorial on the Auction 90 Web page for prospective bidders to familiarize themselves with the auction process. This online tutorial will provide information about pre-auction procedures, completing short-form applications, auction conduct, the FCC Auction Bidding System, auction rules, and broadcast services rules. The tutorial will also provide an avenue to ask FCC staff questions about the auction, auction procedures, filing requirements, and other matters related to this auction.

70. The Auction 90 online tutorial replaces the live bidder seminars that have been offered for most previous auctions. The Bureaus believe parties interested in participating in Auction 90 will find this interactive, online tutorial a more efficient and effective way to further their understanding of the auction process.

71. The auction tutorial will be accessible from the FCC's Auction 90 Web page at *http://wireless.fcc.gov/auctions/90/* through an Auction Tutorial link. Once posted, this tutorial will remain available for reference in connection with the procedures outlined in the *Auction 90 Procedures Public Notice* and accessible anytime.

B. Short-Form Applications—Due Prior to 6 p.m. ET on December 15, 2010

72. In order to be eligible to bid in this auction, applicants must first follow the procedures set forth in Attachment B to the *Auction 90 Procedures Public Notice* to submit a short-form application (FCC Form 175) electronically via the FCC Auction System. This short-form application must be submitted through the FCC Auction System prior to 6 p.m. ET on December 15, 2010. Late applications will not be accepted. There is no application fee required when filing an FCC Form 175, but an applicant must submit a timely upfront payment to be eligible to bid.

C. Application Processing and Minor Corrections

73. After the deadline for filing FCC Form 175 applications, the Commission will process all timely submitted applications to determine which are complete, and subsequently will issue a public notice identifying (1) those applications that are complete; (2) those applications that are rejected; and (3) those applications that are incomplete because of minor defects that may be corrected. The public notice will include the deadline for resubmitting corrected applications.

74. Non-mutually exclusive applications will not proceed to auction, but will proceed in accordance with instructions set forth in a public notice. All mutually exclusive applications will be considered under the relevant procedures for conflict resolution. Mutually exclusive applications proposing commercial stations will proceed to auction. In the *NCE Second Report and Order,* 68 FR 26220, May 15, 2003, the Commission held that applications for NCE full power television stations on nonreserved spectrum, filed during a television filing window, will be returned as unacceptable for filing if mutually exclusive with any application for a commercial station. Accordingly, if an FCC Form 175 filed during the Auction 90 filing window identifying the application's proposed station as noncommercial educational is mutually exclusive with any application filed during that window by an applicant for a commercial station, the former will be returned as unacceptable for filing.

75. After the application filing deadline on December 15, 2010, applicants continue to be able to make only minor corrections to their applications. Applicants will not be permitted to make major modifications to their applications (*e.g.,* change their construction permit selections, change

control of the applicant, change the certifying official, claim eligibility for a higher percentage of bidding credit, or change their self-identification as NCE).

76. Applicants should be aware the Commission staff will communicate only with an applicant's contact person or certifying official, as designated on the applicant's short-form application, unless the applicant's certifying official or contact person notifies the Commission in writing that applicant's counsel or other representative is authorized to speak on its behalf. Authorizations may be sent by e-mail to *auction90@fcc.gov.*

D. Upfront Payments—Due January 21, 2011

77. In order to be eligible to bid in this auction, applicants must submit an upfront payment accompanied by an FCC Remittance Advice Form (FCC Form 159). We note that all applicants for permits must make an upfront payment in order to qualify as a bidder and obtain a permit, whether or not any other applicant in their MX groups becomes a qualified bidder. After completing its short-form application, an applicant will have access to an electronic version of the FCC Form 159 that can be printed and sent by fax to U.S. Bank in St. Louis, Missouri. All upfront payments must be made as instructed in this Public Notice and must be received in the proper account at U.S. Bank before 6 p.m. ET on January 21, 2011.

i. Making Upfront Payments by Wire Transfer

78. Wire transfer payments must be received before 6 p.m. ET on January 21, 2011. No other payment method is acceptable. To avoid untimely payments, applicants should discuss arrangements (including bank closing schedules) with their bankers several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline.

79. At least one hour before placing the order for the wire transfer (but on the same business day), applicants must fax a completed FCC Form 159 (Revised 2/03) to U.S. Bank at (314) 418–4232. On the fax cover sheet, applicants should write Wire Transfer—Auction Payment for Auction 90. In order to meet the Commission's upfront payment deadline, an applicant's payment must be credited to the Commission's account for Auction 90 before the deadline. The applicant is responsible for obtaining confirmation from its financial institution that U.S. Bank has timely received its upfront payment and deposited it in the proper account.

80. Please note the following information regarding upfront payments: (1) All payments must be made in U.S. dollars; (2) All payments must be made by wire transfer; (3) Upfront payments for Auction 90 go to a lockbox number different from the lockboxes used in previous FCC auctions; and (4) Failure to deliver a sufficient upfront payment as instructed by the January 21, 2011, deadline will result in dismissal of the short-form application and disqualification from participation in the auction.

ii. FCC Form 159

81. A completed FCC Remittance Advice Form (FCC Form 159, Revised 2/03) must be faxed to U.S. Bank to accompany each upfront payment. Proper completion of FCC Form 159 is critical to ensuring correct crediting of upfront payments. Detailed instructions for completion of FCC Form 159 are included in Attachment C to the *Auction 90 Procedures Public Notice.* An electronic pre-filled version of the FCC Form 159 is available after submitting the FCC Form 175. Payers using the pre-filled FCC Form 159 are responsible for ensuring that all of the information on the form, including payment amounts, is accurate. The FCC Form 159 can be completed electronically, but must be filed with U.S. Bank by fax.

iii. Upfront Payments and Bidding Eligibility

82. The Commission has delegated to the Bureaus the authority and discretion to determine appropriate upfront payments for each auction. Upfront payments help deter frivolous or insincere bidding, and provide the Commission with a source of funds in the event that the bidder incurs liability during the auction.

83. Applicants that are former defaulters, as described above, must pay upfront payments 50 percent greater than non-former defaulters. For purposes of this calculation, the applicant includes the applicant itself, its affiliates, its controlling interests, and affiliates of its controlling interests, as defined by 47 CFR 1.2110 of the Commission's rules.

84. Applicants must make upfront payments sufficient to obtain bidding eligibility on the construction permits on which they will bid. The Bureaus proposed, in the *Auction 90 Comment Public Notice,* that the amount of the upfront payment would determine a bidder's initial bidding eligibility, the maximum number of bidding units on which a bidder may place bids. Under the Bureaus' proposal, in order to bid on a particular construction permit, a qualified bidder must have selected the construction permit on its FCC Form 175 and must have a current eligibility level that meets or exceeds the number of bidding units assigned to that construction permit. At a minimum, therefore, an applicant's total upfront payment must be enough to establish eligibility to bid on at least one of the construction permits selected on its FCC Form 175, or else the applicant will not be eligible to participate in the auction. An applicant does not have to make an upfront payment to cover all construction permits the applicant selected on its FCC Form 175, but only enough to cover the maximum number of bidding units that are associated with construction permits on which the bidder wishes to place bids and hold provisionally winning bids at any given time.

85. In the *Auction 90 Comment Public Notice,* the Bureaus proposed upfront payments for each construction permit taking into account various factors related to the efficiency of the auction process and the potential value of similar spectrum and sought comment on this proposal. The Bureaus received no comments on the proposal that the upfront payment amount would determine a bidder's initial bidding eligibility or in response to the specific upfront payments proposed in the *Auction 90 Comment Public Notice.* Therefore, the Bureaus adopt the upfront payments and bidding units proposed for each construction permit in Auction 90. Upfront payment amounts and bidding units are set forth in Attachment A of the *Auction 90 Procedures Public Notice.*

86. In calculating its upfront payment amount, an applicant should determine the maximum number of bidding units on which it may wish to be active (bid on or hold provisionally winning bids on) in any single round, and submit an upfront payment amount covering that number of bidding units. In order to make this calculation, an applicant should add together the bidding units for all construction permits on which it seeks to be active in any given round. Applicants should check their calculations carefully, as there is no provision for increasing a bidder's eligibility after the upfront payment deadline.

87. If an applicant is a former defaulter, it must calculate its upfront payment for all of its identified construction permits by multiplying the number of bidding units on which it wishes to be active by 1.5. In order to

calculate the number of bidding units to assign to former defaulters, the Commission will divide the upfront payment received by 1.5 and round the result up to the nearest bidding unit.

E. Applicant's Wire Transfer Information for Purposes of Refunds of Upfront Payments

88. To ensure that refunds of upfront payments are processed in an expeditious manner, the Commission is requesting that all pertinent information listed below be supplied. Applicants can provide the information electronically during the initial short-form application filing window after the form has been submitted. (Applicants are reminded that information submitted as part of an FCC Form 175 will be available to the public; for that reason, wire transfer information should not be included in an FCC Form 175.) Wire Transfer Instructions can also be manually faxed to the FCC, Financial Operations, Auctions Accounting Group, Attn: Gail Glasser, at (202) 418–2843.

F. Auction Registration

89. Approximately ten days before the auction, the Bureaus will issue a public notice announcing all qualified bidders for the auction. Qualified bidders are those applicants with submitted FCC Form 175 applications that are deemed timely-filed, accurate, and complete, provided that such applicants have timely submitted an upfront payment that is sufficient to qualify them to bid.

90. All qualified bidders are automatically registered for the auction. Registration materials will be distributed prior to the auction by overnight mail. The mailing will be sent only to the contact person at the contact address listed in the FCC Form 175 and will include the SecurID® tokens that will be required to place bids, the Integrated Spectrum Auction System (ISAS) Bidder's Guide, and the Auction Bidder Line phone number.

91. Qualified bidders that do not receive this registration mailing will not be able to submit bids. Therefore, any qualified bidder that has not received this mailing by noon on Wednesday, February 9, 2011, should call (717) 338–2868. Receipt of this registration mailing is critical to participating in the auction, and each applicant is responsible for ensuring it has received all of the registration material.

92. In the event that SecurID® tokens are lost or damaged, only a person who has been designated as an authorized bidder, the contact person, or the certifying official on the applicant's short-form application may request replacements. Qualified bidders requiring the replacement of these items must call Technical Support at (877) 480–3201, option nine; (202) 414–1250; or (202) 414–1255 (TTY).

G. Remote Electronic Bidding

93. The Commission will conduct this auction over the Internet, and telephonic bidding will be available as well. Only qualified bidders are permitted to bid. Each applicant should indicate its bidding preference—electronic or telephonic—on its FCC Form 175. In either case, each authorized bidder must have its own SecurID® token, which the Commission will provide at no charge. Each applicant with one authorized bidder will be issued two SecurID® tokens, while applicants with two or three authorized bidders will be issued three tokens. For security purposes, the SecurID® tokens, the telephonic bidding telephone number, and the Integrated Spectrum Auction System (ISAS) Bidder's Guide are only mailed to the contact person at the contact address listed on the FCC Form 175. Each SecurID® token is tailored to a specific auction. SecurID® tokens issued for other auctions or obtained from a source other than the FCC will not work for Auction 90.

H. Mock Auction—February 11, 2011

94. All qualified bidders will be eligible to participate in a mock auction on Friday, February 11, 2011. The mock auction will enable qualified bidders to become familiar with the FCC Auction System prior to the auction. Participation by all bidders is strongly recommended. Details will be announced by public notice.

IV. Auction Event

95. The first round of bidding for Auction 90 will begin on Tuesday, February 15, 2011. The initial bidding schedule will be announced in a public notice listing the qualified bidders, which is to be released approximately 10 days before the start of the auction.

A. Auction Structure

i. Simultaneous Multiple Round Auction

96. In the *Auction 90 Comment Public Notice,* the Bureaus proposed to auction the two construction permits in Auction 90 using the Commission's standard simultaneous multiple-round auction format. This type of auction offers every construction permit for bid at the same time and consists of successive bidding rounds in which eligible bidders may place bids on individual construction permits. A bidder may bid on, and potentially win, any number of construction permits. The Bureaus received no comment on this proposal; this proposal is adopted. Unless otherwise announced, bids will be accepted on all construction permits in each round of the auction until bidding stops on every construction permit.

ii. Eligibility and Activity Rules

97. The Bureaus will use upfront payments to determine initial (maximum) eligibility (as measured in bidding units) for Auction 90. The amount of the upfront payment submitted by a bidder determines initial bidding eligibility, the maximum number of bidding units on which a bidder may be active. Each construction permit is assigned a specific number of bidding units listed in Attachment A of the *Auction 90 Procedures Public Notice.* Bidding units for a given construction permit do not change as prices rise during the auction. A bidder's upfront payment is not attributed to specific construction permits. Rather, a bidder may place bids on any of the construction permits selected on its short-form application as long as the total number of bidding units associated with those construction permits does not exceed its current eligibility. Eligibility cannot be increased during the auction; it can only remain the same or decrease. Thus, in calculating its upfront payment amount, an applicant must determine the maximum number of bidding units it may wish to bid on or hold provisionally winning bids on in any single round, and submit an upfront payment amount covering that total number of bidding units. At a minimum, an applicant's upfront payment must cover the bidding units for at least one of the construction permits it selected on its short-form application. The total upfront payment does not affect the total dollar amount a bidder may bid on any given construction permit.

98. In order to ensure that an auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction.

99. A bidder's activity level in a round is the sum of the bidding units associated with any construction permits covered by new and provisionally winning bids. A bidder is considered active on a construction permit in the current round if it is either

the provisionally winning bidder at the end of the previous bidding round or if it submits a bid in the current round.

100. The Bureaus received no comments on the proposed eligibility and activity rules. Therefore, in order to ensure that the auction closes within a reasonable period of time, the Bureaus adopt the proposal with the following activity requirement: A bidder is required to be active on 100 percent of its current eligibility during each round of the auction. That is, a bidder must place a bid (or bids) and/or have a provisionally winning bid (or bids) during each round of the auction. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.

iii. Activity Rule Waivers

101. In the *Auction 90 Comment Public Notice,* the Bureaus proposed that each bidder in the auction be provided with three activity rule waivers. The Bureaus received no comments on this issue. Therefore, the Bureaus adopt this proposal to provide each bidder with three activity rule waivers.

102. Bidders may use an activity rule waiver in any round during the course of the auction. Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required minimum activity level. The FCC Auction System will automatically apply a waiver at the end of any bidding round where a bidder's activity level is below the minimum required unless (1) there are no activity rule waivers available or (2) the bidder overrides the automatic application of a waiver by reducing eligibility. If a bidder has no waivers remaining and does not satisfy the activity requirement, the FCC Auction System will permanently reduce the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction. It is important for bidders to understand that applying a waiver is irreversible. Once a bidder submits a proactive waiver, the bidder cannot unsubmit the waiver even if the round has not yet ended.

iv. Auction Stopping Rules

103. For Auction 90, the Bureaus proposed to employ a simultaneous stopping rule approach. A simultaneous stopping rule means that all construction permits remain available for bidding until bidding closes simultaneously on all construction permits. More specifically, bidding will close simultaneously on all construction permits after the first round in which no bidder submits any new bids or applies a proactive waiver.

104. The Bureaus also sought comment on three alternative versions of the simultaneous stopping rule for Auction 90. The Bureaus received no comment on these proposals and adopt them for Auction 90 as specified in the *Auction 90 Comment Public Notice.* The Bureaus retain the discretion to exercise any of these options with or without prior announcement during the auction.

v. Auction Delay, Suspension, or Cancellation

105. In the *Auction 90 Comment Public Notice,* the Bureaus proposed that, by public notice or by announcement during the auction, they may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. The Bureaus received no comment on this issue. Because this approach to notification of delay during an auction has proven effective in resolving exigent circumstances in previous auctions, the Bureaus adopt these proposed rules regarding auction delay, suspension, or cancellation.

B. Bidding Procedures

i. Round Structure

106. The initial schedule of bidding rounds will be announced in the public notice listing the qualified bidders, which is released approximately 10 days before the start of the auction. Each bidding round is followed by the release of round results. Multiple bidding rounds may be conducted in a given day.

107. The Bureaus have the discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The Bureaus may increase or decrease the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors.

ii. Reserve Price and Minimum Opening Bids

108. Section 309(j) of the Communications Act of 1934, as amended, calls upon the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid established when applications for FCC licenses or construction permits are subject to auction (*i.e.,* because they are mutually exclusive), unless the Commission determines that a reserve price or minimum opening bid is not in the public interest. Consistent with this mandate, the Commission directed the Bureaus to seek comment on the use of a minimum opening bid and/or reserve price prior to the start of each auction.

109. In the *Auction 90 Comment Public Notice*, the Bureaus did not propose to establish a reserve price for the construction permits to be offered in Auction 90. This is consistent with policy applied in earlier broadcast spectrum auctions. The Bureaus, however, did propose to establish minimum opening bids for each construction permit, reasoning that a minimum opening bid, which has been used in other auctions, is an effective bidding tool for accelerating the competitive bidding process. Specifically, a minimum opening bid was proposed for each construction permit by taking into account various factors relating to the efficiency of the auction and the potential value of the spectrum, including the type of service and class of facility offered, market size, population covered by the proposed VHF commercial television station and any other relevant factors. The Bureaus sought comment on the proposed minimum opening bids. A Commenter requests that the minimum opening bid for the new television channel in Seaford, Delaware, be lowered from the proposed $200,000 to $50,000. The Commenter points out that Seaford, with a population of roughly 10,000 people, is in the Salisbury Designated Market Area, and that Atlantic City is in the Philadelphia, PA DMA. The Commenter suggests that the minimum opening bid should be lower for the Seaford permit than for the Atlantic City permit on account of the larger population of the Philadelphia DMA. On that basis, the Commenter concludes that the opening bid for Seaford, DE should be less than a station in the Philadelphia market. The Bureaus' are not persuaded that the minimum opening bid previously proposed for the Seaford construction permit is too high. In Commission auctions, minimum opening bids are intended to serve as useful starting points for bidding. Based on the Bureaus' experience using minimum opening bids in other auctions, they believe that minimum opening bids speed the course of the

auction and ensure that valuable assets are not sold for nominal prices, without unduly interfering with the efficient awarding of construction permits. Accordingly, the Bureaus adopt the minimum opening bid amounts as proposed in the *Auction 90 Comment Public Notice.*

110. The specific minimum opening bid amounts for the construction permits available in Auction 90 are set forth below and in Attachment A to the *Auction 90 Procedures Public Notice.*

iii. Bid Amounts

111. In the *Auction 90 Comment Public Notice*, the Bureaus proposed that in each round, eligible bidders be able to place a bid on a given construction permit in any of up to nine different amounts. Under the proposal, the FCC Auction System interface will list the nine acceptable bid amounts for each construction permit. The Bureaus received no comments on this proposal; therefore, this proposal is adopted.

112. The first of the acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid amount until there is a provisionally winning bid on the construction permit. After there is a provisionally winning bid for a permit, the minimum acceptable bid amount will be a percentage higher.

113. In the *Auction 90 Comment Public Notice*, the Bureaus proposed to use a minimum acceptable bid percentage of 10 percent. The Bureaus did not receive any comments on this proposal. The Bureaus' experience in previous broadcast auctions assures that a minimum acceptable bid percentage of 10 percent is sufficient to ensure active bidding. Therefore, the Bureaus will begin the auction with a minimum acceptable bid percentage of 10 percent.

114. The eight additional bid amounts are calculated using the minimum acceptable bid amount and a bid increment percentage. In the *Auction 90 Comment Public Notice*, the Bureaus proposed to use a bid increment percentage of 5 percent, and received no comment on this issue. The Bureaus believe that a bid increment percentage of 5 percent will give bidders the flexibility to speed up the pace of the auction, if appropriate. The Bureaus therefore adopt this proposal, and will begin the auction with a bid increment percentage of 5 percent.

115. The Bureaus proposed to retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid percentage, the bid increment percentage, and the number of acceptable bid amounts if the Bureaus determine that circumstances so dictate. Further, the Bureaus proposed to retain the discretion to do so on a construction permit-by-construction permit basis. The Bureaus also proposed to retain the discretion to limit (a) the amount by which a minimum acceptable bid for a construction permit may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount.

116. The Bureaus did not receive any comments on their proposal to retain the discretion to change bid amounts if they determine that circumstances so dictate. The Bureaus adopt this proposal. If the Bureaus exercise this discretion, they will alert bidders by announcement in the FCC Auction System during the auction.

iv. Provisionally Winning Bids

117. At the end of each bidding round, a provisionally winning bid will be determined based on the highest bid amount received for each construction permit. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the same construction permit at the close of a subsequent round. Provisionally winning bids at the end of the auction become the winning bids. Bidders are reminded that provisionally winning bids count toward activity for purposes of the activity rule.

118. In the *Auction 90 Comment Public Notice*, the Bureaus proposed to use a random number generator to select a single provisionally winning bid in the event of identical high bid amounts being submitted on a construction permit in a given round (*i.e.*, tied bids). No comments were received on this proposal.

119. Hence, the Bureaus adopt the proposal. The FCC Auction System will assign a random number to each bid upon submission. The tied bid with the highest random number wins the tiebreaker, and becomes the provisionally winning bid. Bidders, regardless of whether they hold a provisionally winning bid, can submit higher bids in subsequent rounds. However, if the auction were to end with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid.

v. Bidding

120. All bidding will take place remotely either through the FCC Auction System or by telephonic bidding. There will be no on-site bidding during Auction 90. Please note that telephonic bid assistants are required to use a script when entering bids placed by telephone. Telephonic bidders are therefore reminded to allow sufficient time to bid by placing their calls well in advance of the close of a round. The length of a call to place a telephonic bid may vary; please allow a minimum of ten minutes.

121. A bidder's ability to bid on specific construction permits is determined by two factors: (1) The construction permits selected on the bidder's FCC Form 175 and (2) the bidder's eligibility. The bid submission screens will allow bidders to submit bids on only those construction permits the bidder selected on its FCC Form 175.

122. In order to access the bidding function of the FCC Auction System, bidders must be logged in during the bidding round using the passcode generated by the SecurID® token and a personal identification number (PIN) created by the bidder. Bidders are strongly encouraged to print a round summary for each round after they have completed all of their activity for that round.

123. In each round, eligible bidders will be able to place bids on a given construction permit in any of up to nine pre-defined bid amounts. For each construction permit, the FCC Auction System will list the acceptable bid amounts in a drop-down box. Bidders use the drop-down box to select from among the acceptable bid amounts. The FCC Auction System also includes an upload function that allows bidders to upload text files containing bid information.

124. Until a bid has been placed on a construction permit, the minimum acceptable bid amount for that construction permit will be equal to its minimum opening bid amount. Once there is a bid on a construction permit, the minimum acceptable bid for that construction permit for the following round will be determined.

125. During a round, an eligible bidder may submit bids for as many construction permits as it wishes (provided that it has enough bidding eligibility), remove bids placed in the current bidding round, or permanently reduce eligibility. If a bidder submits multiple bids for the same construction permit in the same round, the system takes the last bid entered as that bidder's bid for the round. Bidders should note that the bidding units associated with construction permits for which the bidder has removed bids do not count toward the bidder's current activity.

vi. Bid Removal and Bid Withdrawal

126. In the *Auction 90 Comment Public Notice*, the Bureaus proposed bid removal procedures. The Bureaus proposed to provide each bidder with the option of removing any bids placed in a round provided that such bids are removed before the close of that bidding round. By using the remove bids function in the FCC Auction System, a bidder may effectively unsubmit any bid placed within that round. A bidder removing a bid placed in the same round is not subject to withdrawal payments. Removing a bid will affect a bidder's activity for the round in which it is removed, *i.e.*, a bid that is removed does not count toward bidding activity. The Bureaus received no comments on this issue of bid removals. These removal procedures will enhance bidder flexibility during the auction. Therefore, the Bureaus adopt their proposed procedures to permit bid removals for Auction 90.

127. Once a round closes, a bidder may no longer remove a bid. In the *Auction 90 Comment Public Notice*, the Bureaus proposed to prohibit bidders from withdrawing any bids after the round in which bids were placed has closed. This proposal was made in recognition that bid withdrawals, particularly those made late in this auction, could result in delays in licensing of digital broadcast television service to the public in these two markets. The Bureaus received no comments on the issue of bid withdrawal. Accordingly, the Bureaus will prohibit bid withdrawals in Auction 90. Bidders are cautioned to select bid amounts carefully because no bid withdrawals will be allowed in Auction 90, even if a bid was mistakenly or erroneously made.

vii. Round Results

128. Reports reflecting bidders' identities for Auction 90 will be available before and during the auction. Thus, bidders will know in advance of this auction the identities of the bidders against which they are bidding.

129. Bids placed during a round will not be made public until the conclusion of that round. After a round closes, the Bureaus will compile reports of all bids placed, current provisionally winning bids, new minimum acceptable bid amounts for the following round, whether the construction permit is FCC held, and bidder eligibility status (bidding eligibility and activity rule waivers), and post the reports for public access.

viii. Auction Announcements

130. The Commission will use auction announcements to announce items such as schedule changes. All auction announcements will be available by clicking a link in the FCC Auction System.

V. Post-Auction Procedures

131. Shortly after bidding has ended, the Commission will issue a public notice declaring the auction closed, identifying the winning bidders, and establishing the deadlines for submitting down payments, final payments, and the long-form applications (FCC Form 301).

A. Down Payments

132. Within ten business days after release of the auction closing public notice, each winning bidder must submit sufficient funds (in addition to its upfront payment) to bring its total amount of money on deposit with the Commission for Auction 90 to 20 percent of the net amount of its winning bids (gross bids less any applicable new entrant bidding credits).

B. Final Payments

133. Each winning bidder will be required to submit the balance of the net amount of its winning bids within ten business days after the applicable deadline for submitting down payments.

C. Long-Form Application (FCC Form 301)

134. The Commission's rules currently provide that within thirty days after release of the auction closing notice, winning bidders must electronically submit a properly completed long-form application (FCC Form 301, Application for Construction Permit for Commercial Broadcast Station), and required exhibits for each construction permit won through Auction 90. Winning bidders claiming new entrant status must include an exhibit demonstrating their eligibility for the bidding credit. Further instructions on these and other filing requirements will be provided to winning bidders in the auction closing public notice.

D. Default and Disqualification

135. Any winning bidder that defaults or is disqualified after the close of the auction (*i.e.*, fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application, fails to make full payment, or is otherwise disqualified) will be subject to the payments described in 47 CFR 1.2104(g)(2). The payments include both a deficiency payment, equal to the difference between the amount of the bidder's bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less.

136. The percentage of the applicable bid to be assessed as an additional payment for defaults in a particular auction is established in advance of the auction. Accordingly, in the *Auction 90 Comment Public Notice*, the Bureaus proposed to set the additional default payment for this auction at twenty percent of the applicable bid. The Bureaus received no comments on this proposal, and therefore, adopt the proposal.

137. Finally, in the event of a default, the Commission has the discretion to re-auction the construction permit or offer it to the next highest bidder (in descending order) at its final bid amount. In addition, if a default or disqualification involves gross misconduct, misrepresentation, or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing authorizations held by the applicant.

E. Refund of Remaining Upfront Payment Balance

138. After the auction, applicants that are not winning bidders or are winning bidders whose upfront payment exceeded the total net amount of their winning bids may be entitled to a refund of some or all of their upfront payment. All refunds will be returned to the payer of record, as identified on the FCC Form 159, unless the payer submits written authorization instructing otherwise. Bidders that drop out of the auction completely (have exhausted all of their activity rule waivers and have no remaining bidding eligibility) may request a refund of their upfront payments before the close of the auction.

Federal Communications Commission.

Gary D. Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 2010–30219 Filed 11–30–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Radio Broadcasting Services; AM or FM Proposals To Change The Community of License

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The following applicants filed AM or FM proposals to change the community of license: Armada Media—McCook, Inc., Station KMTY, Facility ID 27174, BPH–20101021ADL, from Holdrege, NE, to Gibbon, NE; Christian Listening Network, Inc., Station WGQR, Facility ID 60881, BPH–20101108AAZ, from Elizabethtown, NC, to Rennert, NC; Entravision Holdings, LLC, Station WNUE–FM, Facility ID 46969, BPH–20091230AAY, from Titusville, FL, to Deltona, FL; Hawaii Public Radio, Inc., Station KIPM, Facility ID 172438, BMPED–20101019ACS, from Hana, HI, to Waikapu, HI; Huron Broadcasting, LLC, Station KZLA, Facility ID 86866, BMPH–20101027ACV, from Huron, CA, to Riverdale, CA; Radio License Holding CBC, LLC, Station WNML–FM, Facility ID 7998, BPH–20101008ABK, from Loudon, TN, to Friendsville, TN; Sacred Heart University, Inc., Station WSHU, Facility ID 43126, BP–20101019ACL, from Westport, CT, to Stratford, CT; the Last Bastion Station Trust, LLC, as Trustee, Station KRDJ, Facility ID 8167, BPH–20101029AAF, From New Iberia, LA, to Zachary, LA.

DATES: Comments may be filed through January 31, 2011.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Tung Bui, 202–418–2700.

SUPPLEMENTARY INFORMATION: The full text of these applications is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW., Washington, DC 20554 or electronically via the Media Bureau's Consolidated Data Base System, *http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm.* A copy of this application may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

Federal Communications Commission.

James D. Bradshaw,

Deputy Chief, Audio Division, Media Bureau.

[FR Doc. 2010–30180 Filed 11–30–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS10–11]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting.

Description: In accordance with Section 1104(b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in closed session:

Location: FDIC Building, 1776 F Street, NW., Room 4085, Washington, DC 20429.

Date: December 8, 2010.

Time: Immediately following the ASC open session beginning at 11:15 a.m.

Status: Closed.

Matters to be Considered:

November 10, 2010 minutes—Closed Session.

Preliminary discussion of State Compliance Reviews.

Dated: November 26, 2010.

James R. Park,

Executive Director.

[FR Doc. 2010–30214 Filed 11–30–10; 8:45 am]

BILLING CODE P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS10–10]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting.

Description: In accordance with Section 1104 (b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in open session for its regular meeting:

Location: FDIC Building, 1776 F Street, NW., Room 4085, Washington, DC 20429.

Date: December 8, 2010.

Time: 11:15 a.m.

Status: Open.

Matters to be Considered:

Summary Agenda:

November 10, 2010 minutes—Open Session.

(No substantive discussion of the above items is anticipated. These matters will be resolved with a single vote unless a member of the ASC requests that an item be moved to the discussion agenda.)

Discussion Agenda:

Appraisal Foundation July 2010 Grant Reimbursement Request
Appraisal Foundation August 2010 Grant Reimbursement Request
2011 Appraisal Foundation Grant Request
Connecticut Compliance Review
Georgia Compliance Review
North Dakota Compliance Review
South Dakota Compliance Review
Washington Compliance Review
Draft Amendment to ASC Rules of Operation

How To Attend and Observe an ASC Meeting

E-mail your name, organization and contact information *meetings@asc.gov.*

You may also send a written request via U.S. Mail, fax or commercial carrier to the Executive Director of the ASC, 1401 H Street NW., Ste 760, Washington, DC 20005. Your request must be received no later than 4:30 p.m., ET, on the Monday prior to the meeting. If that Monday is a Federal holiday, then your request must be received 4:30 p.m., ET on the previous Friday. Attendees must have a valid government-issued photo ID and must agree to submit to reasonable security measures. The meeting space is intended to accommodate public attendees. However, if the space will not accommodate all requests, the ASC may refuse attendance on that reasonable basis.

Dated: November 26, 2010.

James R. Park,

Executive Director.

[FR Doc. 2010–30215 Filed 11–30–10; 8:45 am]

BILLING CODE P

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 agreement to the Secretary, Federal Maritime Commission,

Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. A copy of the agreement is 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.: 011426–049.

Title: West Coast of South America Discussion Agreement.

Parties: A.P. Moller-Maersk A/S; APL Co. Pte Ltd.; Compania Chilena de Navegacion Interoceanica, S.A.; Compania Sud Americana de Vapores, S.A.; Frontier Liner Services, Inc.; Hamburg-Süd; Interocean Lines, Inc.; King Ocean Services Limited, Inc.; Mediterranean Shipping Company, SA; Seaboard Marine Ltd.; South Pacific Shipping Company, Ltd. (dba Ecuadorian Line); and Trinity Shipping Line.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW., Suite 1100; Washington, DC 20006–4007.

Synopsis: The amendment updates APL's corporate address.

Agreement No.: 012086–001.

Title: Maersk Line/Horizon Lines Space Charter Agreement.

Parties: A.P. Moller-Maersk A/S and Horizon Lines, LLC.

Filing Party: Matthew Thomas, Esq.; Reed Smith LLP; 1301 K Street, NW., Suite 1100–East Tower; Washington, DC 20005.

Synopsis: The amendment deletes authority for Maersk to charter space from Horizon in the trade lane from Hawai'i to China/Taiwan after November 24, 2010.

Agreement No.: 012111.

Title: Hainan PO Shipping Co., Ltd. and TS Lines Ltd. Slot Charter Agreement.

Parties: Hainan PO Shipping Co., Ltd. and T.S. Lines Ltd.

Filing Party: Neal M. Mayer, Esq.; Hoppel, Mayer & Coleman; 1050 Connecticut Avenue, NW., Tenth Floor; Washington, DC 20036

Synopsis: The agreement authorizes the parties to provide space to each other on an "as needed/as available" basis in the trade between the U.S. Pacific Coast and China.

Dated: November 24, 2010.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–30130 Filed 11–30–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from the Ames Laboratory, Ames, Iowa, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On October 6, 2010, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy, its predecessor agencies, and its contractors and subcontractors who worked in any area of the Department of Energy facility at the Ames Laboratory from January 1, 1955 through December 31, 1960, for a number of work days aggregating at least 250 work days, occurring either solely under this employment, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on November 5, 2010, as provided for under 42 U.S.C. 7384*l*(14)(C). Hence, beginning on November 5, 2010, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Interim Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2010–30205 Filed 11–30–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from Revere Copper and Brass, Detroit, Michigan, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On October 6, 2010, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All Atomic Weapons Employer employees who worked at Revere Copper and Brass, Detroit, Michigan, from July 24, 1943 through December 31, 1954, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees included in the Special Exposure Cohort.

This designation became effective on November 5, 2010, as provided for under 42 U.S.C. 7384*l*(14)(C). Hence, beginning on November 5, 2010, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Interim Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2010–30203 Filed 11–30–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Guidance on Institutional Review Board Approval of Research With Conditions

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health, Office for Human Research Protections.

ACTION: Notice.

SUMMARY: The Office for Human Research Protections (OHRP), Office of the Assistant Secretary for Health, is announcing the availability of a guidance document entitled "Guidance on IRB Approval of Research with Conditions." The guidance document provides OHRP's first formal guidance on this topic. The document, which is available on OHRP's Web site at *http://www.hhs.gov/ohrp/policy/conditionalapproval2010.html* or *http://www.hhs.gov/ohrp/policy/conditionalapproval2010.pdf,* is intended primarily for institutional review boards (IRB), investigators, Department of Health and Human Services (HHS) funding agencies, and others that may be responsible for the review, conduct, or oversight of human subject research conducted or supported by HHS. The guidance document announced in this notice finalizes the draft guidance that was made available for public comment through a notice in the **Federal Register** on November 6, 2009 (74 FR 57486). OHRP received comments on the draft guidance document from 12 individuals and organizations, and those comments were considered as the guidance was finalized.

DATES: Comments on OHRP guidance documents are welcome at any time.

ADDRESSES: Submit written requests for a single copy of the guidance document entitled, "Guidance on IRB Approval of Research with Conditions," to the Division of Policy and Assurances, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–402–2071. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance document.

Submit written comments to Comments on Conditional IRB Approval Guidance, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852. Comments also may be sent via e-mail to *ohrp@hhs.gov* or via facsimile at 240–402–2071.

FOR FURTHER INFORMATION CONTACT: Irene Stith-Coleman, PhD, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852, 240–453–6900; e-mail *Irene.Stith-Coleman@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

OHRP is announcing the availability of a guidance document entitled "Guidance on IRB Approval of Research with Conditions." The guidance document provides OHRP's first formal guidance on this topic. The document is intended primarily for IRBs, investigators, HHS funding agencies, and others that may be responsible for the review, conduct, or oversight of human subject research conducted or supported by HHS.

The guidance document applies to non-exempt human subjects research conducted or supported by HHS. It provides guidance on the authority of IRBs to approve research with conditions. In particular, the guidance addresses the following nine topics:

(1) What actions can an IRB take when reviewing research?

(2) What does *IRB approval with conditions* mean?

(3) What circumstances preclude the IRB from approving research?

(4) What circumstances permit the IRB to approve research with conditions?

(5) How should the IRB handle changes to research that are proposed after the IRB has approved the research with conditions?

(6) How do conditions on IRB approval at the time of initial review affect the initiation of research?

(7) May an IRB approve some components of a proposed research study and defer taking action on other components at the time of initial review?

(8) How do conditions on IRB approval at the time of continuing review, or at the time of review of proposed changes in previously approved research, affect ongoing research?

(9) What must the IRB records include regarding the documentation of conditions of IRB approval of research?

The guidance document announced in this notice finalizes the draft guidance that was made available for public comment through a notice in the **Federal Register** on November 6, 2009 (74 FR 57486). OHRP received comments on the draft guidance document from 12 individuals and organizations, and those comments were considered as the guidance was finalized. The majority of commenters expressed general support for the draft guidance document. The final guidance document is largely unchanged from what was proposed in the draft guidance, with only minor clarifying edits made in response to many of the comments.

II. Electronic Access

The guidance document is available on OHRP's Web site at *http://www.hhs.gov/ohrp/policy/conditionalapproval2010.html* or *http://www.hhs.gov/ohrp/policy/conditionalapproval2010.pdf.*

III. Comments

Interested persons may submit comments regarding this guidance document to OHRP at any time. Please see the **ADDRESSES** section for information on where to submit written comments.

Dated: November 24, 2010.

Jerry Menikoff,

Director, Office for Human Research Protections.

[FR Doc. 2010–30201 Filed 11–30–10; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Guidance on Institutional Review Board Continuing Review of Research

AGENCY: Department of Health and Human Services, Office for Human Research Protections, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Office for Human Research Protections (OHRP), Office of the Assistant Secretary for Health, is announcing the availability of a guidance document entitled "Guidance on IRB Continuing Review of Research." The guidance document supersedes OHRP's January 15, 2007 guidance entitled "Guidance on Continuing Review." The document, which is available on OHRP's Web site at *http://www.hhs.gov/ohrp/policy/continuingreview2010.html* or *http://www.hhs.gov/ohrp/policy/continuingreview2010.pdf,* is intended primarily for institutional review boards (IRB), investigators, Department of Health and Human Services (HHS) funding agencies, and others that may be responsible for the review, conduct, or oversight of human subject research

conducted or supported by HHS. The guidance document announced in this notice finalizes the draft guidance that was made available for public comment through a notice in the **Federal Register** on November 6, 2009 (74 FR 57487). OHRP received comments on the draft guidance document from 18 individuals and organizations, and those comments were considered as the guidance was finalized.

DATES: Comments on OHRP guidance documents are welcome at any time.

ADDRESSES: Submit written requests for a single copy of the guidance document entitled, "Guidance on IRB Continuing Review of Research," to the Division of Policy and Assurances, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–402–2071. *See* the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance document.

Submit written comments to Comments on Continuing Review Guidance, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852. Comments also may be sent via e-mail to *ohrp@hhs.gov* or via facsimile at 240–402–2071.

FOR FURTHER INFORMATION CONTACT: Irene Stith-Coleman, PhD, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852, 240–453–6900; e-mail *Irene.Stith-Coleman@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

OHRP is announcing the availability of a guidance document entitled "Guidance on IRB Continuing Review of Research." The guidance document supersedes OHRP's January 15, 2007 guidance entitled "Guidance on Continuing Review." The document is intended primarily for IRBs, investigators, HHS funding agencies, and others that may be responsible for the review, conduct, or oversight of human subject research conducted or supported by HHS.

The guidance document applies to non-exempt human subjects research conducted or supported by HHS. It provides guidance on the authority of IRBs to approve research with conditions. In particular, the guidance addresses the following 11 topics:

(1) Key IRB Considerations When Evaluating Research Undergoing Continuing Review;

(2) Process for Conducting Continuing Review;

(3) Additional Considerations for Continuing Review of Multicenter Research Projects;

(4) When Expedited Review Procedures may be Used by an IRB for Continuing Review;

(5) Determining the Frequency of Continuing Review;

(6) Determining the Effective Date of Initial IRB Approval and the Dates for Continuing Review;

(7) Lapses in IRB Approval;

(8) Communicating the IRB's Continuing Review Determination to Investigators and the Institution;

(9) Suspension or Termination of IRB Approval of Research or Disapproval of Research at the Time of Continuing Review;

(10) Identifying the Point When Continuing Review is no Longer Necessary; and

(11) Continuing Review is Not Required for Exempt Human Subjects Research Projects.

The guidance document announced in this notice finalizes the draft guidance that was made available for public comment through a notice in the **Federal Register** on November 6, 2009 (74 FR 57487). OHRP received comments on the draft guidance document from 18 individuals and organizations, and those comments were considered as the guidance was finalized. The majority of commenters expressed general support for the draft guidance document. The final guidance document is largely unchanged from what was proposed in the draft guidance, with only minor clarifying edits made in response to many of the comments.

To enhance human subject protections and reduce regulatory burden, OHRP and the Food and Drug Administration (FDA) have been actively working to harmonize the agencies' regulatory requirements and guidance for human subjects research. The guidance document announced in this notice was developed as a part of these efforts. When FDA finalizes its related guidance entitled "Guidance for IRBs, Clinical Investigators, and Sponsors: IRB Continuing Review After Clinical Investigation Approval," which was made available in draft for public comment through a notice in the **Federal Register** on January 13, 2010 (75 FR 1790), OHRP will update the guidance document announced in this notice as needed to harmonize with FDA's final guidance document.

II. Electronic Access

The guidance document is available on OHRP's Web site at *http://www.hhs.gov/ohrp/policy/continuingreview2010.html* or *http://www.hhs.gov/ohrp/policy/continuingreview2010.pdf.*

III. Comments

Interested persons may submit comments regarding this guidance document to OHRP at any time. Please *see* the **ADDRESSES** section for information on where to submit written comments.

Dated: November 24, 2010.

Jerry Menikoff,

Director, Office for Human Research Protections.

[FR Doc. 2010–30198 Filed 11–30–10; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0001]

Food Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Food Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on March 30 and 31, 2011, from 8:30 a.m. to 4:30 p.m.

Location: The Hilton Hotel, Silver Spring, 8727 Colesville Rd., Silver Spring, MD 20910, 301–589–5200.

Contact Person: Carolyn Jeletic, Center for Food Safety and Applied Nutrition (HFS–024), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1913 or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014510564. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly

enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The Food Advisory Committee will meet to discuss whether available relevant data demonstrate a link between children's consumption of synthetic color additives in food and adverse effects on behavior.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before March 23, 2011. Oral presentations from the public will be scheduled between approximately 10 a.m. and 11 a.m. on March 31, 2011. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before March 15, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by March 16, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Carolyn Jeletic at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 24, 2010.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2010–30187 Filed 11–30–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0001]

Food Labeling Workshop; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA), Office of Regulatory Affairs, Southwest Regional Small Business Representative (SWR SBR) Program, in collaboration with Iowa State University, is announcing a public workshop entitled "Food Labeling Workshop." This public workshop is intended to provide information about FDA food labeling regulations and other related subjects to the regulated industry, particularly small businesses and startups.

Date and Time: This public workshop will be held on March 3 and 4, 2011, from 8 a.m. to 5 p.m.

Location: The public workshop will be held at the Scheman Conference Center, Lincoln Way and University Avenue, Iowa State Center, Ames, IA.

Contact: David Arvelo, Food and Drug Administration, Southwest Regional Office, 4040 North Central Expressway, suite 900, Dallas, TX 75204, 214–253–4952, FAX: 214–253–4970, or email: *david.arvelo@fda.hhs.gov.*

For information on accommodation options, visit *http://www.fshn.hs.iastate.edu/foodlabel/register.php* or contact Dr. Ruth MacDonald, 2312 Food Sciences Building, Iowa State University, Ames, IA 50011, 515–294–5991, FAX: 515–294–8181, email: *ruthmacd@iastate.edu.*

Registration: You are encouraged to register by February 21, 2011. The workshop has a $250 registration fee to cover the cost of facilities, materials, lunch on day 1, and breaks. There is no registration fee for FDA employees. Seats are limited; please submit your registration as soon as possible. Workshop space will be filled in order of receipt of registration. Those accepted into the workshop will receive confirmation. Registration will close after the workshop is filled. Registration at the site is not guaranteed but may be possible on a space available basis on the day of the public workshop beginning at 8 a.m. The cost of registration at the site is $350 payable to: "Iowa State University." If you need special accommodations due to a disability, please contact Dr. Ruth MacDonald (*see Contact*) at least 14 days in advance.

Registration Form Instructions: To register, please complete the online registration form at *http://www.fshn.hs.iastate.edu/foodlabel/register.php,* or submit your full name, business or organization name, complete mailing address, telephone number, email address, optional fax number, and any special accommodations required due to disability, along with a check or money order for $250 payable to "Iowa State University." Mail to: Dr. Ruth MacDonald, Food Science and Human Nutrition, 2312 Food Sciences Building, Ames, IA 50011.

Transcripts: Transcripts of the public workshop will not be available due to the format of this workshop. Requests for workshop handouts may be obtained through David Arvelo (see *Contact*).

SUPPLEMENTARY INFORMATION: This public workshop is being held in response to the large volume of food labeling inquiries from small food manufacturers and startups originating from the area covered by FDA's Kansas City District Office. The SWR SBR presents these workshops to help achieve objectives set forth in section 406 of the Food and Drug Administration Modernization Act of 1997 (21 U.S.C. 393), which include working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. This is consistent with the purposes of the SBR Program, which are in part to respond to industry inquiries, develop educational materials, and sponsor workshops and conferences to provide firms, particularly small businesses, with firsthand working knowledge of FDA's requirements and compliance policies. This workshop is

also consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), as outreach activities by government agencies to small businesses.

The goal of this public workshop is to present information that will enable manufacturers and regulated industry to better comply with labeling requirements, especially in light of growing concerns about obesity and food allergens. Information presented will be based on Agency position as articulated through regulation, compliance policy guides, and information previously made available to the public. This is a hands-on workshop. Topics to be discussed at the workshop include: (1) Mandatory label elements, (2) nutrition labeling requirements, (3) the Food Allergen Labeling and Consumer Protection Act of 2004, (4) health and nutrient content claims, (5) special labeling issues such as exemptions, and (6) current topics on food labeling and nutrition. FDA expects that participation in this public workshop will provide regulated industry with greater understanding of the Agency's regulatory and policy perspectives on food labeling and increase voluntary compliance with labeling requirements.

Dated: November 24, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–30191 Filed 11–30–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERIVCES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review: Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301) 443–1129. The following request has been submitted to OMB for review under the Paperwork Reduction Act of 1995:

Proposed Project: Ryan White HIV/AIDS Program Annual Data Report Form: Data Report Form: (OMB No. 0915–0253)—Extension

The Ryan White HIV/AIDS Program Annual Data Report was first implemented in 2002 by HRSA's HIV/AIDS Bureau (HAB) as the CARE Act Data Report (CADR). Grantees and their subcontracted service providers who are funded under Parts A, B, C, and D of Title XXVI of the Public Health Service Act, as amended by the Ryan White HIV/AIDS Treatment Extension Act of 2009 (Ryan White HIV/AIDS Program), complete the report. All Parts of the Ryan White HIV/AIDS Program specify HRSA's responsibilities in the administration of grant funds, the allocation of funds, the evaluation of programs for the population served, and the improvement of the quantity and quality of care. Accurate records of the providers receiving Ryan White HIV/AIDS Program funding, the services provided, and the clients served continue to be critical to the implementation of the legislation and thus are necessary for HRSA to fulfill its responsibilities. Ryan White HIV/AIDS Program Grantees are required to report aggregate data to HRSA annually. The Ryan White Data Report (RDR) is completed by grantees and their subcontracted service providers. The Report has seven different sections requesting: (1) Characteristics of the service providers; (2) demographic information about the clients served; (3) information about the type of core and support services provided and the number of clients served; (4) information about HIV counseling and testing services; (5) clinical information about the clients who receive medical care; (6) demographic tables for Parts C and D; and (7) information about the Health Insurance Program. The primary purposes of the Data Report are to: (1) Characterize the organizations where clients receive services; (2) provide information on the number and characteristics of clients who receive Ryan White HIV/AIDS Program Services; and (3) enable HAB to describe the type and amount of services a client receives. In addition to meeting the goal of accountability to the Congress, clients, advocacy groups, and the general public, information collected on the RDR is critical for HRSA, state and local grantees, and individual providers to assess the status of existing HIV-related service delivery systems.

The estimated burden is as follows:

Program under which grantee is funded	Number of grantee respondents	Responses per grantee	Hours to co-ordinate re-ceipt of data	Total hour burden
Part A	56	1	40	2,240
Part B	59	1	40	2,360
Part C	354	1	20	7,080
Part D	98	1	20	1,960
Subtotal	567			13,640

Program under which provider is funded	Number of provider respondents	Responses per provider	Hours per response	Total hour burden
Part A only	685	1	26	17,810
Part B only	558	1	26	14,508
Part C only	95	1	44	4,180
Part D only	59	1	42	2,478
Multiply funded	683	1	50	34,150
Subtotal	2,080			73,126

	Number of respondents			Total hour burden
Total for Both Grantees & Providers	2,647			86,766

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this Federal Register Notice to the desk officer for HRSA, either by e-mail to *OIRA—submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the "attention of the desk officer for HRSA."

Dated: November 24, 2010.

Robert Hendricks,

Director, Division of Policy and Information Coordination.

[FR Doc. 2010–30212 Filed 11–30–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Online Skills Training for PCPs on Substance Abuse

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute on Drug Abuse, the National Institutes of Health has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** in Vol. 75 No. 144, pages 44265–44266, on July 28, 2010 and allowed 60 days for public comment. One public comment was received on the instruments outlined in the 60-day notice. A response to this request was sent to the interested party. The purpose of this notice is to allow an additional 30 days for public comment. 5 CFR 1320.5 (General requirements) Reporting and Recordkeeping Requirements: Final Rule requires that the agency inform the 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.

Proposed Collection:

Title: Online Skills Training for PCPs on Substance Abuse.

Type of Information Collection Request: New.

Need and Use of Information Collection: This research will evaluate the effectiveness of the Online Skills Training for PCPs on Substance Abuse, via the Web site *SBIRTTraining.com,* to positively impact the knowledge, attitudes, intended behaviors and clinical skills of primary care physicians in the US who treat substance abuse patients. The Online Skills Training for PCPs on Substance Abuse is a new program developed with funding from the National Institute on Drug Abuse. The primary goal is to assess the impact of the training program on knowledge, attitude, intended behavior, and clinical skills. A secondary goal is to assess learner satisfaction with the program. If the program is a success, there will be a new, proven resource available to primary care physicians to improve their ability to assess and treat substance use disorders. In order to evaluate the effectiveness of the program, information will be collected from primary care physicians before exposure to the Web based materials (pre-test), after exposure to the Web based materials (post-test), and 4–6 weeks after the program has been completed (follow-up).

Frequency of Response: On occasion.

Affected Public: Primary care physicians who treat patients who have substance abuse.

Type of Respondents: Physicians.

The annual reporting burden is as follows:

Estimated Number of Respondents: 80.

Estimated Number of Responses per Respondent: 3.

Average Burden Hours per Response: 0.75.

Estimated Total Annual Burden Hours Requested: 180.

The Annualized Cost to Respondents Is Estimated at: $13,500. There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated annual burden hours requested
Primary care physicians	80	3	0.75	180

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, OIRA *submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Quandra Scudder, Project Officer, NIH/NIDA/CCTN, Room 3105, MSC 9557, 6001 Executive Boulevard, Bethesda, MD 20892–9557 or email your request, including your address to: *scudderq@nida.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: November 16, 2010.

Mary Affeldt,

Executive Officer (OM Director), NIDA, National Institutes of Health.

[FR Doc. 2010–30089 Filed 11–30–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–112]

Notice of Submission of Proposed Information Collection to OMB; Notice of Proposed Information Collection for Public Comment State Community Development Block Grant Program

AGENCY: Office of the Chief Information Officer.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Housing and Community Development Act of 1974, as amended (HCDA), requires grant recipients that receive CDBG funding to retain records necessary to document compliance with statutory and regulatory requirements on an on-going basis. Grantees must also submit an annual performance and evaluation report to demonstrate progress that it has made in carrying out its consolidated plan, and such records as may be necessary to facilitate review and audit by HUD of the grantee's administration of CDBG funds [Section 104(4)]. The statute also requires [Section 104(e)(2)] that HUD conduct an annual review to determine whether states have distributed funds to units of general local government in a timely manner. HUD has re-designed a form by which grantees can report their compliance with this requirement.

DATES: January 3, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name/or OMB approval number and should be sent to: Ross A. Rutledge, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail: *Ross.A.Rutledge@omb.eop.gov;* fax: 202–395–3086.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Colette.Pollard@HUD.gov;* telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

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: State Community Development Block Grant Program.

Description of Information Collection: The Housing and Community Development Act of 1974, as amended (HCDA), requires grant recipients that receive CDBG funding to retain records necessary to document compliance with statutory and regulatory requirements on an on-going basis. Grantees must also submit an annual performance and evaluation report to demonstrate progress that it has made in carrying out its consolidated plan, and such records as may be necessary to facilitate review and audit by HUD of the grantee's administration of CDBG funds [Section 104(4)]. The statute also requires [Section 104(e)(2)] that HUD conduct an annual review to determine whether states have distributed funds to units of general local government in a timely manner. HUD has re-designed a form by which grantees can report their compliance with this requirement.

OMB Control Number: 2506–0085.

Agency Form Numbers: The collection of this information will be submitted on HUD's timely distribution form or in similar format from state records or systems.

Members of Affected Public: This information collection applies to 50 State CDBG Grantees (40 states and Puerto Rico but not Hawaii).

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of response:

Task	Number of respondents	Frequency of response (annual)	Burden hours per response	Total U.S. burden hours
Current Inventory:				
PER (Performance & Evaluation Report/IDIS)	50	1	237	11,850
Recordkeeping:				
States	50	on-going	176	8,800
Localities	3,500		26.13	91,455
Timely Distribution Form:				
States	50	1	1.5	75
Total	50 plus			112,180

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: November 23, 2010.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–30244 Filed 11–30–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5415–N–27]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2010 Fair Housing Initiatives Program (FHIP)

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its Web site of the applicant information, submission deadlines, funding criteria, and other requirements for HUD's Fiscal Year (FY) 2010 Fair Housing Initiatives Program (FHIP). The FHIP NOFA makes available approximately $40.7 million under the Consolidated Appropriations Act 2010. The purpose of the FHIP program is to investigate allegations of housing discrimination, educate the public and the housing industry about their rights and responsibilities under the Fair Housing Act and increase compliance with the Fair Housing Act. This year's NOFA funds the following initiatives: Private Enforcement, Education and Outreach, and the Fair Housing Organizations Initiatives.

The notice providing information regarding the application process, funding criteria and eligibility requirements can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.* The Catalogue of Federal Domestic Assistance (CFDA) numbers for this program are: Fair Housing Initiatives Program (FHIP) 14408; Private Enforcement Initiative (PEI) 14418; Education and Outreach Initiative (EOI) 14416, Fair Housing Organizations Initiative (FHOI) 14417. Applications must be submitted electronically through *Grants.gov*.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Program staff will not be available to provide guidance on how to prepare the application. Questions regarding the 2010 General Section should be directed to the Office of Grants Management and Oversight at (202) 708–0667 or the NOFA Information Center at 800–HUD–8929 (toll free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: November 24, 2010.

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2010–30242 Filed 11–30–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2010–N224; 80220–1112–0000–F2]

Measure M2 Natural Community Conservation Plan/Habitat Conservation Plan/Master Streambed Alteration Agreement, Orange County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare an Environmental Impact Statement and conduct public scoping.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), regarding an expected application from the Orange County Transportation Authority (OCTA), for an incidental take permit (permit) authorizing incidental take of federally threatened and endangered wildlife species under the Endangered Species Act of 1973, as amended (ESA). We and OCTA intend to gather information necessary to prepare a joint Environmental Impact Report (EIR)/EIS for the Measure M2 (M2) Natural Community Conservation Plan/Habitat Conservation Plan/Master Streambed Alteration Agreement (NCCP/HCP/MSAA). We are furnishing this notice to announce the initiation of a public scoping period, during which we invite other agencies, Tribes, and the public to submit written comments providing suggestions and information on the scope of issues and alternatives to be addressed in the EIS.

DATES: Please send written comments on or before January 3, 2011. We will hold a public scoping meeting on Wednesday, December 15, 2010, from 5 p.m. to 7 p.m.

ADDRESSES: *Comments:* Please send written comments to Mr. James A. Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, CA 92011. Alternatively, you may submit comments by fax to (707) 822–8411. Comments we receive will be available for public inspection, by appointment, during normal business hours (Monday through Friday, 8 a.m. to 4:30 p.m.) at the above address.

Meeting: The public scoping meeting will be held at the Orange County Transportation Authority, 550 South Main Street, Conference Room 103/104, Orange, CA 92863.

FOR FURTHER INFORMATION CONTACT: Jonathan Snyder, Division Chief, Carlsbad Fish and Wildlife Office, at the address above; by telephone at (760) 431–9440 extension 307; or by e-mail at *jonathan_d_snyder@fws.gov.*

SUPPLEMENTARY INFORMATION: OCTA is preparing a habitat conservation plan (HCP) and an application for a permit related to freeway improvements in Orange County, California. OCTA is proposing to cover 22 species in the HCP. The purpose of the HCP is to provide protection to natural communities and sensitive species within the jurisdictional boundaries of Orange County, and to mitigation for the impacts on threatened and endangered and other sensitive species for 13 planned freeway improvement projects over 30 years.

Background

Section 9 of the ESA (16 U.S.C. 1531 *et seq.*) and Federal regulations prohibit the "take" of a fish or wildlife species listed as endangered or threatened. Under the ESA, the following activities are defined as take: To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed wildlife species, or attempt to engage in such conduct (16 U.S.C. 1532). However, under section 10(a)(1)(B) of the ESA, permits may be issued to authorize "incidental take" of listed wildlife species. Incidental take is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing permits for endangered and threatened species are at 50 CFR 17.22 and 50 CFR 17.32, respectively.

Section 10 of the ESA specifies the requirements for the issuance of

incidental take permits to non-Federal entities. Any proposed take must be incidental to otherwise lawful activities and cannot appreciably reduce the likelihood of the survival and recovery of the species in the wild. The impacts of such take must also be minimized and mitigated to the maximum extent practicable. To obtain an incidental take permit, an applicant must prepare an HCP describing the impacts that will likely result from the proposed taking, the measures for minimizing and mitigating the impacts of the take, the funding available to implement such measures, alternatives to the taking, and the reason why such alternatives are not being implemented.

Take of listed plant species is not prohibited under the ESA, and authorization under an ESA section 10 permit is not required. Plant species are proposed to be included on the OCTA permit in recognition of the conservation benefits provided for them under the HCP. All species included on the permit ("Covered Species") would receive assurances under the Service's "No Surprises" regulation (50 CFR 17.22(b)(5) and 17.32(b)(5)).).

The proposed HCP will serve as an application for the issuance of take authorizations by the Service to OCTA pursuant to section 10(a)(1)(B) of the ESA. The HCP will set forth a uniform and systematic conservation strategy that ensures that impacts to Covered Species and their habitats from activities covered by the HCP ("Covered Activities") are minimized and mitigated to the maximum extent practicable. The plan area for the HCP includes all of Orange County (about 798 square miles, or 510,720 acres), and the permit may allow take of Covered Wildlife Species resulting from Covered Activities anywhere in the plan area.

The HCP will be prepared to conserve the Covered Species and their natural habitats within Orange County for future generations. The HCP will address Covered Activities throughout Orange County that allow for freeway improvements while at the same time protecting the natural communities within the County.

Covered Activities in the HCP will consist of 13 freeway improvement projects in Orange County, including improvements to portions of I–5, I–405, I–605, SR–22, SR–55, SR–57, and SR–91.

Potential impacts to Covered Species will be addressed through a mitigation program that includes conservation and restoration of habitats for Covered Species in Orange County. Five percent of the Measure M2 revenue collected for the freeway projects will be allocated to the mitigation program. Habitat conservation and restoration projects appropriate to offset project-related impacts will be selected by OCTA in close coordination with the Service, California Department of Fish and Game, and California Department of Transportation.

Currently, OCTA is proposing to cover 17 (4 listed and 13 unlisted) animal species and 5 plant species (1 listed and 4 unlisted) for 30 years, with the opportunity to renew the permit for an additional 30 years. Listed species proposed to be included are: (1) The endangered southwestern willow flycatcher (*Empidonax trailii extimus*), (2) the threatened coastal California gnatcatcher (Polioptila californica californica), (3) the endangered least Bell's vireo (*Vireo bellii pusillus*), (4) the threatened Santa Ana sucker (*Catostomus santaanae*), and (5) the endangered Braunton's milk-vetch (*Astragulus brauntonii*).

The unlisted species proposed to be included are: (1) Coulter's matilija poppy (*Romneya coulteri*), (2) intermediate mariposa lily (*Calochortus weedii var. intermedius*), (3) many stemmed dudleya (*Dudleya multicaulis*), (4) southern tarplant (*Centromadia parryi* ssp. *australis*), (5) southern pacific pond turtle (*Clemmys marmorata*), (6) San Diego horned lizard (*Phrynosoma coronatum blainvillei*), (7) orange throated whiptail lizard (*Cnemidophorus hyperythrus beldingi*), (8) red diamond rattlesnake (*Crotalus exsul*), (9) coastal cactus wren (*Campylorhynchus brunneicapillus cousei*), (10) coastal rufous-crowned sparrow (*Aimophila ruficeps*), (11) arroyo chub (*Gila orcuttii*), (12) bobcat (*Lynx rufus*), (13) mountain lion (*Felis concolor*), (14) pallid bat (*Antrozous pallidus*), (15) small-footed myotis (*Myotis cilioabrum*), (16) long-eared myotis (*Myotis evotis*), and (17) Yuma myotis (*Myotis yumanensis*).

Environmental Impact Statement

Before deciding whether to issue permit, we will prepare a draft EIS to analyze the environmental impacts associated with the issuance of the requested permit and the implementation of the HCP by OCTA. The EIS will be prepared in compliance with NEPA under the supervision of the Service, which will be responsible for the scope and content of the document. The EIS will consider the proposed action, the issuance of a section 10(a)(1)(B) permit under the ESA, No Action (no permit), and a reasonable range of alternatives. A detailed description of the impacts of the proposed action and each alternative will be included in the EIS.

The proposed action and alternatives will be evaluated against the No Action alternative, which assumes that no permit will be issued. Several alternatives will be considered and analyzed, representing varying levels of conservation and impacts. The alternatives to be considered for analysis in the EIS may include: Variations in the scope of covered activities; variations in the location, amount, and type of conservation; variations in permit duration; or a combination of these elements. The EIS will also identify potentially significant direct, indirect, and cumulative impacts on biological resources, land use, air quality, water quality, water resources, socioeconomics, and other environmental issues that could occur with the implementation of the proposed action and alternatives. For all potentially significant impacts, the EIS will identify avoidance, minimization, and mitigation measures to reduce these impacts, where feasible, to a level below significance.

Public Comments

Please direct any comments to the Service contact listed above in the **ADDRESSES** section, and any questions to the Service contact listed in the **FOR FURTHER INFORMATION CONTACT** section. All comments and materials we receive, including names and addresses, will become part of the administrative record and may be released to the public. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. This notice is provided under section 10(a) of the ESA and Service regulations for implementing NEPA (40 CFR 1506.6).

Dated: November 24, 2010.

Margaret Kolar,

Acting Deputy Regional Director, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2010–30202 Filed 11–30–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT030000.L16510000.IU0000.241A.00]

Notice of Intent To Prepare an Environmental Assessment for the Proposed North Highway 20 Travel Management Plan and Possible Management Framework Plan Amendment

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969 (NEPA), as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Shoshone Field Office, Shoshone, Idaho intends to prepare an Environmental Assessment (EA) which may include an amendment to the 1981 Sun Valley Management Framework Plan (MFP) and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: This notice initiates the public scoping process for the EA and possible MFP amendment. Comments on issues may be submitted in writing until January 3, 2011. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local media and the BLM Web site at: *http://www.blm.gov/id/.* In order to be included in the EA and draft plan amendment, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation upon publication of the EA and draft plan amendment.

ADDRESSES: You may submit comments on issues and planning criteria related to the North Highway 20 Travel Management Plan by any of the following methods:

- *E-mail: North_Highway20_Travel_Plan@blm.gov*
- *Fax:* (208) 732–7317, Attention: John Kurtz; or
- *Mail:* North Highway 20 Travel Management Plan, 400 West "F" Street, Shoshone, Idaho 83352

Documents pertinent to this proposal may be examined at the Shoshone Field Office.

FOR FURTHER INFORMATION CONTACT: To have your name added to our mailing list contact John Kurtz, Outdoor Recreation Planner, BLM Shoshone Field Office, 400 West F Street, Shoshone, Idaho 83352 or telephone: (208) 732–7296.

SUPPLEMENTARY INFORMATION: The planning area consists of 239,145 acres of BLM-managed public land and approximately 660 miles of existing roads and trails lying north of Highway 20 within the BLM Shoshone Field Office. Boundaries include Chimney Creek on the west and Craters of the Moon National Monument and Preserve and Fish Creek on the east.

The Sun Valley MFP designated the majority of the planning area as "Open" to off-highway vehicles (OHV), meaning OHVs can travel cross-country. The planning area will be evaluated using current policy and resource information to consider and identify as planning decisions areas "Open," "Limited to Designated Routes," or "Closed" to OHV use. A "Limited to Designated Routes" designation would result in motorized and possibly mechanized vehicles being limited to designated roads and trails, while a "Closed" designation precludes OHV travel altogether. The OHV designations in the Sun Valley MFP would be amended as a result of the travel management plan decision. In addition to the plan decisions described above, the travel management implementation plan will also make implementation decisions regarding designated routes and type of use. Future travel management development, such as parking areas and trailheads and future trail construction corridors on public land, may also be considered in order to facilitate travel through public lands and provide trail-based recreational opportunities. There is a need to be responsive to current and future demand for recreational opportunities and to provide access to support livestock operations, realty actions and private in-holdings.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the EA, including alternatives, and guide the process for developing the EA. At present, the BLM has identified the following preliminary issues: Demand for trail-based recreational opportunities; unauthorized trail construction; resource impacts resulting from vehicles traveling cross-country; conflicts between user groups (motorized and non-motorized); conflicts between recreationists and livestock operations; and legal access to public lands.

Authorization of this proposal may require amendment of the 1981 Sun Valley MFP. By this notice, the BLM is complying with requirements in 43 CFR 1610.2(c) to notify the public of potential amendments to land use plans, predicated on the findings of the EA. If a land use plan amendment is necessary, the BLM will integrate the land use planning process with the NEPA process for this project. The BLM will use and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the National Historic Preservation Act (16 U.S.C. 470(f)) as provided for in 36 CFR 800.2(d)(3). Native American tribal consultations will be conducted in accordance with policy and tribal concerns. Potential impacts on Indian trust assets will be given due consideration. Federal, state, and local agencies, along with other stakeholders that may be interested in or affected by the BLM's decision on this project are invited to participate in the scoping process and, if eligible, may request, or be requested by the BLM, to participate as a cooperating agency.

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.

Authority: 40 CFR 1501.7 and 43 CFR 1610.2.

Ruth Miller,

Field Manager.

[FR Doc. 2010–30188 Filed 11–30–10; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT01000.L16100000.DP0000.LXSS081D0000]

Notice of Extension of Public Comment Period to Notice of Availability of the Draft Jarbidge Field Office Resource Management Plan and Environmental Impact Statement, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of extension.

SUMMARY: The Bureau of Land Management (BLM) published a Notice of Availability of the Draft Jarbidge Field Office Resource Management Plan (RMP) and Environmental Impact Statement (EIS) in the **Federal Register** on September 3, 2010 [75 FR 54177] and

announced the availability of these documents. In response to multiple requests, the BLM is extending the public comment period for the Draft RMP and Draft EIS until January 31, 2010.

DATES: The comment period is extended to January 31, 2010.

ADDRESSES: Copies of the Jarbidge Field Office Draft RMP/Draft EIS have been sent to tribal governments, Federal, state, and local government agencies and other stakeholders. Copies of the Draft RMP/Draft EIS are available for public inspection at the Jarbidge Field Office, Bureau of Land Management, 2536 Kimberly Road, Twin Falls, Idaho 83301. Interested persons may also review the Draft RMP/Draft EIS at the following Web site: *http://www.blm.gov/id/st/en/prog/planning/jarbidge_resource.html.* You may submit comments by any of the following methods:

- *E-mail: ID_Jarbidge_RMP@blm.gov.*
- *Fax:* (208) 736–2375, Attention: Jarbidge Planning Team.
- *Mail:* Jarbidge Planning Team, BLM Jarbidge Field Office, 2536 Kimberly Road, Twin Falls, Idaho 83301.

FOR FURTHER INFORMATION CONTACT: Richard Vander Voet, Jarbidge Field Office Manager, or Aimee Betts, Jarbidge RMP Project Manager, telephone (208) 736–2350; address Jarbidge Field Office, 2536 Kimberly Road, Twin Falls, Idaho 83301. 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.

SUPPLEMENTARY INFORMATION: The Draft RMP/Draft EIS addresses public land and resources managed by the Jarbidge Field Office in parts of Elmore, Owyhee, and Twin Falls Counties in south-central Idaho and Elko County in northern Nevada. These lands and resources are currently managed under the 1987 Jarbidge RMP, as amended. The planning area extends from the Bruneau River on the west to Salmon Falls Creek on the east, and from the Snake River on the north to the northern boundaries of the BLM Elko Field Office and the Humboldt-Toiyabe National Forest on the south.

The Jarbidge RMP addresses management on approximately 1.4 million acres of public land and 1.6 million acres of Federal mineral estate in the Jarbidge Field Office. Planning decisions in the RMP will only apply to the BLM-administered public lands and mineral estate in the planning area.

The Draft RMP/Draft EIS includes a series of management actions, within six management alternatives, designed to achieve or maintain desired future conditions that have been defined through the planning process for various concerns including, but not limited to: vegetation, livestock grazing, recreation, energy development, and Areas of Critical Environmental Concern (ACEC).

Authority: 40 CFR 1506.6, 1506.10 and 43 CFR 1610.2, 1610.5.

Steven A. Ellis,

Bureau of Land Management, Idaho State Director.

[FR Doc. 2010–30190 Filed 11–30–10; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVW00000 L14300000.ET0000 241A; NEV–051742; 11–08807; MO#4500012855; TAS: 14X1109]

Notice of Proposed Withdrawal Extension, Corrections to Existing Withdrawal, and Opportunity for Public Meeting; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service (FWS) filed an application to extend the duration of Public Land Order (PLO) No. 6849 for an additional 20-year term. PLO No. 6849 withdrew approximately 457,800 acres of Federal lands, known as the Sheldon National Wildlife Refuge, from mineral entry and location under the United States mining laws to protect the wildlife habitat and unique resource values of the refuge lands. In addition, this notice corrects errors made in describing unsurveyed lands in Township 46 North, Range 27 East, and in the calculation of total acreage withdrawn by PLO No. 6849. This notice gives an opportunity for the public to comment on the proposed withdrawal extension and announces the date, time, and location of a public meeting.

DATES: For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may do so in writing until March 1, 2011. The public will also be notified of the meeting date by announcement in a local newspaper and on the BLM Web site: *http://www.blm.gov/nv/st/en/fo/wfo.html* at least 30 days prior to the scheduled date of the meeting.

ADDRESSES: Comments should be mailed to: Humboldt River Field Manager, Bureau of Land Management (BLM), 5100 E. Winnemucca Blvd., Winnemucca, NV 89445, or e-mailed to: *Michael_Truden@blm.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Truden, 775–623–1500, or e-mail: *Michael_Truden@blm.gov.*

SUPPLEMENTARY INFORMATION: The FWS Region 1 has filed an application to extend the withdrawal established by PLO No. 6849 (56 FR 16278), for an additional 20-year term. The PLO withdrew the following described Federal lands from location under the United States mining laws and will expire on April 21, 2011, unless extended.

Mount Diablo Meridian

T. 45 N., R. 22 E.,
Secs. 1 and 2;
Sec. 3, lots 1, 2, and 4, S½NE¼, NE¼SW¼, S½SW¼, and SE¼;
Sec. 10, N½N½, SE¼NE¼, and E½SE¼;
Secs. 11 to 14, inclusive;
Sec. 15, NE¼, W½NW¼, NW¼SW¼, and E½SE¼;
Sec. 19;
Sec. 20, NE¼, S½NW¼, and S½;
Sec. 21;
Sec. 22, NE¼NE¼, S½N½, and S½;
Secs. 23 to 34, inclusive;
Sec. 35, NE¼, NW¼NW¼, S½NW¼, and S½;
Sec. 36.

T. 46 N., R. 22 E.,
Secs. 1 to 5, inclusive;
Sec. 6, lots 1 and 2, S½NE¼, E½SW¼, and SE¼;
Sec. 7, lots 1, 2, and 4, NE¼, E½NW¼, SE¼SW¼, NE¼SE¼, and S½SE¼;
Secs. 8 and 9;
Sec. 10, E½, W½W½, and SE¼SW¼;
Sec. 11, N½, SW¼, N½SE¼, and SW¼SE¼;
Sec. 12, N½NE¼, SW¼NE¼, NW¼, and SE¼SE¼;
Sec. 13, N½NE¼, SE¼NE¼, SW¼NW¼, SW¼, NE¼SE¼, and SW¼SE¼;
Sec. 14, NE¼, E½NW¼, SW¼NW¼, and S½;
Sec. 15, W½NE¼, SE¼NE¼, W½, and SE¼;
Secs. 16, 17, 18, 22, and 23;
Sec. 24, W½NE¼, SE¼NE¼, W½, and SE¼;
Secs. 25, 26, 27, 34, 35, and 36.

T. 47 N., R. 22 E.,
Secs. 13, 14, and 15;
Sec. 16, lot 4 and W½SW¼;
Secs. 17 to 20, inclusive;
Sec. 21, NW¼NW¼ and E½SE¼;
Secs. 22 to 27, inclusive;
Sec. 28, E½E½, NW¼NW¼, and SW¼SE¼;
Sec. 29, NE¼, N½NW¼, SW¼NW¼, W½SW¼, SE¼SW¼, N½SE¼, and SW¼SE¼;

Secs. 30, 31, and 32;
Sec. 33, NE¼, N½SE¼, and SE¼SE¼;
Secs. 34, 35, and 36.

T. 43 N., R. 23 E.,
Secs. 1 to 6, inclusive;
Sec. 7, lots 1 to 4, inclusive, W½E½, SE¼NE¼, E½W½, and E½SE¼;
Sec. 8, E½;
Sec. 9, N½, N½SW¼, SE¼SW¼, and N½SE¼;
Sec. 10, N½, NE¼SW¼, and SE¼;
Secs. 11 and 12;
Sec. 13, N½, SW¼, N½SE¼, and SW¼SE¼;
Sec. 14, E½, N½NW¼, SE¼NW¼, and SW¼;
Sec. 15, N½, N½SW¼, SE¼SW¼, and SE¼;
Sec. 16, SE¼NE¼, N½NW¼, SW¼NW¼, NE¼SE¼, and S½SE¼;
Sec. 17, E½ and SE¼SW¼;
Sec. 18, lots 1 to 4, inclusive, NE¼, E½W½, N½SE¼, and SW¼SE¼;
Sec. 19, lots 1 to 4, inclusive, W½NE¼, SE¼NE¼, E½W½, and SE¼;
Sec. 20;
Sec. 21, E½, E½NW¼, and SW¼;
Sec. 22;
Sec. 23, N½, N½SW¼, SW¼SW¼, and SE¼;
Sec. 24, E½, W½NW¼, SE¼NW¼, and SW¼;
Sec. 25, N½, NE¼SW¼, S½SW¼, and SE¼;
Secs. 26 to 32, inclusive;
Sec. 33, NE¼, W½NW¼, SE¼NW¼, and SW¼;
Sec. 34, N½N½, SE¼NE¼, SW¼NW¼, E½SW¼, and SE¼;
Sec. 35, E½, E½NW¼, SW¼NW¼, and SW¼;
Sec. 36, N½, NE¼SW¼, S½SW¼, and SE¼.

T. 44 N., R. 23 E.,
Sec. 1;
Sec. 2, lots 1, 2, and 3, S½NE¼, SE¼NW¼, E½SW¼, SW¼SW¼, and SE¼;
Sec. 3, lots 2, 3, and 4, SW¼NE¼, S½NW¼, and S½;
Sec. 4, lots 1 to 4, inclusive, S½NE¼, SW¼NW¼, W½SW¼, SE¼SW¼, and W½SE¼;
Sec. 5, lots 1 to 4, inclusive, S½N½, N½SW¼, and SE¼;
Sec. 6;
Sec. 7, lots 1 to 4, inclusive, N½NE¼, E½W½, and SE¼;
Sec. 8;
Sec. 9, NE¼NE¼, S½NE¼, W½, and SE¼;
Sec. 10, N½, SW¼, N½SE¼, and SE¼SE¼;
Sec. 11, N½NE¼, SE¼NE¼, W½, and SE¼;
Sec. 12, N½, SW¼, N½SE¼, and SE¼SE¼;
Secs. 13 and 14;
Sec. 15, E½NE¼, NW¼NW¼, S½NW¼, SW¼, and NE¼SE¼;
Sec. 16, E½, E½W½, SW¼NW¼, and NW¼SW¼;
Sec. 17, E½, NW¼, E½SW¼, and SW¼SW¼;
Secs. 18, 19, and 20;
Sec. 21, N½, SW¼, N½SE¼, and SW¼SE¼;
Sec. 22, W½NE¼, NW¼, and N½S½;
Sec. 23, E½, N½NW¼, SE¼NW¼, and NE¼SW¼;
Sec. 24;
Sec. 25, NE¼, N½NW¼, NW¼SW¼, S½SW¼, NE¼SE¼, and SW¼SE¼;
Sec. 26, SW¼NE¼, W½NW¼, SE¼NW¼, and S½;
Sec. 27, E½, S½NW¼, and SW¼;
Sec. 28, S½NE¼, NW¼NW¼, and S½;
Secs. 29 to 36, inclusive.

T. 45 N., R. 23 E.,
Secs. 1 to 14, inclusive;
Sec. 15, N½, SW¼, N½SE¼, and SE¼SE¼;
Sec. 16, N½, N½S½, SE¼SW¼, and SE¼SE¼;
Sec. 17;
Sec. 18, lots 1 and 4, NE¼, E½NW¼, and N½SE¼;
Sec. 19, lots 1 to 4, inclusive, SW¼NE¼, E½W½, and SE¼;
Sec. 20, NW¼NE¼, SE¼NE¼, NE¼NW¼, SW¼, NE¼SE¼, and SW¼SE¼;
Sec. 21, E½NE¼, SW¼NE¼, N½NW¼, SE¼NW¼, NW¼SW¼, S½SW¼, and S½SE¼;
Sec. 22, E½NE¼, SW¼NE¼, W½, and SE¼;
Secs. 23 and 24;
Sec. 25, N½, SW¼, and N½SE¼;
Secs. 26 and 27;
Sec. 28, E½, E½NW¼, SW¼NW¼, and SW¼;
Sec. 29, W½NE¼, SE¼NE¼, W½, and SE¼;
Sec. 30, lots 1, 2, and 4, E½, E½NW¼, and NE¼SW¼;
Secs. 31, 32, and 33;
Sec. 34, N½, SW¼, N½SE¼, and SW¼SE¼;
Sec. 35, N½NE¼, SW¼NE¼, NW¼, SE¼SW¼, and S½SE¼;
Sec. 36, NE¼NE¼, S½NE¼, NW¼NW¼, and S½.

T. 46 N., R. 23 E.,
Secs. 1 to 4, inclusive;
Sec. 5, lots 1 to 4, inclusive, S½N½, SW¼, E½SE¼, and SW¼SE¼;
Sec. 6, lots 1 to 7, inclusive, S½NE¼, SE¼NW¼, NE¼SW¼, NE¼SE¼, and S½SE¼;
Sec. 7, lots 2 and 4, N½NE¼, SW¼NE¼, E½NW¼, SE¼SW¼, and S½SE¼;
Secs. 8 to 17, inclusive;
Sec. 18, lots 1, 2, and 3, E½, and E½W½;
Sec. 19, lot 4, E½, and E½NW¼;
Sec. 20, E½, N½NW¼, SW¼NW¼, and SW¼;
Sec. 21;
Sec. 22, W½NE¼, SE¼NE¼, W½, and SE¼;
Sec. 23, E½NE¼, SW¼NE¼, E½NW¼, N½SW¼, SE¼SW¼, and SE¼;
Secs. 24 to 29, inclusive;
Sec. 30, lots 1 to 4, inclusive, N½NE¼, SE¼NE¼, SE¼NW¼, E½SW¼, and SE¼;
Secs. 31 to 36, inclusive.

T. 47 N., R. 23 E.,
Secs. 13 to 36, inclusive.

T. 46 N., R. 23½ E., unsurveyed,
Secs. 1 and 2,
Secs. 11 to 14, inclusive;
Secs. 23 to 26, inclusive;
Secs. 35 and 36.

T. 47 N., R. 23½ E., unsurveyed,
Secs. 23 to 26, inclusive;
Secs. 35 and 36.

T. 43 N., R. 24 E.,
Sec. 1;
Sec. 2, lots 1 and 4, SE¼NE¼, SW¼NW¼, SE¼SW¼, and SE¼;
Sec. 3, lots 1 to 4, inclusive, S½N½, SW¼, N½SE¼, and SW¼SE¼;
Sec. 4;
Sec. 5, lots 1 to 4, inclusive, S½N½, and SE¼;
Sec. 6, lots 1 to 7, inclusive, S½NE¼, SE¼NW¼, E½SW¼, and NW¼SE¼;
Sec. 7, lots 1 to 4, inclusive, SE¼NW¼, E½SW¼, and W½SE¼;
Sec. 8, E½ and E½SW¼;
Sec. 9, N½NE¼, SW¼NE¼, W½, and E½SE¼;
Sec. 10, NE¼NE¼, S½NE¼, NW¼NW¼, W½SW¼, N½SE¼, and SW¼SE¼;
Sec. 11, N½, SW¼, N½SE¼, and SW¼SE¼;
Sec. 12;
Sec. 13, N½, SW¼, N½SE¼, and SW¼SE¼;
Sec. 14, W½NE¼, NW¼, NE¼SW¼, SW¼SW¼, and S½SE¼;
Sec. 15, NE¼NE¼, SW¼NE¼, NW¼, W½SW¼, SE¼SW¼, and S½SE¼;
Sec. 16, E½NE¼, W½, and NE¼SE¼;
Sec. 17, E½, E½NW¼, SW¼NW¼, and SW¼;
Sec. 18, lots 1 to 4, inclusive, W½NE¼, E½NW¼, NE¼SW¼, and SE¼;
Sec. 19, lots 1, 3, and 4, N½NE¼, SE¼NE¼, E½NW¼, and E½SE¼;
Sec. 20;
Sec. 21, E½, S½NW¼, and SW¼;
Secs. 22 and 23;
Sec. 24, W½NE¼, SE¼NE¼, W½, and SE¼;
Secs. 25 to 28, inclusive;
Sec. 29, N½, E½SW¼, and SE¼;
Sec. 30, lots 1 to 4, inclusive, NE¼NE¼, E½W½, W½SE¼, and SE¼SE¼;
Sec. 31, lots 1, 2, and 3, N½NE¼, SW¼NE¼, SE¼NW¼, E½SW¼, and SE¼;
Sec. 32, NE¼, SE¼NW¼, NE¼SW¼, N½SE¼, and SE¼SE¼;
Sec. 33;
Sec. 34, NW¼NE¼, W½, E½SE¼, and SW¼SE¼;
Secs. 35 and 36.

T. 44 N., R. 24 E.,
Sec. 1;
Sec. 2, lots 1 to 4, inclusive, S½N½, and NE¼SE¼;
Secs. 3 to 9, inclusive;
Sec. 10, N½, N½SW¼, SW¼SW¼, and SE¼;
Sec. 11, W½NE¼, SE¼NE¼, W½, N½SE¼, and SW¼SE¼;
Sec. 12, NE¼, NE¼NW¼, NW¼SW¼, and E½SE¼;
Sec. 13, NE¼NE¼, W½, W½SE¼, and SE¼SE¼;
Sec. 14, S½N½, NW¼NW¼, and S½;
Secs. 15 to 20, inclusive;
Sec. 21, NE¼, N½NW¼, SW¼NW¼, N½SW¼, SW¼SW¼, and N½SE¼;
Sec. 22, N½, N½SW¼, SE¼SW¼, and SE¼;

Sec. 23, NE¼, W½, and E½SE¼;
Sec. 24;
Sec. 25, NE¼NE¼, S½N½, NW¼NW¼, and S½;
Sec. 26, E½NE¼, W½, and SE¼;
Sec. 27, E½, E½NW¼, SW¼NW¼, and SW¼;
Sec. 28, S½NE¼, W½, and SE¼;
Sec. 29;
Sec. 30, lots 1, 2, and 3, NE¼, and E½NW¼;
Sec. 31, lots 1 to 4, inclusive, S½NE¼, E½W½, and SE¼;
Sec. 32, NE¼, NE¼NW¼, SW¼NW¼, SW¼, and E½SE¼;
Secs. 33 and 34;
Sec. 35, N½NE¼, SE¼NE¼, N½NW¼, SW¼NW¼, W½SW¼, and E½SE¼;
Sec. 36, NE¼NE¼, SW¼NE¼, W½NW¼, SE¼NW¼, and S½.

T. 45 N., R. 24 E.,
Secs. 1 to 17, inclusive;
Sec. 18, lots 1 to 4, inclusive, E½, E½NW¼, and SE¼SW¼;
Secs. 19 to 29, inclusive;
Sec. 30, lots 1, 2, and 3, E½, and E½W½;
Secs. 31 to 36, inclusive.

T. 45½ N., R. 24 E.,
Sec. 31;
Sec. 32, lots 1 to 4, inclusive, SW¼NE¼, S½NW¼, and S½;
Secs. 33 to 36, inclusive.

T. 46 N., R. 24 E., partially unsurveyed,
Secs. 1 to 32, inclusive;
Sec. 33, N½NE¼, NW¼, W½SW¼, SE¼SW¼, E½SE¼, and SW¼SE¼;
Secs. 34, 35, and 36.

T. 47 N., R. 24 E., unsurveyed,
Secs. 19 to 36, inclusive.

T. 43 N., R. 24½ E.,
Sec. 1;
Sec. 2, lots 1, 3, and 4, and E½E½;
Secs. 11 to 14, inclusive;
Secs. 23 to 26, inclusive;
Sec. 35, lots 1 to 8, inclusive, and SE¼NE¼;
Sec. 36.

T. 44 N., R. 24½ E.,
Secs. 1 and 2;
Secs. 11 to 14, inclusive;
Secs. 23 to 26, inclusive;
Secs. 35 and 36.

T. 43 N., R. 25 E.,
Secs. 1 and 2;
Sec. 3, E½, E½NW¼, SW¼NW¼, N½SW¼, and SW¼SW¼;
Secs. 4 to 9, inclusive;
Sec. 10, NE¼, W½W½, E½SE¼, and SW¼SE¼;
Secs. 11 to 14, inclusive;
Sec. 15, E½NE¼, SW¼NE¼, NW¼NW¼, SE¼NW¼, and S½;
Sec. 16, N½N½, SW¼NW¼, and SE¼;
Secs. 17, 18, and 19;
Sec. 20, N½ and SW¼;
Sec. 21, N½, E½SW¼, and SE¼;
Secs. 22 to 27, inclusive;
Sec. 28, N½, S½SW¼, and NE¼SE¼;
Sec. 29, lots 1, 2, and 3, W½NE¼, W½, and NW¼SE¼;
Secs. 30 to 36, inclusive.

T. 44 N., R. 25 E.,
Secs. 1 to 9, inclusive;
Sec. 10, N½, SW¼, and N½SE¼;
Secs. 11 to 14, inclusive;
Sec. 15, NE¼NE¼, SW¼NE¼, W½, and SE¼;
Secs. 16 to 26, inclusive;
Sec. 27, N½, N½SW¼, SW¼SW¼, and SE¼;
Secs. 28 to 33, inclusive;
Sec. 34, E½, NW¼NW¼, and SE¼SW¼;
Secs. 35 and 36.

T. 45 N., R. 25 E., partially unsurveyed,
Sec. 1, surveyed areas lots 1 and 2, S½NE¼, and unsurveyed areas N½, SW¼, N½SE¼, and SW¼SE¼;
Secs. 2 to 11, inclusive;
Sec. 12, W½;
Sec. 13, NE¼NW¼ and W½W½;
Secs. 14 to 22, inclusive;
Sec. 23, N½ and N½SW¼;
Secs. 27 to 34, inclusive;
Sec. 35, lots 1, 2, 3, 5, 6, and 7;
Sec. 36, NE¼NE¼, S½N½, and S½.

T. 45½ N., R. 25 E., unsurveyed,
Sec. 25, SW¼SW¼;
Secs. 26 to 35, inclusive;
Sec. 36, W½NW¼ and S½.

T. 46 N., R. 25 E., partially unsurveyed,
Secs. 1 to 25, inclusive;
Sec. 26, N½, NE¼SW¼, and SE¼;
Sec. 27, N½NE¼, SE¼NE¼, and W½;
Secs. 28 to 33, inclusive;
Sec. 34, W½;
Sec. 36, N½NE¼ and NE¼NW¼.

T. 47 N., R. 25 E., unsurveyed,
Secs. 19 to 36, inclusive.

T. 43 N., R. 26 E.,
Secs. 1 to 33, inclusive;
Sec. 34, lots 1, 3, and 4, N½, NW¼SW¼, and N½SE¼;
Secs. 35 and 36.

T. 44 N., R. 26 E., unsurveyed,
Secs. 1 to 36, inclusive.

T. 45 N., R. 26 E., partially unsurveyed,
Sec. 6, lots 3, 4, and 5, NE¼, and SE¼NW¼;
Sec. 21, SE¼SW¼ and S½SE¼;
Sec. 22, S½SW¼, SW¼SE¼, and SE¼SE¼ excluding patented portion;
Sec. 23, SW¼SW¼ excluding patented portion, SE¼SW¼, and S½SE¼;
Sec. 24, S½S½;
Secs. 25 to 28, inclusive;
Sec. 29, E½ and E½W½;
Sec. 30, S½SW¼;
Secs. 31 to 36, inclusive.

T. 46 N., R. 26 E., partially unsurveyed,
Secs. 1 to 12, inclusive;
Sec. 13, N½, SW¼, and NW¼SE¼;
Sec. 14, N½, N½SW¼, SE¼SW¼, and SE¼;
Sec. 15, N½, SW¼, N½SE¼, and SW¼SE¼;
Secs. 16 to 21, inclusive;
Sec. 22, NW¼NE¼, NW¼, N½SW¼, and SW¼SW¼;
Sec. 28, NE¼NE¼, W½NE¼, NW¼, and N½SW¼;
Secs. 29 and 30;
Sec. 31, lots 1, 2, and 3, NE¼, and E½NW¼;
Sec. 32, N½NE¼ and NW¼.

T. 47 N., R. 26 E., unsurveyed,
Secs. 19 to 36, inclusive.

T. 46 N., R. 27 E., partially unsurveyed,
Sec. 1, NW¼;
Sec. 2, N½, SW¼, and N½SE¼;
Sec. 3;
Sec. 4, N½ and E½SE¼;
Sec. 5, N½, SW¼, N½SE¼, and SW¼SE¼;
Sec. 6;
Sec. 7, N½, SW¼, and NW¼SE¼;
Sec. 8, N½NW¼ and SW¼NW¼;
Sec. 9, E½NE¼ and SE¼;
Sec. 10;
Sec. 15, N½NE¼, NW¼, and W½SW¼;
Sec. 16, E½, NE¼SW¼, and S½SW¼;
Sec. 18, N½NW¼ and SW¼NW¼;
Sec. 20, E½E½;
Sec. 21, N½NE¼, SW¼NE¼, and W½;
Sec. 28, N½NW¼.

T. 47 N., R. 27 E., unsurveyed,
Secs. 19 to 24, inclusive;
Sec. 25, W½NE¼ and W½;
Secs. 26 to 35, inclusive;
Sec. 36, NW¼NW¼ and W½SW¼.

The areas described aggregate approximately 457,800 acres in Washoe and Humboldt Counties. The legal descriptions of the unsurveyed lands are based on what normal survey subdivision units would be when surveyed. PLO No. 6849, when published, withdrew 445,766 acres but was subsequently corrected by **Federal Register** notice 56 FR 24119, and PLO Nos. 6849 and 6907. The corrections to the legal descriptions and acreage calculations result in the recognition of an additional 12,034 acres that lie within the existing withdrawal boundary but that were omitted due to protraction errors.

This notice does not alter or extinguish or otherwise affect the existing mineral withdrawal created by PLO No. 6849.

The lands withdrawn by PLO No. 6849 consist of high desert habitat. The purpose of the withdrawal extension is to continue to conserve and protect the sagebrush-steppe landscape for optimum populations of native plants and wildlife including large wintering herds of pronghorn antelope, bighorn sheep, pygmy rabbits, and greater sage-grouse.

The use of a right-of-way, interagency agreement, or cooperative agreement, would not provide adequate protection for the wildlife habitat and unique resource values within the Sheldon National Wildlife Refuge.

No additional water rights would be needed to fulfill the purpose of the requested withdrawal extension.

There are no suitable alternative sites since the lands described herein contain the natural and biological resources of interest for protection.

Comments, including names and street addresses of respondents, will be available for public review at the address stated above, during regular business hours, 7:30 a.m. to 4:30 p.m.,

Monday through Friday, except holidays. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. If you wish to withhold your name or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comments. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Notice is hereby given that a public meeting in connection with the proposed withdrawal extension will be held on January 18, 2011 from 6 p.m. to 8 p.m at the BLM Winnemucca District Office, located at the address stated above. A notice of the time and place will also be published in at least one newspaper of local jurisdiction no less than 30 days before the scheduled meeting date. Interested parties may make oral statements and may file written statements at the meeting. All statements received will be considered before any recommendation concerning the proposed extension is submitted to the Assistant Secretary for Land and Minerals Management for final action.

The application will be processed in accordance with the regulations set forth in 43 CFR 2310.4.

Authority: 43 CFR 2310.3–1.

Ron Wenker,

State Director, Nevada.

[FR Doc. 2010–30189 Filed 11–30–10; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–340–E and 340–H (Third Review)]

Solid Urea From Russia and Ukraine

AGENCY: United States International Trade Commission.

ACTION: Institution of five-year reviews concerning the antidumping duty orders on solid urea from Russia and Ukraine.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the antidumping duty orders on solid urea from Russia and Ukraine would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is January 3, 2011. Comments on the adequacy of responses may be filed with the Commission by February 14, 2011. 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), as most recently amended at 74 FR 2847 (January 16, 2009).

DATES: *Effective Date:* December 1, 2010.

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:

Background. On July 14, 1987, the Department of Commerce ("Commerce") issued antidumping duty orders on imports of solid urea from the Union of Soviet Socialist Republics ("USSR") (52 FR 26367). On June 29, 1992, following the division of the USSR in December 1991 into 15 independent states, Commerce divided the original antidumping duty order on solid urea from the USSR into 15 orders applicable to each independent state (57 FR 28828). Following first five-year reviews by Commerce and the Commission, effective November 17, 1999, Commerce issued a continuation of the antidumping duty orders on imports of solid urea from Russia and Ukraine (64 FR 62653). Following second five-year reviews by Commerce and the Commission, effective January 5, 2006, Commerce issued a continuation of the antidumping duty orders on imports of solid urea from Russia and Ukraine (71 FR 581). The Commission is now conducting third reviews to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full reviews or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions. The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are Russia and Ukraine.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, its expedited first five-year review determinations, and its full second five-year review determinations, the Commission defined the *Domestic Like Product* as solid urea consistent with Commerce's scope of subject merchandise.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, its expedited first five-year review determinations, and its full second five-year review determinations, the Commission defined the *Domestic Industry* as all domestic producers of solid urea.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 11–5–234, expiration date June 30, 2011. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list. Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register.** The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation. The Commission's designated agency ethics official has advised that a five-year review is not considered the "same particular matter" as the corresponding underlying original investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b)(19 CFR 201.15(b)), 73 FR 24609 (May 5, 2008). This advice was developed in consultation with the Office of Government Ethics. Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification. Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions. Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is January 3, 2011. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews The deadline for filing such comments is February 14, 2011. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 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). Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information. Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determinations in the reviews.

Information to be Provided In Response To this Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term "firm" includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and E-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the

Subject Merchandise in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2004.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and E-mail address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2009, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (i.e., the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) The quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s); and

(d) The quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s).

(e) The value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2009 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) The quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) The quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2009 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production; and

(b) Capacity (quantity) of your firm to produce the *Subject Merchandise* in each *Subject Country* (i.e., the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) The quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 2004, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

Issued: November 19, 2010.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–29948 Filed 11–30–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Senior Executive Service; Appointment of Members to the Performance Review Board

Title 5 U.S.C. 4314(c)(4) provides that Notice of the Appointment of the individual to serve as a member of the Performance Review Board of the Senior Executive Service shall be published in the **Federal Register**.

The following individuals are hereby appointed to serve on the Department's Performance Review Board:

Permanent Membership

Chair—Deputy Secretary—Seth D. Harris
Vice-Chair—Assistant Secretary for Administration and Management—T. Michael Kerr
Executive Secretary—Director, Executive Resources—Crystal Scott
Alternate Vice-Chair—Director, Human Resources Center—Eugenio (Gene) Ochoa Sexton

Rotating Membership

ASP Kathleen E. Franks, Director, Office of Regulatory and Programmatic Policy—appointment expires on 09/30/12
BLS John M. Galvin, Associate Commissioner, Office of Employment and Unemployment Statistics—appointment expires on 09/30/2013
EBSA Sharon S. Watson, Director, Office of Participant Assistance—appointment expires on 9/30/12
EBSA Jonathan Kay, Regional Administrator (New York)—appointment expires on 9/30/13
ETA Grace A. Kilbane, Administrator, Office of Workforce Investment—appointment expires on 09/30/11
ILAB Marcia M. Eugenio, Director, Office of Child Labor, Forced Labor Human Trafficking—appointment expires on 09/30/12
MSHA Maureen Walsh, Director, Administration and Management—appointment expires on 09/30/12
OASAM Charlotte A. Hayes, Deputy Assistant Secretary for Policy—appointment expires on 09/30/12
OASAM Milton A. Stewart, Director, Business Operations Center—appointment expires on 09/30/12
OASAM Ramon Suris-Fernandez, Director, Civil Rights Center—appointment expires on 09/30/11
OCFO Karen Tekleberhan, Deputy Chief Financial Officer—appointment expires on 09/30/2013
OFCCP Sandra S. Zeigler, Regional Director (Chicago)—appointment expires on 9/30/12
OLMS Stephen J. Willertz, Director, Office of Enforcement and International Union Audits—appointment expires on 09/30/2012
OWCP Rachel P. Leiton, Director, Energy Employees' Occupational Illness Compensation—appointment expires on 09/30/11
SOL Katherine E. Bissell, Associate Solicitor for Civil Rights and Labor Management—appointment expires on 09/30/11
SOL Michael D. Felsen, Regional Solicitor, Boston—appointment expires on 09/30/12
SOL Deborah Greenfield, Deputy Solicitor—appointment expires on 9/30/12
SOL Jeffrey L. Nesvet, Associate Solicitor for Federal Employees' and Energy Workers' Compensation—appointment expires on 09/30/13
VETS Ismael Ortiz, Jr., Deputy Assistant Secretary—appointment expires on 9/30/12
WHD Cynthia C Watson, Regional Administrator (Dallas)—appointment expires on 09/30/13

FOR FURTHER INFORMATION CONTACT: Ms. Crystal Scott, Director, Office of Executive Resources, Room C5508, U.S. Department of Labor, Frances Perkins Building, 200 Constitution Ave., NW., Washington, DC 20210, telephone: (202) 693–7628.

Signed at Washington, DC, on 24th day of November 2010.

Hilda L. Solis,

Secretary of Labor.

[FR Doc. 2010–30210 Filed 11–30–10; 8:45 am]

BILLING CODE 4510–23–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2010–4]

Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of inquiry: Extension of comment period; extension of reply comment period.

SUMMARY: The Copyright Office of the Library of Congress is extending the time in which comments and reply comments can be filed in response to its Notice of Inquiry requesting public input on the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction.

DATES: Initial written comments must be received in the Office of the General Counsel of the Copyright Office no later than January 31, 2011. Reply comments must be received in the Office of the General Counsel of the Copyright Office no later than March 2, 2011.

ADDRESSES: The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at *http://www.copyright.gov/docs/sound/comments/comment-submission-index.html*. The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browse button. To meet accessibility standards, each comment must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted on the Copyright Office Web site, along with names and organizations.

If electronic submission of comments is not feasible, comments may be delivered in hard copy. If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Room LM–401, James Madison Building, 101 Independence Ave., SE., Washington, DC 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site ("CCAS") located at 2nd and D Streets, SE., Washington, DC between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM–403, James Madison Building, 101 Independence Avenue, SE., Washington, DC 20559. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Chris Weston, Attorney Advisor. Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: To assist in the preparation of its study on federal protection for pre-1972 sound recordings, the Office published a Notice of Inquiry seeking comments on many detailed questions regarding various aspects of the study. *See* 75 FR 67777 (November 3, 2010). Initial

comments were due to be filed by December 20, 2010; reply comments were due to be filed by January 19, 2011.

The Copyright Office has received a request from the Recording Industry Association of America to extend the comment period to January 31, 2011, in order to allow sufficient time to gather relevant information from its member companies and to provide the Office with comprehensive comments. Given the need for more factual data regarding pre-1972 sound recordings, and the complexity of the issues raised by the Notice of Inquiry, the Office has decided to extend the deadline for filing comments by a period of 42 days, making initial comments due by January 31, 2011. The period for filing reply comments will be similarly extended, making reply comments due by March 2, 2011.

Dated: November 24, 2010.

David O. Carson,

General Counsel.

[FR Doc. 2010–30213 Filed 11–30–10; 8:45 am]

BILLING CODE 1410–30–P

NUCLEAR REGULATORY COMMISSION

[EA–10–152; Project No. 52–0001; NRC–2010–0368]

In the Matter of Toshiba America Nuclear Energy Corporation and All Other Persons Who Seek or Obtain Access to Safeguards Information Described Herein; Order Imposing Safeguards Information Protection Requirements for Access to Safeguards Information (Effective Immediately)

I

On June 12, 2009, the U.S. Nuclear Regulatory Commission (the Commission or NRC) published a rulemaking in the **Federal Register** (74 FR 28112), that requires applicants for a variety of licensing activities, including nuclear power plant designers, to perform a design-specific assessment of the effects of a large, commercial aircraft impact and to incorporate design features and functional capabilities into the nuclear power plant design to provide additional inherent protection with reduced operator actions. Section V of the **Federal Register** notice contains specific requirements for applicants for new nuclear power reactors. To assist designers in completing this assessment, the Commission has decided to provide the detailed aircraft impact characteristics that reactor vendors and architect/engineers who have the need to know and who meet the NRC's requirements for the disclosure of such information should use as reasonable input in studies of the inherent capabilities of their designs.

The NRC derived these characteristics from agency analyses performed on operating reactors to support, in part, the development of a broadly effective set of mitigation strategies to combat fires and explosions from a spectrum of hypothetical aircraft impacts. Although the NRC did not select these detailed characteristics as a basis for designing new reactors, the staff is suggesting that designers use them as a starting point for aircraft impact assessments. As stated in the rulemaking, the Commission will specify, in a safeguards information (SGI) guidance document, the detailed aircraft impact characteristics that should be used in a required assessment of the new reactor designs. The agency is working to finalize the form and values of those detailed characteristics. On July 10, 2009, the NRC issued Draft Regulatory Guide (DG)–1176, "Guidance for the Assessment of Beyond-Design-Basis Aircraft Impacts," to assist applicants in the completion of the assessment. The agency did not receive any comments on DG–1176. The staff is currently finalizing the regulatory guide. In addition, the staff recognizes that no national or international consensus has been reached on the selection of appropriate characteristics for such analyses. Therefore, applicants should consider the information preliminary and subject to authorized stakeholder comment. The detailed aircraft characteristics that are the subject of this Order are hereby designated as SGI,[1] in accordance with Section 147 of the Atomic Energy Act of 1954, as amended (AEA).

On October 24, 2008, the NRC revised Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, § 73.21, "Protection of Safeguards Information: Performance Requirements," to include applicants in the list of entities required to protect SGI (73 FR 63546). The NRC is issuing this Order to Toshiba America Nuclear Energy Corporation (TANE) to impose requirements for the protection of SGI in addition to the requirements in the revised 10 CFR 73.21. These additional requirements include nomination of a reviewing official, restrictions on the storage of SGI, and access to SGI by certain individuals.

To implement this Order, TANE must nominate an individual, known as the "reviewing official," who will review the results of the Federal Bureau of Investigation (FBI) criminal history records check to make SGI access determinations. The reviewing official must be someone who seeks access to SGI. Based on the results of the FBI criminal history records check, the NRC staff will determine whether this individual may have access to SGI. If the NRC determines that the individual may not be granted access to SGI, the enclosed Order prohibits that individual from obtaining access to any SGI. Once the NRC determines that the nominated individual may have access to SGI, and after TANE has completed the background check on the reviewing official and has determined that he or she is trustworthy and reliable, and has approved the individual as the reviewing official, that reviewing official, and only that reviewing official, can make SGI access determinations for other individuals who have been identified by TANE as having a need to know SGI and who have been fingerprinted and have had a criminal history records check in accordance with this Order. The reviewing official can only make SGI access determinations for other individuals; he or she cannot approve other individuals to act as reviewing officials. If TANE wishes to nominate a new or additional reviewing official, the NRC must first determine whether that individual may have access to SGI before he or she can act in the capacity of a reviewing official.

The regulations at 10 CFR 73.59, "Relief from Fingerprinting, Identification and Criminal History Records Checks and Other Elements of Background Checks for Designated Categories of Individuals," relieve certain categories of individuals from fingerprinting requirements. Those individuals include: (1) Federal, State, and local law enforcement personnel, (2) Agreement State inspectors who conduct security inspections on behalf of the NRC, (3) members of Congress, (4) employees of members of Congress or congressional committees who have undergone fingerprinting for a prior U.S. Government criminal history check, and (5) certain representatives of the International Atomic Energy Agency or certain foreign government organizations. In addition, the NRC has determined that individuals who have had a Favorably-decided U.S. Government criminal history check within the last 5 years or individuals

[1] SGI is a form of sensitive, unclassified, security-related information that the Commission has the authority to designate and protect under Section 147 of the AEA.

who have active Federal security clearances (provided, in either case, that they make available the appropriate documentation) have already been subjected to fingerprinting and criminal history records checks and, therefore, have satisfied the fingerprinting requirement in the Energy Policy Act of 2005.

II

The Commission has broad statutory authority to protect and prohibit the unauthorized disclosure of SGI. Section 147 of the AEA grants the Commission explicit authority to issue such orders, as necessary, to prohibit the unauthorized disclosure of SGI. Furthermore, Section 652 of the Energy Policy Act of 2005 amended Section 149 of the AEA to require fingerprinting and an FBI identification and criminal history records check of each individual who seeks access to SGI. In addition, no person may have access to SGI unless that person has an established need to know and satisfies the trustworthiness and reliability requirements of the regulations.

To provide assurance that TANE is continuing to implement the appropriate measures to ensure a consistent level of protection to prohibit unauthorized disclosure of SGI and to comply with the fingerprinting, criminal history records check, and background check requirements for access to SGI, TANE shall implement the requirements for the protection of SGI in 10 CFR 73.21, 10 CFR 73.22 and this Order. In addition, under 10 CFR 2.202, "Orders," the NRC finds that in light of the matters identified above, which warrant the issuance of this Order, public health and safety and the public interest require that this Order be effective immediately.

III

Accordingly, under Sections 147, 149, 161b, 161i, 161o, 182, and 186 of the AEA and under the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 73, "Physical Protection of Plants and Materials," *it is hereby ordered,* Effective Immediately, that Tane and all other persons who seek or obtain access to SGI as described herein shall comply with the requirements set forth in 10 CFR 73.21, 10 CFR 73.22, and this order.

A.1. No person may have access to any SGI if the NRC, when determining SGI access for a nominated reviewing official, has determined, based on fingerprinting and an FBI identification and criminal history records check that the person nominated may not have access to SGI.

2. TANE shall store SGI designated by this Order only in the facility or facilities specifically approved in writing by the NRC for storage of SGI designated by this Order. TANE may request, in writing, NRC approval of additional facilities for the storage of the SGI designated by this Order that the NRC will consider on a case-by-case basis.

3. TANE may provide SGI designated by this Order to individuals (such as foreign nationals, U.S. citizens living in foreign countries, or individuals under the age of 18) for whom fingerprinting and an FBI criminal history records check are not reasonably expected to yield sufficient criminal history information to form the basis of an informed decision on granting access to SGI, provided that the individual satisfies the requirements of this Order and that TANE has implemented measures, in addition to those set forth in this Order, to ensure that the individual is suitable for access to the SGI designated by this Order. Such additional measures must include, but are not limited to, equivalent criminal history records checks conducted by a local, State, or foreign government agency, and/or enhanced background checks, including employment and credit history. The NRC must review these additional measures and approve them in writing.

B. No person may provide SGI to any other person except in accordance with Section III.A above. Before providing SGI to any person, a copy of this Order shall be provided to that person.

C. TANE shall comply with the following requirements:

1. TANE shall, within 20 days of the date of this Order, submit the fingerprints of one individual who (a) TANE nominates as the "reviewing official" for determining access to SGI by other individuals and (b) has an established need to know the information. The NRC will determine whether this individual (or any subsequent nominated reviewing official) may have access to SGI and, therefore, will be permitted to serve as TANE's reviewing official.[2] TANE may, at the same time or later, submit the fingerprints of other individuals to whom TANE seeks to grant access to SGI. Fingerprints shall be submitted and reviewed in accordance with the procedures described in the attachment to this Order.

[2] The NRC's determination of this individual's access to SGI in accordance with the process described in Enclosure 3 to the transmittal letter of this Order is an administrative determination that is outside the scope of this Order.

2. TANE shall, within 20 days of the date of this Order, notify, in writing, the Commission: (a) If it is unable to comply with any of the requirements described in the Order, including the attachment; or (b) if compliance with any of the requirements is unnecessary in its specific circumstances.

The notification shall provide TANE's justification for seeking relief from, or variation of, any specific requirement.

TANE shall submit responses to Section III.C.1 and Section III.C.2 above to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555. In addition, TANE shall mark its responses as "Security-Related Information—Withhold under 10 CFR 2.390."

Except for the requirements for fingerprinting, the Director, Office of New Reactors, may, in writing, relax or rescind any of the above conditions upon demonstration of good cause by TANE.

IV

In accordance with 10 CFR 2.202, TANE must, and any other person adversely affected by this Order may, submit an answer to this Order and may request a hearing on this Order within 20 days of the date of its publication in the **Federal Register**. Where good cause is shown, the NRC will consider extending the time to answer or request a hearing. A request for an extension of time in which to submit an answer or to request a hearing must be made in writing to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and must include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of

the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket, which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The answer may consent to this Order. If the answer, on the other hand, includes a request for hearing, it shall, in writing and under oath or affirmation, specifically set forth the matters of fact and law by which TANE relies and the reasons as to why the NRC should not have issued this Order. If a person other than TANE requests a hearing, that person shall set forth with particularity the manner in which his/her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

If TANE or a person whose interest is adversely affected requests a hearing, the Commission will issue an order designating the time and place of any hearing. If a hearing is held, the issue to be considered at this hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), TANE may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the order on the grounds that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for a hearing or written approval of an extension of time in which to request a hearing, the provisions, as specified above in Section III, shall be final 20 days from the date this Order is published in the **Federal Register**, without further issuance of an order or proceedings.

If the agency approves an extension of time in which to request a hearing, the provisions, as specified above in Section III, shall be final when the extension expires if the NRC has not received a hearing request.

An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated at Rockville, MD, this 19th day of November 2010.

For the Nuclear Regulatory Commission.

Michael R. Johnson,

Director, Office of New Reactors.

Guidance for the Evaluation of Access to Safeguards Information With the Inclusion of Criminal History Records (Fingerprint) Checks

When a licensee or other person [3] submits fingerprints to the U.S. Nuclear Regulatory Commission (NRC) in accordance with an NRC Order, that licensee or other person will receive a criminal history summary of information, as provided in federal records, since the individual's 18th birthday. Individuals retain the right to correct and complete information and to initiate challenge procedures described in Enclosure 3. The licensee will receive the information from the criminal history records check for those individuals who require access to Safeguards Information (SGI), and the reviewing official will evaluate that information using the guidance below. Furthermore, the requirements of all orders, which apply to the information and material to which access is being granted, must be met.

The licensee's reviewing official is required to evaluate all pertinent and available information when determining an individual's access to SGI, including the criminal history information pertaining to that individual as required by the NRC Order. The reviewing official must use the criminal history records check when determining whether an individual has a record of criminal activity that indicates that he or she should not have access to SGI. The reviewing official must document each determination of access to SGI, including a review of criminal history information and the basis for the decision that he or she made as follows:

- If the reviewing official discovers negative information that the individual did not provide or that is different in any material respect from the information that the individual provided, the reviewing official should consider this information and must document his or her decisions made based on these findings.
- The reviewing official should carefully evaluate any record that contains information on a pattern of behaviors that indicates that the behaviors could be expected to recur or continue or on recent behaviors that cast questions on whether an individual should have access to SGI before any authorization of access to SGI.

A licensee must resubmit fingerprints only under either one of the following two conditions:

(1) The Federal Bureau of Investigation (FBI) has determined that the fingerprints cannot be classified due to poor quality in the mechanics of taking the initial impressions; or

(2) The initial submission has been lost.

If the FBI advises that six sets of fingerprints are unclassifiable based on conditions other than poor quality, the licensee may submit a request to the NRC for alternatives. When those search results are received from the FBI, no further search is necessary.

Process To Challenge NRC Denials or Revocations of Access to Safeguards Information

1. Policy

This policy establishes a process by which individuals who are nominated as a reviewing official by a U.S. Nuclear Regulatory Commission (NRC) licensee or other person [1] are afforded the opportunity to challenge and appeal NRC denials or revocations of access to Safeguards Information (SGI). Any individual nominated as a licensee reviewing official whom the NRC has determined may not have access to SGI shall, to the extent provided below, be afforded an opportunity to challenge and appeal the NRC's determination. This policy shall not be construed to require the disclosure of SGI to any person, nor shall it be construed to create a liberty or property interest of any kind in the access of any individual to SGI.

2. Applicability

This policy applies solely to those employees of licensees who are nominated as a reviewing official and who are thus considered, by the NRC, for initial or continued access to SGI in that position.

3. SGI Access Determination Criteria

The NRC staff will make determinations for granting a nominated reviewing official access to SGI. The NRC shall deny or revoke access to SGI whenever it determines that an individual does not meet the applicable standards. The agency shall resolve any doubt about an individual's eligibility for initial or continued access to SGI in favor of the national security and will deny or revoke access.

4. Procedures To Challenge the Contents of Records Obtained From the Federal Bureau of Investigation (FBI)

Before the NRC Facilities Security Branch Chief makes the determination to deny or revoke access to SGI by an individual nominated as a reviewing official, that individual shall be afforded the following:

(1) The individual shall have access to the contents of records obtained from the FBI for the purpose of ensuring correct and complete information. If, after reviewing the record, an individual believes that the information is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency or to explain any matter in the record, he or she may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation, Identification Division, Washington, DC 20537–9700 (as set forth in Title 28 of the *Code of Federal Regulations* (28 CFR) 16.30, "Purpose and Scope," through 28 CFR 16.34, "Procedure to Obtain Change, Correction or Updating of Identification Records"). In the latter case, the FBI will forward the challenge to the agency that submitted the data and will request that the agency verify or correct the challenged entry. Once the FBI receives an official communication directly from the agency that contributed the original information, the FBI's Identification Division makes any necessary changes in accordance with the information supplied by that agency.

(2) The individual shall have 10 days to initiate an action challenging the results of an FBI criminal history records check (described in provision 1 above) after the record is made available for the individual's review. If the individual initiates such a challenge, the NRC Facilities Security Branch Chief may make a determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record.

5. Procedures To Provide Additional Information

Before the NRC Facilities Security Branch Chief makes a determination to deny or revoke access to SGI by an individual nominated as a reviewing official, that individual shall be given

[3] As used herein, "licensee" means any licensee or other person who must conduct fingerprinting.

[1] As used herein, "licensee" means any licensee or other person who must conduct fingerprinting.

the opportunity to submit information relevant to the his or her trustworthiness and reliability. The NRC Facilities Security Branch Chief shall, in writing, notify the individual of this opportunity and of any deadlines for submitting this information. The NRC Facilities Security Branch Chief may make a determination of access to SGI only upon receipt of the additional information submitted by the individual or, if no such information is submitted, when the deadline to submit such information has passed.

6. Procedures To Notify an Individual of the NRC Facilities Security Branch Chief's Determination To Deny or Revoke Access to Safeguards Information

Once the NRC Facilities Security Branch Chief makes a determination to deny or revoke access to SGI by an individual nominated as a reviewing official, that individual shall be provided a written explanation of the basis for this determination.

7. Procedures To Appeal an NRC Determination To Deny or Revoke Access to Safeguards Information

Once the NRC Facilities Security Branch Chief makes a determination to deny or revoke access to SGI by an individual nominated as a reviewing official, that individual shall be afforded an opportunity to appeal this determination to the Director, Division of Facilities and Security. The individual must appeal the determination within 20 days of receipt of the written notice of the determination by the Facilities Security Branch Chief, either in writing or in person. Any appeal made in person shall take place at the NRC's Headquarters and shall be at the individual's own expense. The determination made by the Director, Division of Facilities and Security, shall be rendered within 60 days after receipt of the appeal.

8. Procedures To Notify an Individual of the Determination by the Director, Division of Facilities and Security, Upon an Appeal

A determination by the Director, Division of Facilities and Security, shall be provided to the individual in writing and shall include an explanation of the basis for this determination. A determination by the Director, Division of Facilities and Security, to affirm the Facilities Branch Chief's determination to deny or revoke an individual's access to SGI is final and not subject to further administrative appeals.

General Requirements

Licensees and other persons who are required to conduct fingerprinting shall comply with the requirements of this enclosure.[2]

The licensee shall notify the U.S. Nuclear Regulatory Commission (NRC) of any desired change in reviewing officials in compliance with Section III.C.1 of the subject order. The NRC will determine whether the individual nominated as the new reviewing official may have access to Safeguards Information (SGI) based on a previously obtained or new criminal history records check and, therefore, will be permitted to serve as the licensee's reviewing official.

Procedures for Processing Fingerprint Checks

For the purpose of complying with this Order, licensees shall, using an appropriate method listed in Title 10 of the *Code of Federal Regulations* (10 CFR) 73.4, "Communications," submit to the NRC's Division of Facilities and Security, Mail Stop T–6 E46, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking access to SGI to the Director, Division of Facilities and Security, marked to the attention of the Division's Criminal History Check Section. Licensees may obtain copies of these forms by written request to the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; by telephone at (301) 415–5877; or by e-mail at *forms@nrc.gov.* Practicable alternative formats appear in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken minimizes the rejection rate of fingerprint cards because of illegible or incomplete cards.

The NRC will review submitted fingerprint cards for completeness. Any Form FD–258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one resubmission if the Federal Bureau of Investigation (FBI) returns the initial submission because the fingerprint impressions cannot be classified. The one free resubmission must have the FBI transaction control number reflected on it. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

Fees for processing fingerprint checks are due upon application. Licensees shall submit payment with the application for processing fingerprints by a corporate check, certified check, cashier's check, money order, or electronic payment made payable to "U.S. NRC." (For guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at 301–415–7404.) A combined payment for multiple applications is acceptable. The application fee (currently $26) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee and an NRC processing fee, which covers administrative costs associated with NRC's handling of licensee fingerprint submissions. The Commission will directly notify licensees that are subject to this regulation of any fee changes.

The Commission will forward to the submitting licensee all data received from the FBI resulting from the licensee's application(s) for criminal history records checks, including the FBI fingerprint record.

Right To Correct and Complete Information

Before any final adverse determination, the licensee shall make available to the individual the contents of any criminal records obtained from the FBI for the purpose of ensuring correct and complete information. The licensee must maintain the individual's written confirmation of receipt of this notification for a period of 1 year from the date of the notification. If, after reviewing the record, an individual believes that the information is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency or to explain any matter in the record, he or she may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (*i.e.,* law enforcement agency) that contributed the questioned information or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation, Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30, "Purpose and Scope," through 28 CFR 16.34, "Procedure to Obtain Change, Correction or Updating of Identification Records"). In the latter case, the FBI will forward the challenge to the agency that submitted the data and will request that the agency verify or correct the challenged entry. Once the FBI receives

[2] As used herein, "licensee" means any licensee or other person who must conduct fingerprinting in accordance with these requirements.

an official communication directly from the agency that contributed the original information, the FBI's Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must allow an individual at least 10 days to initiate an action challenging the results of an FBI criminal history records check after the record is made available for his or her review. The licensee may make a final SGI access determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to SGI, the licensee shall provide the individual its documented basis for denial. The licensee shall not grant an individual access to SGI during the review process.

Protection of Information

Each licensee who obtains a criminal history record on an individual under this Order shall establish and maintain a system of files and procedures for protecting the record and the personal information from unauthorized disclosure.

The licensee may not disclose the record or personal information that it collects and maintains to persons other than the subject individual or his or her representative or to those who have a need to access the information in performing assigned duties in the process of determining access to SGI. No individual authorized to have access to the information may redisseminate the information to any other individual who does not have a need to know.

The licensee may transfer personal information obtained on an individual from a criminal history records check to another licensee if the licensee holding the criminal history records check receives the individual's written request to redisseminate the information contained in his or her file and if the current licensee verifies information such as the individual's name, date of birth, Social Security number, sex, and other applicable physical characteristics for identification purposes.

The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

The licensee shall retain all fingerprint and criminal history records that it receives from the FBI or a copy of these records if the individual's file has been transferred for 3 years after termination of employment or upon determination of access to SGI (whether access was approved or denied). After the required 3-year period, the licensee shall destroy these documents by a method that will prevent the reconstruction of the information in whole or in part.

[FR Doc. 2010–30221 Filed 11–30–10; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Parcel Return Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: Postal Service notice of filing of a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List pursuant to 39 U.S.C. 3642 and 3632(b)(3).

DATES: December 1, 2010.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that on November 17, 2010, it filed with the Postal Regulatory Commission a Request of the United States Postal Service to Add Parcel Return Service Contract 2 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data. Documents are available at *http://www.prc.gov,* Docket Nos. MC2011–6 and CP2011–33.

Neva R. Watson,

Attorney, Legislative.

[FR Doc. 2010–30185 Filed 11–30–10; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63367; File No. SR–Phlx–2010–163]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Obvious Errors Respecting Complex Trades

November 23, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on November 17, 2010, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes to amend Rule 1092, Obvious Errors and Catastrophic Errors, to address obvious and catastrophic errors involving complex orders.

The text of the proposed rule change is available on the Exchange's website at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov,* 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 the proposed rule change is to mitigate the risk to parties using complex orders, where part or all of a complex order traded at an erroneous price; specifically, the proposal addresses the situation where one component (or leg) of a complex order is deemed an obvious (or catastrophic) error but the other component(s) is (are) not.

Background

Complex orders are orders with more than one component, and take many

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

forms, such as spreads and straddles.[5] Complex orders have been trading electronically on the Exchange's trading system since 2008.[6] At this time, the Exchange is proposing to amend its Rule 1092 to address complex orders that have at least one leg that trades at an erroneous price. Rule 1092 is the Exchange's rule that governs obvious errors and catastrophic errors in options. Most options exchanges have similar but not identical rules; this proposal would adopt a new process of determining how to deal with obvious/catastrophic errors when a complex order trades with another complex order.

Rule 1092 provides a framework for reviewing the price of a transaction to determine whether that price was an "obvious error"[7] pursuant to objective standards. When a participant believes he/she received one or more executions at an erroneous price, a participant may notify the Options Exchange Officials ("OEOs") and request the review of a trade as a possible obvious error.[8] An obvious error will be deemed to have occurred when the execution price of a transaction is higher or lower than the theoretical price for a series by a certain amount depending on the type of option. OEOs use one of three criteria when determining the theoretical price of an options execution, which is enumerated in Rule 1092(b). The theoretical price is then compared to an obvious/catastrophic error chart within Rule 1092(a). If the transaction price meets this threshold, the transaction may be adjusted or nullified.

Proposal

The proposal at hand would permit all legs of a complex order execution to be nullified when one leg can be nullified under this Rule, only if the execution was a complex order versus a complex order (such that all of the same parties are involved in the trade).[9] This occurs when a complex order executes against another complex order, with each piece executing through the System against each other. For example, assume a customer trades a call spread at a net price of $.50 by buying the January 50 calls at $3.00 and selling the January 55 calls at $2.50. If the January 50 calls should have been trading at $7.00 and thus meet the obvious error threshold in Rule 1092, then the entire complex trade will be nullified only if the January 50 and 55 calls traded as a complex order against another complex order, rather than as two separate trades. Currently, once the trade involving the January 50 calls is nullified, both parties are stuck with a transaction in the January 55 calls, which was not intended by either. This proposal to nullify all the components of a complex order that traded with another complex order provides an important benefit to both parties, neither of whom intended to end up with just one option.

This proposal does not address complex orders that do not trade against other complex orders. Sometimes complex orders are executed by the System by "legging" or executing the component parts against other individual, unrelated orders/quotes rather than a single complex order with the same component parts.[10] The benefit of the legging feature of the Exchange's complex order system is that it increases the likelihood that a complex order will be executed. Nevertheless, it is possible, at times, that after such a trade, only one leg of a complex order may meet the obvious error threshold; thus, this could result in a residual position of a single leg, rather than a complete complex order execution. This will not change under this proposal.

In sum, Rule 1092 is proposed to be amended as enumerated above in order to mitigate risk for parties of a complex order where a complex order traded with another complex order at an erroneous price. By creating uniformity for all trades that are "complex to complex," parties will have less trading risk because all of the components will be nullified under the proposal.

In addition, the Exchange also proposes to make three minor corrections: (i) A reference in Rule 1092(b)(ii) to Rule 1014(c)(1)(A)(i)(a) is inverted and should instead say Rule 1014(c)(i)(A)(1)(a); (ii) the words "obvious error" in Rule 1092(e)(i)(B) are being capitalized to match the rest of the rule; and (iii) a reference to "AUTOM" in Rule 1092(e)(ii) is outdated and will be deleted, leaving reference to the "Help Desk."

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[11] in general, and furthers the objectives of Section 6(b)(5) of the Act[12] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by improving the obvious error process for complex orders that trade with other complex orders. Recognition that a trade is part of a complex order should help add more certainty to the obvious/catastrophic error process and reduce the risk to parties trading on the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR–Phlx–2010–163 on the subject line.

[5] *See* Rule 1080.08.

[6] *See* Securities Exchange Act Release No. 58361 (August 14, 2008), 73 FR 49529 (August 21, 2008) (SR–Phlx–2008–50). Complex orders have long been executed on the trading floor verbally using contingent orders and the rules that apply to such executions.

[7] This proposal also covers catastrophic errors.

[8] *See* Rule 1092(e).

[9] *See* proposed Rule 1092(c)(v)(A).

[10] In the example above, the January 50 calls would be purchased from seller A and the January 55 calls sold to buyer B, both of whom are just bidding/offering one option, not a complex order.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

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–Phlx-2010–163. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx-2010–163 and should be submitted on or before December 22, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30225 Filed 11–30–10; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63372; File No. SR–Phlx–2010–162]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Price Improvement (PIXL) Fees

November 24, 2010.

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 November 18, 2010, NASDAQ OMX PHLX LLC ("Phlx" or the "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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend and supersede its pricing applicable to members utilizing the Exchange's price improvement mechanism known as Price Improvement XL or (PIXL®).

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative for transactions settling on or after November 22, 2010.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend and supersede the current fees assessed for orders known as PIXL Orders[3] and Initiating Orders.[4] The Exchange intends to place a cap on the maximum fee that would be assessed to market participants for utilizing the price improvement mechanism. The Exchange also proposes to amend the fee assessed for Initiating Orders.

Currently, the Exchange assesses PIXL fees on Customers, Directed Participants,[5] Specialists,[6] Streaming Quote Traders ("SQT"),[7] Remote Streaming Quote Traders ("RSQT"),[8] Firms and Broker-Dealers. All options traded on the Exchange are eligible for PIXL.

The Exchange assesses a fee of $0.05 per contract when an Initiating Order executes against a PIXL Order in the symbols listed in Section I, the Fees and Rebates for Adding and Removing Liquidity in Select Symbols[9] (known as "Select Symbols"), and the symbols defined in Section II[10] ("Section II

[3] A member may electronically submit for execution an order it represents as agent on behalf of a public customer, broker-dealer, or any other entity ("PIXL Order") against principal interest or against any other order (except as provided in sub-paragraph (n)(i)(E) below) it represents as agent ("Initiating Order") provided it submits the PIXL order for electronic execution into the PIXL Auction ("Auction") pursuant to Rule 1080. *See* Exchange Rule 1080(n).

[4] *See* footnote 3.

[5] *See* Exchange Rule 1080(l), "* * * The term 'Directed Specialist, RSQT, or SQT' means a specialist, RSQT, or SQT that receives a Directed Order." A Directed Participant has a higher quoting requirement as compared with a specialist, SQT or RSQT who is not acting as a Directed Participant. *See* Exchange Rule 1014.

[6] A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

[7] A Streaming Quote Trader is defined in Exchange Rule 1014(b)(ii)(A) as an ROT who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned.

[8] A Remote Streaming Quote Trader is defined Exchange Rule in 1014(b)(ii)(B) as an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned.

[9] The Fees and Rebates for Adding and Removing Liquidity in Select Symbols are listed in Section I of the Fee Schedule.

[10] An equity option includes exchange-traded fund share ("ETF"), Holding Company Depositary Receipt ("HOLDR"), Russell 2000(R) Index (the "Full Value Russell Index" or "RUT"), options on the one-tenth value Russell 2000® Index (the "Reduced

Continued

Symbols"). The Exchange assesses the fees listed in Section II of the Fee Schedule for the PIXL Order when the PIXL Order trades against the Initiating Order in Section II Symbols and the Select Symbols. For example, a member or member organization is assessed $0.00 for Customer transactions.

For the symbols assessed according to Section III [11] of the Fee Schedule, titled Sector Index Options Fees and U.S Dollar-Settled Foreign Currency ("WCO") Options Fees, the transaction fees described in Section III apply to both the Initiating Order and the PIXL Order for all executions.

Select Symbols: Section I

With respect to executions in Select Symbols, where the PIXL Order is not trading against the Initiating Order, the PIXL Order is assessed the Fee for Removing Liquidity when that order is executed against a resting contra-side order or quote that was present upon initial receipt of the PIXL Order. The resting contra-side order or quote receives the Rebate for Adding Liquidity. Additionally, the PIXL Order receives the Rebate for Adding Liquidity when that order is executed against contra-side order(s) that respond to the PIXL auction broadcast message as well as when executed against contra-side quotes and unrelated orders on the PHLX book that arrived after the PIXL auction was initiated. The PIXL auction responders, contra-side order(s) and quote(s) is/are assessed the Fee for Removing Liquidity.

For the symbols assessed according to Section III of the Fee Schedule, titled Sector Index Options Fees and U.S Dollar-Settled Foreign Currency ("WCO") Options Fees, the transaction fees described in Section III apply to both the Initiating Order and the PIXL Order for all executions.

Equity Options: Section II

With respect to executions in Section II Equity Options,[12] the PIXL Order is assessed the appropriate Equity Option Fee in Section II of the Fee Schedule. The contra-side order or quote is assessed the appropriate Equity Option Fee listed on the Fee Schedule as well. All other Equity Options Fees in Section II apply as appropriate, including but not limited to Payment for Order Flow.

The Exchange is proposing to amend its PIXL fees to assess $0.07 per contract for each Initiating Order and to add language to the Fee Schedule to indicate that certain fees will be limited to a maximum of $0.32 per contract for PIXL Orders. Specifically, for options overlying the Select Symbols defined in Section I and Equity Options defined in Section II of the Fee Schedule, the maximum fee any participant will pay will be $0.32 per contract. The Exchange believes that these fees should encourage the initiation of price improvement auctions.

The Exchange is also adding "BKX" to the text of Section IV of the Fee Schedule, as BKX was added to the equity options fees.[13]

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative for transactions settling on or after November 22, 2010.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [14] in general, and furthers the objectives of Section 6(b)(4) of the Act [15] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange is lowering prices to provide incentives for its members to seek price improvement for customer orders. Offering lower prices to members that initiate a price improvement opportunity is sound public policy and market structure. Any order that is assessed the lower fee will, by definition, have received the opportunity for an execution at a price superior to the market. The Exchange believes that the fee proposal is both equitable and reasonable for this and the reasons listed hereafter.

The proposed fees are consistent with the price differentials that exist today at most option exchanges. For example, the highest transaction fee differential proposed by the Exchange is the same transaction fee differential that currently exists between broker-dealers that that manually facilitate their customer order flow (known as firm facilitation) and the transaction fees charged to other broker-dealers by the both NYSE Arca, Inc. ("NYSE Arca") [16] and NYSE Amex LLC ("NYSE Amex").[17] [18] [sic]

Additionally, the fees and rebates assessed by the Exchange are similar, and in some cases less than, the fees and rebates assessed by the Boston Options Exchange Group, LLC ("BOX") [19] and the International Securities Exchange ("ISE") [20] for orders executed in a price improvement mechanism. For example a BOX participant could be assessed total fees of $0.35 per contract as the price improvement period ("PIP") initiator and receive a rebate for their customer PIP order of $0.25 per contract (in this example the net fee charged the BOX participant would be $0.10), whereas the PIP responder could be assessed a fee of $0.50 per contract. This is a differential of $0.40 per contract between two BOX participants for participating in the PIP auction, which is equal to or less than the differentials that exist in the Exchange's proposal. With respect to ISE, the Exchange pays a rebate for certain PIXL executions, which is similar to the $0.15 rebate ISE pays for its price improvement mechanism.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section

Value Russell Index" or "RMN"), options on the Nasdaq 100 Index traded under the symbol NDX ("NDX"), options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX ("MNX") and the KBW Bank Index ("BKX").

[11] The symbols assessed fees according to Section III are BKX, FPX, HGX, OSX, SOX, UTY, and XAU ("Sector Index Options") and U.S. Dollar-Settled Foreign Currency Options ("WCOs").

[12] This includes all Symbols that are not specifically Select Symbols as listed in Section I of the Fee Schedule.

[13] *See* Securities Exchange Act Release No. 63252 (November 5, 2010), 75 FR 69486 (November 12, 2010) (SR–Phlx–2010–150) (a rule change to add the KBW Bank Index ("BKX") to the Equity Option Fees).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4).

[16] *See* Securities Exchange Act Release No. 62670 (August 9, 2010), 75 FR 49546 (August 13, 2010) (SR–NYSEArca–2010–77). *See also* NYSE Arca's Fee Schedule. NYSE Arca assesses no fee for firm facilitation-manual trades and a $0.25 per contract fee for all other firm and broker-dealer manual trades.

[17] *See* Securities Exchange Act Release No. 50012 (August 9, 2010), 75 FR 50012 (August 16, 2010) (SR–NYSEAmex–2010–81). *See also* NYSE Amex's Fee Schedule. NYSE Amex assesses no fee for firm facilitation-manual trades and a $0.25 per contract fee for all other firm and broker-dealer manual trades.

[18] The Exchange also assesses similar firm facilitation fees. *See* Exchange's Fee Schedule.

[19] *See* Securities and Exchange Act Release No. 62632 (August 3, 2010), 75 FR 47869 (August 3, 2010) (SR–BX–2010–049).

[20] See the ISE schedule of fee as of August 2, 2010.

19(b)(3)(A)(ii) of the Act.[21] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2010–162 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–Phlx–2010–162. 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,[22] 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–162 and should be submitted on or before December 22, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30227 Filed 11–30–10; 8:45 am]

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[21] 15 U.S.C. 78s(b)(3)(A)(ii).

[22] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63375; File No. SR–FINRA–2010–061]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt Rules Governing Guarantees, Carrying Agreements, Security Counts and Supervision of General Ledger Accounts in the Consolidated FINRA Rulebook

November 24, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "SEA") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 12, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt FINRA Rules 4150 (Guarantees by, or Flow Through Benefits for, Members), 4311 (Carrying Agreements), 4522 (Periodic Security Counts, Verifications and Comparisons) and 4523 (Assignment of Responsibility for General Ledger Accounts and Identification of Suspense Accounts) in the consolidated FINRA rulebook and to delete NASD Rule 3230, Incorporated NYSE Rules 322, 382, 440.10 and 440.20 and Incorporated NYSE Rule Interpretations 382/01 through 382/05, 409(a)/01 and 440.20/01.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA 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, FINRA 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. FINRA 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

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),[3] FINRA is proposing to adopt new, consolidated rules governing guarantees, carrying agreements, security counts and supervision of general ledger accounts for purposes of the Consolidated FINRA Rulebook. FINRA proposes to adopt FINRA Rules 4150 (Guarantees by, or Flow Through Benefits for, Members), 4311 (Carrying Agreements), 4522 (Periodic Security Counts, Verifications and Comparisons) and 4523 (Assignment of Responsibility for General Ledger Accounts and Identification of Suspense Accounts) in the Consolidated FINRA Rulebook and to delete NASD Rule 3230, NYSE Rules

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

322, 382, 440.10 and 440.20 and NYSE Rule Interpretations 382/01 through 382/05, 409(a)/01 and 440.20/01.[4]

The proposed rules would, in combination with the new consolidated financial responsibility rules that the SEC has approved,[5] enhance FINRA's authority to execute effectively its financial and operational surveillance and examination programs. Consistent with the approach that FINRA discussed in SR–FINRA–2008–067 and *Regulatory Notice* 09–71, many of the requirements set forth in the proposed rules are substantially the same as requirements found in current rules and, where appropriate, are tiered to apply only to carrying or clearing firms, or to firms that engage in certain specified activities.[6] Certain of the proposed rule provisions are new for FINRA members that are not Dual Members ("non-NYSE members"). Certain other provisions are new for both Dual Members and non-NYSE members alike.

(A) Proposed FINRA Rule 4150 (Guarantees by, or Flow Through Benefits for, Members)

Proposed FINRA Rule 4150(a), based in large part on NYSE Rule 322, requires that prior written notice be given to FINRA whenever a member guarantees, endorses or assumes, directly or indirectly, the obligations[7] or liabilities of another person (including an entity).[8] Paragraph (b) of the rule requires that prior written approval must be obtained from FINRA whenever any member receives flow-through capital benefits in accordance with Appendix C of SEA Rule 15c3–1.[9] Details of the rule's notice and prior approval requirements are included in proposed FINRA Rule 4150.01. Proposed FINRA Rule 4150.02 provides that a member may at any time (*i.e.,* not just within the context of the prior written notice that the member provides or the prior written approval that the member seeks to obtain pursuant to the proposed rule) be required to provide FINRA with information with respect to the arrangement, relationship and dealings with a person referred to in the proposed rule.

Proposed FINRA Rule 4150.03 prohibits any member from entering into an arrangement described in the proposed rule unless the member has the authority to make available promptly the books and records of the other person for inspection by FINRA in the United States. The proposed rule provides that the books and records of the other person must be kept separately from those of the member.

With respect to persons referred to in the proposed rule that are registered broker-dealers, proposed FINRA Rule 4150.04 requires that the member must furnish to FINRA copies of the person's FOCUS Reports simultaneous with their being filed with the person's designated examining authority ("DEA"). FINRA expects that members shall furnish the person's FOCUS Reports to FINRA on an ongoing basis (the member need not furnish the person's FOCUS Reports to FINRA if FINRA is the person's DEA). With respect to persons that are not registered broker-dealers, the proposed rule requires, in lieu of FOCUS Reports, submission of financial and operational statements, in such format and at such time periods as FINRA may require, sufficient to gauge the capital and operational effects of the arrangement or relationship on the member.

Proposed FINRA Rule 4150.05 provides that guarantees executed routinely in the normal course of business, such as trade guarantees, signature guarantees, endorsement of securities and the writing of options, are not subject to the requirements of the proposed rule provided that, in regard to the guarantee of the writing of options, the transaction is appropriately recorded on the member's books and records in accordance with SEA Rule 17a–3(a)(10) and is reflected in its net capital computation pursuant to SEA Rule 15c3–1.[10]

In response to commenter suggestions, proposed FINRA Rule 4150.06 provides that, within 30 days of the implementation date of the rule, each member must advise FINRA, in writing, of any guarantees, endorsements, assumptions of obligations/liabilities, or flow through capital benefits, in effect as of the implementation date of the rule, not having otherwise been reported, in writing, to the appropriate Regulatory Coordinator.[11]

NASD Rules do not have a provision that corresponds to NYSE Rule 322. Accordingly, the requirements of proposed FINRA Rule 4150 would be new to non-NYSE members.

(B) Proposed FINRA Rule 4311 (Carrying Agreements)

Proposed FINRA Rule 4311 is based on NASD Rule 3230 and NYSE Rule 382 (including NYSE Rule Interpretations 382/01 through/05 and 409(a)/01). The proposed rule governs the requirements applicable to members when entering into agreements for the carrying of any customer accounts in which securities transactions can be effected. Historically, the purpose of the NASD and NYSE rules upon which the proposed rule is based has been to ensure that certain functions and responsibilities are clearly allocated to either the introducing or carrying firm, consistent with the requirements of the SRO's and SEC's financial responsibility and other rules and regulations, as applicable.[12] The proposed rule continues to serve that same purpose and, accordingly, contains many requirements that are substantially unchanged from NASD Rule 3230 and NYSE Rule 382. Proposed FINRA Rule 4311 also codifies certain provisions that are new for non-NYSE members, or are new for both Dual Members and non-NYSE members alike. Following is a summary of the more significant provisions of the proposed rule.

Proposed FINRA Rule 4311(a)(1) prohibits a member, unless otherwise permitted by FINRA, from entering into an agreement for the carrying, on an omnibus or fully disclosed basis, of any customer account in which securities transactions can be effected (for purposes of Rule 4311, "customer

[4] For convenience, the Incorporated NYSE Rules are referred to as the "NYSE Rules."

[5] *See* Securities Exchange Act Release No. 60933 (November 4, 2009), 74 FR 58334 (November 12, 2009) (Order Granting Accelerated Approval to Proposed Rule Change; File No. SR–FINRA–2008–067). *See also Regulatory Notice* 09–71 (December 2009) (SEC Approves Consolidated FINRA Rules Governing Financial Responsibility); *Regulatory Notice* 09–03 (January 2009) (Financial Responsibility and Related Operational Rules).

[6] For purposes of the new consolidated financial responsibility rules and the proposed rules, FINRA has specified in the rule text where appropriate that all requirements that apply to a member that clears or carries customer accounts also apply to any member that, operating pursuant to the exemptive provisions of SEA Rule 15c3–3(k)(2)(i), either clears customer transactions pursuant to such exemptive provisions or holds customer funds in a bank account established thereunder. For further discussion, *see* 74 FR 58334. *See also* proposed FINRA Rule 4523.02 in this rule filing.

[7] In response to comments, FINRA notes that the term "obligations" includes financial obligations, as well as other obligations that may have a financial impact on a member, such as performance obligations. *See* Section (A) under Item II.C.

[8] NASD Rule 0120(n) defines "person" to include any natural person, partnership, corporation, association, or other legal entity. Similarly, NYSE Rule 2(d) states that "person" means a natural person, corporation, limited liability company, partnership, association, joint stock company, trust, fund or any organized group of persons whether incorporated or not. All references to "persons" in this filing include entities.

[9] In the interest of clarity, FINRA has revised the proposed rule so as to better align it with the requirements of Appendix C.

[10] *See* note 33.

[11] *See* Section (A) under Item II.C.

[12] *See, e.g., Notice to Members* 94–7 (February 1994) (SEC Approves New NASD Rule Relating to the Obligations and Responsibilities of Introducing and Clearing Firms) and NYSE *Information Memo* 82–18 (March 1982) (Carrying Agreements—Amendments to Rules 382 and 405).

account" or "account"), unless the agreement is with a carrying firm that is a FINRA member.[13] This is a new requirement for all members; however, the vast majority of carrying firms in the United States are FINRA members. Proposed FINRA Rule 4311(a)(1) also includes a provision that requires that when an introducing firm acts as an intermediary for another introducing firm or firms (so-called "piggyback" or "intermediary clearing arrangements") for the purpose of obtaining clearing services from the carrying firm, the introducing firm must notify the carrying firm of the existence of the arrangement(s) with the other introducing firm(s) and disclose the identity of the firm(s). Based in large part on NYSE Rule Interpretation 382/05, the proposed rule further requires that each carrying agreement must identify and bind every direct and indirect recipient of clearing services as a party thereto.

Proposed FINRA Rule 4311(b)(1), consistent with the requirements of NASD Rule 3230(e) and NYSE Rule 382(a), requires that the carrying firm must submit to FINRA for prior approval any agreement for the carrying of accounts, whether on an omnibus or fully disclosed basis, before such agreement may become effective. The proposed rule also provides that the carrying firm must also submit to FINRA for prior approval any material changes to an approved carrying agreement before the changes may become effective.[14] The proposed rule codifies the practice under NASD Rule 3230 of permitting use of pre-approved standardized forms of agreement, with the exception of agreements with parties that are not U.S.-registered broker-dealers. The proposed rule requires a carrying firm to submit to FINRA for approval each carrying agreement with a non-U.S.-registered broker-dealer.[15] This is a new requirement for non-NYSE members.

Proposed FINRA Rule 4311(b)(3) codifies the current practice under NYSE Rule 382 of requiring that as early as possible, but not later than 10 business days, prior to the carrying of any accounts of a new introducing firm (including the accounts of any piggyback or intermediary introducing firm(s)), the carrying firm must submit to FINRA a notice identifying each such introducing firm by name and CRD number and include such additional information as FINRA may require.[16] This is a new requirement for non-NYSE carrying members, and permits FINRA to obtain additional information that enables it to evaluate the impact of the new carrying arrangement on the financial and operational condition of the member.

Proposed FINRA Rule 4311(b)(4) expressly requires each carrying firm to conduct appropriate due diligence with respect to any new introducing firm relationship. In response to commenter suggestion, the proposed rule provides that such due diligence must assess the financial, operational, credit and reputational risk that such arrangement will have upon the carrying firm.[17] The rule provides that FINRA, in its review of any arrangement, may in its discretion require specific items to be addressed by the carrying firm as part of the firm's due diligence requirement under the rule. The rule further provides that the carrying firm must maintain a record, in accord with the time frames prescribed by SEA Rule 17a–4(b), of the due diligence conducted for each new introducing firm.

Proposed FINRA Rule 4311(c), based in part on NASD Rule 3230(a) and NYSE Rule 382(b), requires that each carrying agreement in which accounts are to be carried on a fully disclosed basis must specify the responsibilities of each party to the agreement. The rule sets forth the minimum responsibilities that the agreement must allocate. Because FINRA believes that it is important to ensure the accuracy and integrity of customer account statements, the proposed rule requires that each carrying agreement in which accounts are to be carried on a fully disclosed basis must expressly allocate to the carrying firm the responsibility for preparing and transmitting statements of account to customers.[18]

Based in part on NASD Rule 3230(g), NYSE Rule 382(c) and NYSE Rule Interpretation 382/03, proposed FINRA Rule 4311(d) requires that each customer whose account is introduced on a fully disclosed basis must be notified in writing upon the opening of the account of the existence of the carrying agreement and the responsibilities allocated to each respective party. The carrying firm would be responsible for the content of the notification to the customer. Further, the proposed rule provides that the customer must be notified promptly and in writing in the event of any change to any of the parties to the agreement or any material change to the allocation of responsibilities thereunder. In response to commenter suggestion,[19] Supplementary Material to the proposed rule provides that, for purposes of proposed FINRA Rule 4311(d), notification to customers of a change to any of the parties to the carrying agreement is not required in instances where, consistent with applicable FINRA rules and the federal securities laws, such customers' accounts are being transferred pursuant to: (a) ACATS using an authorized Transfer

[13] Because carrying firms generally are FINRA members, FINRA expects requests to enter into carrying agreements with firms that are not FINRA members to be infrequent. Further, as proposed in *Regulatory Notice* 09–03, the proposed rule's scope would reach any customer account. FINRA has revised proposed Rule 4311 to clarify that the rule applies, unless otherwise permitted by FINRA, to the carrying of any customer account in which securities transactions can be effected. FINRA has made other minor changes to the proposed rule in the interest of clarity.

[14] In response to commenter suggestion, the proposed rule includes revised guidance as to what constitutes a material change for purposes of Rule 4311(b)(1). *See* Section (B)(3) under Item II.C. Specifically, as set forth in proposed FINRA Rule 4311.01, material changes include, but are not limited to, changes to: The allocation of responsibilities required by the proposed rule; termination clauses applicable to the introducing firm; any terms or provisions affecting the liability of the parties; and the parties to the agreement, including, for example, the addition of a new party to the agreement, such as a "piggyback" arrangement, a new carrying firm or a new introducing firm, but not including a termination of the agreement. (However, as explained in *Regulatory Notice* 08–76, under NYSE Rule 416A carrying firms that are Dual Members are required to update their Firm Clearing Arrangement Form information on an ongoing basis no later than 30 days after the information has changed. FINRA expects to extend this requirement to all carrying firms later as part of the rulebook consolidation process. *See Regulatory Notice* 08–76 (December 2008) (Reporting Clearing Arrangements).) Lastly, FINRA has made other minor changes to proposed FINRA Rule 4311(b)(1) in the interest of clarity.

[15] Note that proposed FINRA Rule 4311(a)(2) would expressly permit a carrying firm to enter into a carrying agreement for the carrying of the customer accounts of a person other than a U.S. registered broker or dealer, subject to the conditions set forth in the proposed rule.

[16] Proposed FINRA Rule 4311.02 provides that, for purposes of the notice requirement, the carrying firm must submit a questionnaire in such form as to be specified by FINRA in a *Regulatory Notice,* which questionnaire may be updated from time to time as FINRA deems necessary.

[17] Supplementary Material to the proposed rule provides that, for purposes of proposed FINRA Rule 4311(b)(4), the due diligence may include, without limitation, inquiry by the carrying firm into the introducing firm's business model and product mix, proprietary and customer positions, FOCUS and similar reports, audited financial statements and complaint and disciplinary history. *See* proposed FINRA Rule 4311.03. *See also* Section (B)(2) under Item II.C.

[18] However, the proposed rule provides that the carrying firm may authorize the introducing firm to prepare and/or transmit such statements on the carrying firm's behalf with the prior written approval of FINRA. *See* proposed FINRA Rule 4311(c)(2). In the interest of customer protection, FINRA has revised proposed FINRA Rule 4311(c)(2) (and made corresponding revisions to Rule 4311(c)(1)) to provide that the safeguarding of funds and securities for the purposes of SEA Rule 15c3–3 must also be expressly allocated to the carrying firm.

[19] *See* Section (B)(3) under Item II.C.

Instruction Form (TIF); or (b) a process outside of ACATS where notification to customers is provided by means of an alternative mechanism such as affirmative or negative response letters.[20]

Consistent with NYSE Rule Interpretation 382/03, proposed FINRA Rule 4311(e) requires that each carrying agreement must expressly state that to the extent that a particular responsibility is allocated to one party, the other party or parties will supply to the responsible organization all appropriate data in their possession pertinent to the proper performance and supervision of that responsibility. This is a new requirement for non-NYSE members.

Based in large part on NASD Rule 3230(d) and NYSE Rule 382(f), proposed FINRA Rule 4311(f) provides that a carrying agreement may authorize an introducing firm to issue negotiable instruments directly to its customers on the carrying firm's behalf, using instruments for which the carrying firm is the maker or drawer, provided that the parties comply with SEA Rule 15c3–3 and further that the introducing firm represents to the carrying firm in writing that the introducing firm maintains, and will enforce, supervisory policies and procedures with respect to such negotiable instruments that are satisfactory to the carrying firm.[21]

The provisions of proposed FINRA Rule 4311(g)(1) and (h) generally address the obligations of the parties to provide the referenced information, such as any written customer complaints and exception reports, to each other and/or to FINRA and are based upon existing NASD and NYSE rule provisions. (FINRA notes that the July 1 deadline set forth in paragraph (h)(2) of the proposed rule differs from the current requirement (no later than July 31) specified by the corresponding NASD and NYSE rule provisions.) Proposed FINRA Rule 4311(g)(2) provides that, upon a showing of good cause, FINRA, at its discretion, may exclude certain carrying firms from the requirements of proposed FINRA Rule 4311(g)(1) in instances where the introducing firm is an affiliated entity of the carrying firm. This provision is based upon NASD Rule 3230(b)(3) but is not contained in NYSE Rule 382.

Proposed FINRA Rule 4311(i) is based largely on NASD Rule 3230(h) and does not have a corresponding provision to NYSE Rule 382. The proposed rule provides that all carrying agreements must require each introducing firm to maintain its proprietary and customer accounts, and the proprietary and customer accounts of any introducing firm for which it is acting as an intermediary in obtaining clearing services from the carrying firm, in such a manner as to enable the carrying firm and FINRA to specifically identify the proprietary and customer accounts belonging to each introducing firm. Consistent with NASD Rule 3230(h), the proposed rule's requirements apply only to intermediary clearing arrangements that are established on or after February 20, 2006.

(C) Proposed FINRA Rule 4522 (Periodic Security Counts, Verifications and Comparisons)

Proposed FINRA Rule 4522(a), based in large part on NYSE Rule 440.10, requires each member firm that is subject to the requirements of SEA Rule 17a–13 to make the counts, examinations, verifications, comparisons and entries set forth in SEA Rule 17a–13. Proposed FINRA Rule 4522(b), again based in large part on NYSE Rule 440.10, requires each carrying or clearing member subject to SEA Rule 17a–13 to make more frequent counts, examinations, verifications, comparisons and entries where prudent business practice would so require. Each such carrying or clearing member would be required to receive position statements no less than once per month with respect to securities held by clearing corporations, other organizations or custodians and, at least once per month, reconcile all such securities and money balances by comparison of the clearing corporations' or custodians' position statements to the member's books and records. The carrying or clearing member must promptly report any differences to the contra organization, and both the contra organization and the member firm must promptly resolve the differences. Where there is a higher volume of activity, the proposed rule provides that good business practice may require a more frequent exchange of statements and performance of reconciliations. The proposed rule further requires that no later than seven business days after each security count, the carrying or clearing member must enter any unresolved differences in a "Difference" account for that security count.

NASD Rules do not have a provision that corresponds to NYSE Rule 440.10. Accordingly, the requirements of proposed FINRA Rule 4522(b) are new to non-NYSE carrying or clearing members that are subject to the requirements of SEA Rule 17a–13.[22]

(D) Proposed FINRA Rule 4523 (Assignment of Responsibility for General Ledger Accounts and Identification of Suspense Accounts)

Proposed FINRA Rule 4523, based in large part on NYSE Rule 440.20, is intended to help assure the accuracy of each member's books and records and includes supervisory measures for their implementation. Paragraph (a) of the proposed rule requires that each member must designate an associated person to be responsible for each general ledger bookkeeping account and account of like function used by the member, and that the associated person must control and oversee entries into each such account and determine that the account is current and accurate as necessary to comply with all applicable FINRA rules and Federal securities laws governing books and records and financial responsibility requirements. The proposed rule requires that a supervisor must, as frequently as is necessary considering the function of the account but, in any event, at least monthly, review each account to determine that it is accurate and that any items that are aged or uncertain as to resolution are promptly identified for research and possible transfer to a suspense account(s).

Proposed FINRA Rule 4523(b) requires that each carrying or clearing member must maintain a record of the name of each individual assigned primary and supervisory responsibility for each account as required by paragraph (a) of the rule. In the interest of clarity, FINRA has revised the proposed rule to require that all records made pursuant to Rule 4523(b) must be preserved for a period of not less than six years (the period set forth in SEA Rule 17a–4(a)).

Proposed FINRA Rule 4523(c) provides that each member must record, in an account that must be clearly identified as a suspense account, money charges or credits and receipts or deliveries of securities whose ultimate disposition is pending determination. The proposed rule requires that a record must be maintained of all information known with respect to each item so recorded. Again, in the interest of clarity, FINRA has revised proposed Rule 4523(c) to require that all records made pursuant to that paragraph must be preserved for a period of not less

[20] *See* proposed FINRA Rule 4311.04.

[21] FINRA has made minor changes to the proposed rule in the interest of clarity.

[22] In response to commenter request for clarification, FINRA notes that the proposed rule, by its terms, does not apply to members that are exempt from SEA Rule 17a–13. *See* Section (C) under Item II.C.

than six years (the period set forth in SEA Rule 17a–4(a)).

In response to commenter suggestion,[23] Supplementary Material to the proposed rule provides that, for the purposes of paragraphs (a) and (b) of the rule, members with only one associated person may assign primary and supervisory responsibility for each account to that associated person, subject to applicable registration requirements.[24] Further, the Supplementary Material provides that members of limited size and resources that have more than one associated person may seek FINRA's prior written approval to assign primary and supervisory responsibility for each account to the same associated person. Further, for purposes of clarification, proposed FINRA Rule 4523.02 provides that, for purposes of Rule 4523, all requirements that apply to a member that clears or carries customer accounts shall also apply to any member that, operating pursuant to the exemptive provisions of SEA Rule 15c3–3(k)(2)(i), either clears customer transactions pursuant to such exemptive provisions or holds customer funds in a bank account established thereunder.[25]

NASD Rules do not have a provision that corresponds to NYSE Rule 440.20. Accordingly, the requirements of proposed FINRA Rule 4523 are new to non-NYSE members.

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The implementation date will be no later than 120 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[26] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will further the purposes of the Act because, as part of the FINRA rulebook consolidation process, the proposed rule change will streamline and reorganize existing rules that govern guarantees, carrying agreements, security counts and supervision of general ledger accounts. Further, the proposed rule change will provide greater regulatory clarity with respect to these issues.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The proposed rule change was published for comment in *Regulatory Notice* 09–03 (January 2009) (Financial Responsibility and Related Operational Rules) (the "*Notice*"). Four comments were received in response to the *Notice*.[27] A copy of the *Notice* is attached to the filing as Exhibit 2a.[28] A list of the comment letters received in response to the *Notice* is attached to the filing as Exhibit 2b.[29]

(A) Proposed FINRA Rule 4150 (Guarantees by, or Flow Through Benefits for, Members)

One commenter sought clarification as to whether the scope of the term "obligations" as used in proposed FINRA Rule 4150 is limited to financial obligations as opposed to other types of contractual obligations.[30] In response, FINRA has clarified that the term "obligations" includes financial obligations, as well as other obligations that may have a financial impact on a member, such as performance obligations.[31] The same commenter sought clarification regarding the proposed rule's impact on expense sharing agreements. The commenter inquired whether, if a firm files or has already filed such an agreement with FINRA, the rule imposes a separate obligation to provide written notice to FINRA. The commenter further suggested that the rule should exempt guarantees that are already subject to review by another regulator (for instance, federal bank regulators). In response, FINRA believes that, in view of the importance of this regulatory area, FINRA should be notified in accordance with the proposed rule's provisions of any agreement or arrangement that, falling within the subject matter covered by the rule, is already in existence when the rule goes into effect, in addition to any such new agreement or arrangement going forward. Accordingly, FINRA has revised the proposed rule to provide that, within 30 days of the implementation date of the rule, each member must advise FINRA, in writing, of any guarantees, endorsements, assumptions of obligations/liabilities, or flow through capital benefits, in effect as of the implementation date of the rule, not having otherwise been reported, in writing, to the appropriate Regulatory Coordinator.[32] With respect to the commenter's last point, FINRA does not believe that guarantees subject to review by other regulatory authorities should be exempt from the proposed FINRA requirement. It is FINRA's responsibility to exercise supervision over its members in accordance with FINRA's standards. In this regard, FINRA notes that proposed FINRA Rule 4150.05 excludes from the rule's coverage guarantees executed routinely in the normal course of business, which should serve to reduce associated burdens on members.[33]

(B) Proposed FINRA Rule 4311 (Carrying Agreements)

(1) Introducing Firms

As proposed in the *Notice,* proposed FINRA Rules 4311(a)(1) and (i) set forth certain requirements with respect to the identification of introducing firms and their accounts ("clear thru" or piggyback requirements). Proposed FINRA Rule 4311(a)(2) permits carrying firms to enter into carrying agreements for the carrying of the customer accounts of a person other than a U.S.-registered broker or dealer, subject to the rule's

[23] *See* Section (D) under Item II.C.

[24] *See* proposed FINRA Rule 4523.01.

[25] *See* note 6.

[26] 15 U.S.C. 78*o*–3(b)(6).

[27] Letter from Claire Santaniello, Managing Director and Chief Compliance Officer, Pershing LLC ("Pershing"), dated April 27, 2009; Letter from Holly H. Smith and Eric A. Arnold, Sutherland Asbill & Brennan LLP, on behalf of the Committee of Annuity Insurers ("CAI"), dated February 20, 2009; Letter from Sarah McCafferty, Vice President, Chief Compliance Officer, T. Rowe Price Investment Services, Inc. ("TRP"), dated February 19, 2009; and E-mail from Terry Nickels, Chief Financial Officer, Vice President, Wedge Securities, LLC ("Wedge"), dated February 19, 2009.

[28] The Commission notes that while provided in Exhibit 2a to FINRA's filing with the Commission, the Notice is not attached hereto. The Notice can be accessed online at *http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117679.pdf.*

[29] The Commission notes that while provided in Exhibit 2b to the filing, the list of the commenters and comment letters received by FINRA are not attached hereto. Those comment letters can be accessed online at *http://www.finra.org/Industry/Regulation/Notices/2009/P117680.* As stated previously, all references to "commenters" are to the commenters to the Notice, which are listed in Exhibit 2b.

[30] CAI.

[31] *See* note 7.

[32] *See* proposed FINRA Rule 4150.06.

[33] FINRA also has made minor clarifying revisions to proposed FINRA Rule 4150.05.

requirements.[34] One commenter sought clarification as to whether under the proposed rule the so-called "clear thru" requirements would be applied to foreign introducing firms in the same way as they would to members, and, if so, what reporting information would be appropriate.[35] The commenter further inquired whether the term "introducing firm," as used in the proposed rules generally, includes a bank or broker-dealer, or foreign equivalent. In response, FINRA notes that the term "introducing firm" includes a bank or broker-dealer, or the foreign equivalent. With respect to reporting information, FINRA notes that FINRA would expect requirements as to foreign introducing firms to be applied in the same fashion as they do with respect to members.

(2) Due Diligence

One commenter suggested that the proposed rule should not set forth specific review requirements with respect to due diligence obligations and that firms should be allowed to craft their own due diligence review based on a prudential approach according to the business model of the introducing firm.[36] The commenter suggested that due diligence should be limited to confirming that a prospective introducing firm relationship is appropriate from a commercial perspective and does not pose undue credit risk or liability to the carrying firm, and that the rule should not imply a responsibility on the part of the carrying firm to take further steps to proactively determine the appropriateness of the introducing firm's activities or compliance profile, which, the commenter suggested, is the responsibility of regulatory authorities. The commenter further suggested that, in place of the proposed rule's due diligence requirement, the new rule should instead incorporate language from current NYSE Rule Interpretation 384/04, to the effect that members "should carefully weigh the capital and other regulatory and practical consequences" of assuming the responsibilities required under the rule.

In response, FINRA notes that the purpose of the proposed rule is to set a standard as to the due diligence that carrying firms must exercise. The staff believes such a standard is important as a matter of investor protection. However, in response to the commenter's suggestion, FINRA has revised proposed FINRA Rule 4311(b)(4) to provide that the carrying firm must conduct appropriate due diligence with respect to any new introducing firm relationship to assess the financial, operational, credit and reputational risk that such arrangement will have upon the carrying firm. Supplementary Material to the revised rule (proposed FINRA Rule 4311.03) provides that, for purposes of FINRA Rule 4311(b)(4), the due diligence may include, without limitation, inquiry by the carrying firm into the introducing firm's business model and product mix, proprietary and customer positions, FOCUS and similar reports, audited financial statements and complaint and disciplinary history. Further, the revised rule provides that FINRA, in its review of any arrangement, may in its discretion require specific items to be addressed by the carrying firm as part of the due diligence requirement under the rule.

One commenter suggested that FINRA should make clear that the carrying firm's due diligence obligation extends only to pertinent information regarding the introducing firm that receives clearing services, and not the introducing firm's affiliates.[37] The commenter also suggested that FINRA should make clear that any information provided by the introducing firm as part of the due diligence review must be kept confidential by the carrying firm. In response, FINRA notes that the due diligence obligation is with respect to the introducing firm relationship; information about affiliates is not expressly required but should be considered if necessary to make an informed decision about entering into a carrying agreement with the introducing firm. FINRA believes that the confidentiality of due diligence information generally is a matter between the carrying firm and the introducing firm, subject to applicable laws and rules.[38]

(3) Notification of Termination of Carrying Agreements

One commenter sought clarification as to whether, for purposes of proposed FINRA Rule 4311(b)(1), it is a "material change" to an agreement if a party chooses to exercise its right to terminate the agreement, in which case FINRA's prior approval would be required.[39] The commenter suggested that construing the proposed rules in such fashion would burden the parties to the agreement. The commenter further suggested that the rules should delete any proposed requirement to notify customers of such termination because there are existing mechanisms designed to provide customers of such changes, such as communications pursuant to *Notice to Members* 02–57 (addressing the use of negative response letters for the bulk transfer of customer accounts) as well as customers' affirmative consent to open and transfer their accounts to another firm. The commenter cited concern that a further notification requirement could confuse customers and suggested that the proposed rule should require the introducing firm, not the carrying firm, to be responsible for any such notifications. The commenter further suggested the carrying firm should only be required to communicate directly with customers in circumstances when it provides services to the customer through contract.

In response, FINRA has revised proposed FINRA Rule 4311.01 to clarify that certain changes to the parties to the agreement—including the addition of a new party to the agreement, such as a "piggyback" arrangement, a new carrying firm or a new introducing firm—are material and thus require FINRA's prior approval, but that a termination of the agreement is not material for purposes of the provision. (FINRA has noted, however, that—as explained in *Regulatory Notice* 08–76—under NYSE Rule 416A, carrying firms that are Dual Members are required to update their Firm Clearing Arrangement Form information on an ongoing basis no later than 30 days after the information has changed; FINRA expects to extend this requirement to all carrying firms later as part of the rulebook consolidation process.[40]) With respect to notification to customers, FINRA has added proposed FINRA Rule 4311.04 to clarify that notification to customers of a change in the parties to the agreement is not required under FINRA Rule 4311(d) in instances where, consistent with applicable FINRA rules and the federal securities laws, such customers' accounts are being transferred pursuant to: (a) ACATS using an authorized Transfer Instruction Form (TIF); or (b) a process outside of ACATS where notification to customers is provided by means of an alternative mechanism such as affirmative or negative response letters. As a result, customers would need to be notified of changes in parties under proposed FINRA Rule 4311 when, for example, any party to the agreement undergoes a

[34] FINRA also has made minor clarifying revisions to proposed FINRA Rules 4311(a)(1) and (2). *See* note 13.

[35] Pershing.

[36] Pershing.

[37] CAI.

[38] For clarification, FINRA notes that the carrying firm and the introducing firm are not permitted to agree to keep due diligence information confidential from FINRA.

[39] Pershing.

[40] *See* note 14.

reorganization that results in a name change or a carrying firm requires an introducing firm to clear via a piggybacking arrangement rather than directly with the carrying firm.

(4) Furnishing of Customer Complaints and Reports

As proposed in the *Notice,* proposed FINRA Rule 4311(g)(1)(A) provides that each carrying agreement must authorize and direct the carrying firm to furnish promptly to the introducing firm and introducing firm's DEA, or, if none, its appropriate regulatory body, any written customer complaint regarding the introducing firm and its associated persons. Proposed FINRA Rule 4311(h)(2) provides that no later than July 1 of each year the carrying firm must notify certain officers of the introducing firm of a list of reports supplied to the introducing firm, and that a copy of such notification must be provided to the same authorities as specified under Rule 4311(g)(1)(A). One commenter suggested that, if the proposed requirements apply to non-U.S. introducing firms, they could present difficulties for members because some non-U.S. regulatory authorities are not accustomed to or prepared for the receipt of such information.[41] The commenter suggested that FINRA should engage in additional international coordination efforts and industry discussions.

In response, FINRA notes that the proposed rule does extend to non-U.S. introducing firms and, accordingly, the requirement to provide information to foreign regulators may apply. FINRA believes that the proposed requirement is consistent with the goal of strengthening international regulatory coordination and is conducive to investor protection, and further notes that the requirement exists under current rules. Though FINRA has not revised the proposed rule with respect to this issue, FINRA notes that it plans to engage in coordination and education efforts with such bodies as IOSCO, and will consider whether any future changes are necessary based on such discussions.

(C) Proposed FINRA Rule 4522 (Periodic Security Counts, Verifications and Comparisons)

As proposed in the *Notice,* proposed FINRA Rule 4522 imposes certain requirements on members that are subject to SEA Rule 17a–13. One commenter requested clarification as to whether members that are exempt from Rule 17a–13 would also be exempt from the proposed rule, notwithstanding that such members may be carrying or clearing firms.[42] In response, FINRA has clarified that the proposed rule, by its terms, does not apply to members that are exempt from SEA Rule 17a–13.[43]

(D) Proposed FINRA Rule 4523 (Assignment of Responsibility for General Ledger Accounts and Identification of Suspense Accounts)

One commenter sought clarification as to whether the proposed rule is intended only to cover general ledger accounts used by the member and not the general ledger accounts of the corporate complex to which the member belongs.[44] Two commenters suggested that the proposed rule should be revised so as to permit flexibility with respect to members' supervisory obligations.[45] One of the two suggested the proposed rule should incorporate a concept of reasonable supervision and policies and procedures reasonably designed to achieve compliance; the commenter further suggested that FINRA should strike from the proposed rule the requirement that the person responsible for the account must determine "at all times" that the account is current and accurate.[46] The second of the two commenters suggested that there should be an exemption for small firms so that the person assigned responsibility for general ledger bookkeeping would also be the person exercising the supervisory functions that the proposed rule sets forth.[47] The same commenter also sought clarification as to what evidentiary proof of review of the account would be required under the rule.

In response, FINRA appreciates the concerns that small firms may have with respect to supervision of general ledger accounts. As a general matter FINRA does not believe it is appropriate, from the standpoint of investor protection, that the same person assigned responsibility for the accounts also be the person exercising the supervisory functions set forth in the rule. However, in view of the circumstances of small firms, FINRA has revised the proposed rule to allow each member with only one associated person to assign primary and supervisory responsibility for each account to that associated person; members of limited size and resources would be able to seek FINRA's prior written approval to assign primary and supervisory responsibility for each account to the same associated person.[48]

With respect to the requirement, as set forth in the rule as proposed in the *Notice,* to ensure such accounts are current and accurate "at all times," FINRA notes the particular importance of this subject matter. FINRA believes that requiring the accounts be accurate "at all times" is consistent with SEA Rule 15c3–1(a), which governs net capital requirements, and requires a broker-dealer to maintain its required net capital continuously and demonstrate moment-to-moment compliance.[49] However, in response to commenter suggestion, FINRA has revised proposed FINRA Rule 4523(a) to clarify that the obligation imposed by the rule is to ensure that the general ledger account is current and accurate as necessary to comply with all applicable FINRA rules and federal securities laws governing books and records and financial responsibility requirements. Further, FINRA notes that the rule's requirements only apply to the general ledger account of the member, as opposed to the corporate complex to which the member belongs. Lastly, with respect to maintaining records that give evidence of the supervisory review, FINRA notes that FINRA expects members to keep such records as would reasonably demonstrate that the supervision required by the proposed rule is being carried out. (In the interest of clarity with respect to record-retention requirements, FINRA notes that it has revised proposed FINRA Rules 4523(b) and (c) to require that all records made pursuant to each of those rules must be preserved for a period of not less than six years, the period set forth in SEA Rule 17a–4(a)).

(E) Miscellaneous Comments

In FINRA's separate rule filing regarding the proposed consolidated financial responsibility rules, FINRA has proposed certain regulatory treatment of firms that operate pursuant to the exemptive provisions of SEA Rule 15c3–3(k)(2)(i).[50] Regarding such treatment, one commenter on the *Notice* raised concerns that the commenter expressed in virtually identical language in a letter submitted to the SEC on SR–

[41] Pershing.

[42] CAI.

[43] *See* note 22.

[44] TRP.

[45] CAI and Wedge.

[46] CAI.

[47] Wedge.

[48] FINRA has also amended proposed Rule 4523 to require members to designate an "associated person" to perform the specified functions, rather than an "individual."

[49] *See Notice to Members* 07–16 (Frequently Asked Financial and Operational Questions) (April 2007), Question A–1.

[50] *See* note 6.

FINRA–2008–067.[51] Because FINRA has already responded to the commenter's concerns in a separate letter that is available on the SEC Web site,[52] FINRA will not re-address them in connection with this filing.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2010–061 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–FINRA–2010–061. 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 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions.

You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2010–061 and should be submitted on or before December 22, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[53]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30229 Filed 11–30–10; 8:45 am]

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[51] CAI.

[52] *See* letter to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, from Adam H. Arkel, Assistant General Counsel, FINRA, dated April 14, 2009. *See also* Partial Amendment No. 2 to SR–FINRA–2008–067 (June 30, 2009).

[53] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63373; File No. SR–FINRA 2010–057]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Permit a One-Time Waiver of Late Fees Assessable Pursuant to FINRA Rule 6490

November 24, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 12, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b–4 under the Act.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is filing the proposed rule change to grant a one-time waiver of certain late fees under FINRA Rule 6490. The proposed rule change would not make any changes to the text of FINRA Rule 6490.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On September 27, 2010, FINRA Rule 6490 (Processing of Company-Related Actions) (the "Rule") became effective.[4] The Rule codifies in the FINRA rulebook a requirement that exists under Rule 10b–17 of the Act.[5] Specifically, Rule 10b–17 of the Act requires that issuers of a class of publicly traded securities provide timely notice to FINRA of certain corporate actions ("Company-Related Action Notice") including, among other things, notice of dividends or other distributions of cash or securities, stock splits or reverse splits or rights or subscription offerings. The Rule clarifies the scope of FINRA's regulatory authority and discretionary power when processing documents related to announcements of company-related actions for non-exchange-listed equity and debt securities, and implements fees for these services. Issuers must complete the necessary forms and pay the applicable fees

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Exchange Act Release No. 62434 (July 1, 2010; 75 FR 39603 (July 9, 2010); SR–FINRA–2009–089 (Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions) to Clarify the Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities and To Implement Fees for Such Services).

[5] 17 CFR 240.10b–17.

within the required time periods or they will be subject to late fees and delayed processing of documents to announce corporate actions.

FINRA is filing the proposed rule change to grant a one-time waiver of certain late fees under FINRA Rule 6490. Specifically, between September 27, 2010 and December 31, 2010 ("the waiver period"), the first late Company-Related Action Notice submitted by an issuer to FINRA will not be subject to the Rule's late fees.[6] Instead, the issuer will be charged $200 (the timely submission fee) per Company-Related Action Notice filed with FINRA.

Notwithstanding the significant industry outreach undertaken by FINRA in advance of implementation of the new rule, some issuers (who are not FINRA members) have reported to FINRA that they were not aware that Rule 6490 became effective on September 27, 2010.[7] However, FINRA notes that issuers are obligated directly by Rule 10b–17 of the Act to provide FINRA with notice of certain company-related actions and are obligated under that rule to do so in a timely fashion. Nonetheless, FINRA has determined to provide issuers with the proposed one-time waiver of late fees in the instant case. FINRA expects to notify an issuer that submits a late Company-Related Action Notice that its submission is late and that it has received a one-time waiver of applicable late fees pursuant to Rule 6490.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so that FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[8] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes that the proposed rule change granting issuers a one-time waiver of Company-Related Action Notice late fees under FINRA Rule 6490 promotes fairness by providing issuers an additional opportunity to understand their obligations under Rule 6490, while preserving the deterrent effect intended by adoption of the late fees generally.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

FINRA has requested that the Commission waive the 30-day operative delay because the proposed rule change establishes a one-time waiver of certain late fees under FINRA Rule 6490 and waiver of the 30 days would allow FINRA to apply the fee waiver immediately. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal would promote fairness by providing issuers an additional opportunity during the waiver period to understand their obligations under Rule 6490 before being subject to late fees. Therefore, the Commission designates the proposal operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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–FINRA–2010–057 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–FINRA–2010–057. 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

[6] This one-time waiver will apply to the first late submission by an issuer for one (or more) class of securities on a single day during the waiver period. For example, if an issuer submits a late Company-Related Action Notice with respect to three separate classes of securities on a single day during the waiver period, the late fee will be waived for each class. However, if an issuer has already received a waiver with respect to one or more classes of securities during the waiver period and, on a different day during the waiver period, submits a late Company-Related Action Notice with respect to any class of its securities, another waiver will not be granted.

[7] FINRA notes that the rule filing proposing the adoption of FINRA Rule 6490 was published in the **Federal Register** for notice and comment. *See supra* note 4. Following Commission approval, FINRA published *Regulatory Notice* 10–038 announcing approval of Rule 6490 and the September 27, 2010 effective date. In addition, FINRA engaged in extensive outreach regarding the new Rule, including by sending out letters to numerous industry groups involved in issuer corporate actions, sending out alerts via electronic platforms used by market participants, and holding conference calls with relevant parties. FINRA expects that the percentage of late notifications will decline over time.

[8] 15 U.S.C. 78*o*–3(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2010–057 and should be submitted on or before December 22, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–30228 Filed 11–30–10; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 7253]

Culturally Significant Objects Imported for Exhibition Determinations: "Norwegian Painters"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Norwegian Painters," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, New York, from on or about December 15, 2010, until on or about December 15, 2012, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: November 22, 2010.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–30118 Filed 11–30–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Rescinding the Notice of Intent for an Environmental Impact Statement (EIS): Washington and Bolivar Counties, Mississippi Division

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Rescind Notice of Intent to prepare an EIS.

SUMMARY: This notice rescinds the Notice of Intent for preparing an Environmental Impact Statement (EIS) for proposed highway to provide a connection between U.S. Highway 82 Bypass and Interstate 69 in Washington and Bolivar Counties, Mississippi, is terminated. The original Notice of Intent for this EIS process was published in the **Federal Register** on November 29, 2005.

FOR FURTHER INFORMATION CONTACT: Claiborne Barnwell, Project Development Team Leader, Federal Highway Administration, Mississippi Division, 100 West Capitol Street, Suite 1026, Jackson, Mississippi 39269, Telephone: (601) 965–4217.

SUPPLEMENTARY INFORMATION:

Background

The Federal Highway Administration (FHWA) in cooperation with the Mississippi Department of Transportation (MDOT) initiated an Environmental Impact Statement (EIS) with a Notice of Intent November 29, 2005, to provide a connector road, to be built to interstate standards, between the U.S. Highway 82 Bypass in Greenville and Interstate 69 near Benoit.

Due to funding constraints this Notice of Intent is rescinded.

Andrew H. Hughes,

Division Administrator, Mississippi, Federal Highway Administration, Jackson, Mississippi.

[FR Doc. 2010–30024 Filed 11–30–10; 8:45 am]

BILLING CODE M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35433]

Madison Terminal Railway, LLC—Lease and Operation Exemption—Line of Railroad in Dane County, WI

Madison Terminal Railway, LLC (MTR), a noncarrier, has filed a verified notice of exemption, under 49 CFR 1150.31, to lease and operate an existing 0.3-mile industrial spur owned by LN Real Estate, LLC, a noncarrier. The industrial spur originates at the connection with the Union Pacific Railroad Company's (UP) Cottage Grove Industrial Lead at milepost 78.02 in Madison, WI, and is located entirely within the property of ProBuild Holding, LLC (ProBuild), which currently leases the line.[1] UP's Cottage Grove Industrial Lead is currently operated by the Wisconsin & Southern Railroad Company (WSOR) pursuant to a lease agreement authorized in *Wisconsin & Southern Railroad—Lease & Operation Exemption—Union Pacific Railroad,* FD 33139 (STB served Oct. 30, 1996).

MTR states that it will shortly execute an agreement with ProBuild to sub-lease the unused existing industrial spur to revive railroad services on the spur and operate as an independent common carrier performing transloading service for potential railroad freight customers at the proposed transload facility. MTR further states that it expects to enter into an interchange agreement with WSOR to provide inbound and outbound rail freight transportation services to MTR's transload facility, but it will not operate on UP's line and will confine its operations to its line of railroad within the proposed transload facility. As a result of the transaction, MTR states that it will become a Class III carrier of an existing industrial spur that will be converted to a common carrier line of railroad that connects with UP's existing line.[2]

[1] According to MTR, there are no mileposts for the existing 0.3 mile industrial spur.

[2] On November 17, 2010, MTR filed an amendment to correct references in its notice of exemption to MTR's reporting marks and The

MTR certifies that its projected revenues as a result of the transaction will not exceed $5 million annually and will not result in it becoming a Class I or Class II carrier. The earliest this transaction may be consummated is December 15, 2010, the effective date of the exemption (30 days after the exemption was filed).[3]

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 transaction. Petitions for stay must be filed no later than December 8, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35433, 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 James H.M. Savage, Law Offices of John D. Heffner, PLLC, 1750 K Street, NW., Suite 200, Washington, DC 20006.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 23, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–30079 Filed 11–30–10; 8:45 am]

BILLING CODE 4915–01–P

Wisconsin Department of Transportation, Rails and Harbors Section.

[3] MTR states in its notice that it plans to commence operations on the effective date of the exemption.

DEPARTMENT OF THE TREASURY

Office of the Secretary

List of Countries Requiring Cooperation with an International Boycott

In accordance with section 999(a)(3) of the Internal Revenue Code of 1986, the Department of the Treasury is publishing a current list of countries which require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

On the basis of the best information currently available to the Department of the Treasury, the following countries require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, United Arab Emirates, Yemen, Republic of Iraq is not included in this list, but its status with respect to future lists remains under review by the Department of the Treasury.

Dated: November 23, 2010.

Manal Corwin,

International Tax Counsel (Tax Policy).

[FR Doc. 2010–30026 Filed 11–30–10; 8:45 am]

BILLING CODE 4810–25–M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Designation of Three Individuals Pursuant to Executive Order 13224

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 newly-designated individuals whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism."

DATES: The designations by the Director of OFAC of the individuals identified in this notice, pursuant to Executive Order 13224, are effective on November 24, 2010.

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 from 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

On September 23, 2001, the President issued Executive Order 13224 (the "Order") pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c. In the Order, the President declared a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001 terrorist attacks in New York, Pennsylvania, and at the Pentagon. The Order imposes economic sanctions on persons who have committed, pose a significant risk of committing, or support acts of terrorism. The President identified in the Annex to the Order, as amended by Executive Order 13268 of July 2, 2002, 13 individuals and 16 entities as subject to the economic sanctions. The Order was further amended by Executive Order 13284 of January 23, 2003, to reflect the creation of the Department of Homeland Security.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in or hereafter come within the United States or the possession or control of United States persons, of: (1) Foreign persons listed in the Annex to the Order; (2) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States; (3) persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order; and (4) except as provided in section 5 of the Order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to the Order or determined to be subject to the Order or to be otherwise associated with those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order.

On November 24, 2010 the Director of OFAC, in consultation with the Departments of State, Homeland Security, Justice and other relevant agencies, designated, pursuant to one or more of the criteria set forth in subsections 1(b), 1(c) or 1(d) of the Order, three individuals whose property and interests in property are blocked pursuant to Executive Order 13224.

The designees are as follows:

1. ABDULLAH, Mian (a.k.a. SHABBIR, Abu Saad; a.k.a. SHABIR, Abu Sa'ad; a.k.a. SHABIR, Abu Saad; a.k.a. "SHABIR, Ustad"); DOB 1973; alt. DOB 1972; From: Bahawalpur, Punjab Province, Pakistan (individual) [SDGT]
2. KHAN, Mohammad Naushad Alam (a.k.a. KHAN, Muhammad Nowshad Alam; a.k.a. KHAN, Naushad Aalam; a.k.a. KHAN, Rahat Hasan); DOB Aug 1971; alt. DOB Dec 1970; Holder of a Pakistan passport; Holder of a Bangladesh passport (individual) [SDGT]
3. RAUF, Hafiz Abdur (a.k.a. RAOUF, Hafiz Abdul; a.k.a. RAUF, Hafiz Abdul), Dola Khurd, Lahore, Pakistan; 4 Lake Road, Room No. 7, Choburji, Lahore, Pakistan; 129 Jinnah Block, Awan Town, Multan Road, Lahore, Pakistan; 33 Street No. 3, Jinnah Colony, Tehsil Kabir Wala, District Khanewal, Pakistan; 5–Chamberlain Road, Lahore, Pakistan; DOB 25 Mar 1973; POB Sialkot, Punjab Province, Pakistan; National Foreign ID Number CNIC: 35202–540013–9 (Pakistan); alt. National Foreign ID Number NIC: 277–93–113495 (Pakistan) (individual) [SDGT]

Dated: November 24, 2010.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2010–30261 Filed 11–30–10; 8:45 am]

BILLING CODE 4811–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Final Treasury Decision; Comment Request for Regulation Project [127391–07], (TD 9403 Final)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning regulations [127391–07](TD 9403 Final), Guidance under Section 664(c) Regarding the Effect of Unrelated Business Taxable Income on Charitable Remainder Trusts.

DATES: Written comments should be received on or before January 31, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Allan M. Hopkins, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Ralph Terry, (202) 622–8144, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Ralph.M.Terry@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Guidance under Section 664(c) Regarding the Effect of Unrelated Business Taxable Income on Charitable Remainder Trusts.

OMB Number: 1545–2101.

Regulation Project Number: [127391–07], (TD 9403 Final).

Abstract: This document contains final regulations that provide guidance under Internal Revenue Code (Code) section 664 on the tax effect of unrelated business taxable income (UBTI) on charitable remainder trusts. The regulations reflect the changes made to section 664(c) by section 424(a) and (b) of the Tax Relief and Health Care Act of 2006. The regulations affect charitable remainder trusts that have UBTI in taxable years beginning after December 31, 2006.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: .5 hours.

Estimated Total Annual Burden Hours: 50.

The following paragraph applies to all of the collections of information covered by this notice:

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 18, 2010.

Allan M. Hopkins,

IRS Reports Clearance Officer.

[FR Doc. 2010–30181 Filed 11–30–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Agency Information Collection Activities: Submission for OMB Review: Interagency Charter and Federal Insurance Application

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before January 31, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Donald W. Dwyer at (202) 906–6414, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Interagency Charter and Federal Deposit Insurance Application.

OMB Number: 1550–0005.

Form Numbers: 138; 1623.

Description: Organizers of a Federal savings association must file an Interagency Charter and Federal Deposit Insurance Application for permission to organize with the OTS. The submission is required to establish a Federal savings association or a Federal savings bank, and the issuance of a Federal charter, pursuant to 12 CFR Parts 543 and 552.

The applicant shall publish notice no earlier than seven days before and no later than the date of filing of the application. The applicant publishes a notice(s) in accordance with requirements set forth in 12 CFR Subpart B, Publication Requirements, §§ 516.50, 516.60, 516.70, and 516.80. OTS analyzes each information collection to determine whether to approve the proposed application for a Federal charter.

Estimated Number of Respondents: 5.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 625 hours.

Dated: November 24, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–30218 Filed 11–30–10; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Agency Information Collection Activities: Submission for OMB Review: Interagency Notice of Change in Control

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before January 31, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Donald W. Dwyer at (202) 906–6414, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Interagency Notice of Change in Control.

OMB Number: 1550–0032.

Form Number: 1622.

Description: The Regional Office must review the information contained in the Change of Control notices to determine if the application is considered eligible for delegated action. If the application is considered non-delegated, OTS's Washington staff must also review the application. The OTS must review the information in these applications to determine that no person is acting

directly or indirectly, or in concert with one or more other persons, to acquire control of an insured depository institution through the purchase, assignment, transfer, pledge, or other disposition of voting stock of the thrift institution, unless OTS has been afforded sixty days prior written notice to review the proposal and to object to the acquisition.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 45.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 1,673 hours.

Dated: November 24, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–30217 Filed 11–30–10; 8:45 am]

BILLING CODE 6720–01–P

Federal Register

Wednesday,
December 1, 2010

Part II

Environmental Protection Agency

40 CFR Part 98

Mandatory Reporting of Greenhouse Gases: Additional Sources of Fluorinated GHGs; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 98

[EPA–HQ–OAR–2009–0927; FRL–9226–8]

RIN 2060–AQ00

Mandatory Reporting of Greenhouse Gases: Additional Sources of Fluorinated GHGs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing a regulation to require monitoring and reporting of greenhouse gas emissions from additional sources of fluorinated greenhouse gases, including electronics manufacturing, fluorinated gas production, electrical equipment use, electrical equipment manufacture or refurbishment, as well as importers and exporters of pre-charged equipment and closed-cell foams. This rule requires monitoring and reporting of greenhouse gases for these source categories only for sources with carbon dioxide equivalent emissions, imports, or exports above certain threshold levels. This rule does not require control of greenhouse gases.

DATES: The final rule is effective on December 31, 2010. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of December 31, 2010.

ADDRESSES: EPA established a single docket under Docket ID No. EPA–HQ–OAR–2009–0927 for this rule. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9263; fax number: (202) 343–2342; e-mail address: *GHGReportingRule@epa.gov.* For technical information and implementation materials, please go to the Greenhouse Gas Reporting Program Web site *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.* To submit a question, select Rule Help Center, followed by Contact Us.

SUPPLEMENTARY INFORMATION: *Regulated Entities.* The Administrator determined that this action is subject to the provisions of Clean Air Act (CAA) section 307(d). *See* CAA section 307(d)(1)(V) (the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine."). This final rule affects owners and operators of electronics manufacturing facilities, fluorinated gas production facilities, electric power systems, and electrical equipment manufacturing facilities, as well as importers and exporters of pre-charged equipment and closed-cell foams. Regulated categories and entities include those listed in Table 1 of this preamble.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	NAICS	Examples of affected facilities
Electronics Manufacturing	334111	Microcomputers manufacturing facilities.
	334413	Semiconductor, photovoltaic (solid-state) device manufacturing facilities.
	334419	Liquid Crystal Display (LCD) unit screens manufacturing facilities.
	334419	Micro-electro-mechanical systems (MEMS) manufacturing facilities.
Fluorinated Gas Production	325120	Industrial gases manufacturing facilities.
Electrical Equipment Use	221121	Electric bulk power transmission and control facilities.
Electrical Equipment Manufacture or Refurbishment.	33531	Power transmission and distribution switchgear and specialty transformers manufacturing facilities.
Importers and Exporters of Pre-charged Equipment and Closed-Cell Foams.	423730	Air-conditioning equipment (except room units) merchant wholesalers.
	333415	Air-conditioning equipment (except motor vehicle) manufacturing.
	336391	Motor vehicle air-conditioning manufacturing.
	423620	Air-conditioners, room, merchant wholesalers.
	443111	Household appliance stores.
	423730	Automotive air-conditioners merchant wholesalers.
	326150	Polyurethane foam products manufacturing.
	335313	Circuit breakers, power, manufacturing.
	423610	Circuit breakers merchant wholesalers.

Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. Table 1 of this preamble lists the types of facilities that EPA is now aware could be potentially affected by the reporting requirements. Other types of facilities and companies not listed in the table could also be subject to reporting requirements. To determine whether you are affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 98, subpart A and the relevant criteria in the subparts related to electronics manufacturing facilities, fluorinated gas production facilities, electric power transmission or distribution facilities, electrical equipment manufacturing or refurbishment facilities, and importers and exporters of pre-charged equipment and closed-cell foams. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the preceding **FOR FURTHER GENERAL INFORMATION CONTACT** section.

Many facilities that are affected by the final rule have greenhouse gas (GHG) emissions from multiple source categories listed in 40 CFR part 98. Table 2 of this preamble has been developed as a guide to help potential reporters in the source categories subject to this reporting rule identify the source categories (by subpart) that they may need to (1) consider in their facility applicability determination, and/or (2) include in their reporting. The table should only be seen as a guide. Additional subparts in 40 CFR part 98 may be relevant for a given reporter. Similarly, not all listed subparts are relevant for all reporters.

TABLE 2—SOURCE CATEGORIES AND RELEVANT SUBPARTS

Source category (and main applicable subpart)	Subparts recommended for review to determine applicability
Electricity Generation	Electrical Equipment Use.
Electronics Manufacturing	General Stationary Fuel Combustion.
Fluorinated Gas Production	General Stationary Fuel Combustion Suppliers of Industrial Greenhouse Gases.
Electrical Equipment Use	General Stationary Fuel Combustion.
Imports and Exports of Fluorinated GHGs Inside Pre-charged Equipment and Closed-Cell Foams.	Suppliers of Industrial Greenhouse Gases.
Electrical Equipment Manufacture or Refurbishment.	Sulfur Hexafluoride and PFCs from Electrical Equipment Manufacture and Refurbishment.
	General Stationary Fuel Combustion Imports and Exports of Fluorinated GHGs Inside Pre-charged Equipment and Closed-Cell Foams.

What is the effective date? The final rule is effective on December 31, 2010. Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register.** EPA is issuing this final rule under section 307(d)(1) of the Clean Air Act, which states: "The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies." Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the purposes underlying APA section 553(d) in making this rule effective on December 31, 2010. Section 5 U.S.C. 553(d)(3) allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." As explained below, EPA finds that there is good cause for this rule to become effective on or before December 31, 2010, even if this results in an effective date fewer than 30 days from date of publication in the **Federal Register**.

While this action is being signed prior to December 1, 2010, there is likely to be a significant delay in the publication of this rule as it contains complex diagrams, equations, and charts, and is relatively long in length. As an example, EPA signed a shorter technical amendments package related to the same underlying reporting rule on October 7, 2010, and it was not published until October 28, 2010, 75 FR 66434, three weeks later.

The purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Where, as here, the final rule will be signed and made available on the EPA Web site more than 30 days before the effective date, but where the publication is likely to be delayed due to the complexity and length of the rule, that purpose is still met. Moreover, through June 30, 2011, facilities covered by this rule may use Best Available Monitoring Methods (BAMM) for any parameter for which it is not reasonably feasible to acquire, install, or operate a required piece of monitoring equipment in a facility, or to procure measurement services from necessary providers. This will provide facilities a substantial additional period to adjust their behavior to the requirements of the final rule. Accordingly, we find good cause exists to make this rule effective on or before December 31, 2010, consistent with the purposes of 5 U.S.C. 553(d)(3).[1]

Judicial Review.

Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by January 31, 2011. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. This section also provides a mechanism for EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of this rule." Any person seeking to make such a demonstration to EPA should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20004, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

ASTM American Society for Testing and Materials
BAMM Best Available Monitoring Methods
BLS Bureau of Labor Statistics
CAA Clean Air Act
CARB California Air Resources Board
CBI confidential business information
CFC chlorofluorocarbon
CFR Code of Federal Regulations
CO_2 carbon dioxide
CO_2e CO_2-equivalent
DE destruction efficiency
DRE destruction or removal efficiency
ECD electron capture detector
EF_C emission factor for the valve-hose combination
EIA Economic Impact Analysis

[1] We recognize that this rule could be published at least 30 days before December 31, 2010, which would negate the need for this good cause finding, and we plan to request expedited publication of this rule in order to decrease the likelihood of a printing delay. However, as we cannot know the date of publication in advance of signing this rule, we are proceeding with this good cause finding for an effective date on or before December 31, 2010.

EO Executive Order
EPA U.S. Environmental Protection Agency
FERC Federal Energy Regulatory Commission
F–GHG fluorinated greenhouse gas
FTIR fourier transform infrared (spectroscopy)
FID flame ionization detector
GC gas chromatography
GHG greenhouse gas
GWP global warming potential
HAP hazardous air pollutant(s)
HCFC hydrochlorofluorocarbon
HFC hydrofluorocarbon
HFE hydrofluoroether
HTF heat transfer fluid
IBR incorporation by reference
ICR information collection request
IPCC Intergovernmental Panel on Climate Change
kg kilograms
LCD liquid crystal displays
LED light-emitting diode
MEMS micro-electro-mechanical systems
$MMTCO_2e$ million metric tons carbon dioxide equivalent
MRR mandatory greenhouse gas reporting rule
MS mass spectrometry
MVAC motor vehicle air conditioner
N_2O nitrous oxide
NACAA National Association of Clean Air Agencies
NAICS North American Industry Classification System
NERC North American Energy Reliability Corporation
NESHAP National Emissions Standard for Hazardous Air Pollutants
NF_3 nitrogen trifluoride
NMR nuclear magnetic resonance
NRECA National Rural Electric Cooperative Association
NSPS New Source Performance Standards
NTTAA National Technology Transfer and Advancement Act of 1995
OMB Office of Management and Budget
PFC perfluorocarbon
POHC principal organic hazardous constituent
PSD Prevention of Significant Deterioration
PSEF process-vent-specific emission factor
PV photovoltaic cells
QA quality assurance
QA/QC quality assurance/quality control
QMS Quadrapole Mass Spectroscopy
R&D research and development
RF radio frequency
RFA Regulatory Flexibility Act
RGGI Regional Greenhouse Gas Initiative
RIA Regulatory Impact Analysis
RPS remote plasma source
SBREFA Small Business Regulatory Enforcement Fairness Act
SSM startup, shutdown, and malfunction
SF_6 sulfur hexafluoride
TCR The Climate Registry
TSD technical support document
U.S. United States
UMRA Unfunded Mandates Reform Act of 1995
VOC volatile organic compound(s)
WCI Western Climate Initiative

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I. Background

A. Organization of This Preamble

This preamble is broken into several large sections, as detailed in the Table of Contents. The paragraphs below describe the layout of the preamble and provide a brief summary of each section.

The first section of this preamble contains the basic background information about the origin of this rule, including a brief discussion of the rationale for revising the initially proposed requirements for subparts L, DD, and SS. This section also discusses EPA's use of our legal authority under the CAA to collect the required data, and the benefits of collecting the data.

The second section of this preamble provides a brief summary of the key design elements for each subpart. For each subpart, this section includes (1) The definition of the source category, (2) GHGs to report, (3) GHG emission calculating and monitoring methods, (4) data reporting requirements, and (5) records that must be retained. Each subpart also includes a summary of major changes since proposal and a summary of comments and responses. Please refer to the specific source category of interest for more details.

The third section provides the summary of the cost impacts, economic impacts, and benefits of this rule from the Economic Analysis. Finally, the last section discusses the various statutory and executive order requirements applicable to this rule.

B. Background on the Final Rule

This action finalizes monitoring and reporting requirements for the following five source categories: Electronics manufacturing, fluorinated gas production, electrical equipment use, electrical equipment manufacture and refurbishment, and importers and exporters and pre-charged equipment and closed-cell foams.

EPA initially proposed reporting requirements for electronics, fluorinated GHG production, and electrical equipment use on April 12, 2009 (74 FR 16448) as part of a larger rulemaking effort to establish a GHG reporting program for all sectors of the economy. In that proposal, EPA also requested comment on requiring reporting of the quantities of fluorinated GHGs imported and exported inside pre-charged equipment and foams. However, EPA did not include requirements for these source categories in the Final Mandatory GHG Reporting Rule (Part 98) (40 CFR part 98), which was signed by EPA Administrator Lisa Jackson on September 22, 2009 and published in the **Federal Register** on October 30, 2009 (74 FR 56260).

EPA deferred action on these source categories because EPA received a number of lengthy, detailed comments regarding the proposed requirements for these source categories. These comments, which are described in more detail in the discussions of the individual source categories in the April 12, 2010 proposed rule, raised concerns about the costs and technical feasibility of implementing subparts I and L as initially proposed, requested clarification of how "facility" should be interpreted under subpart DD, and both favored and opposed a requirement to report fluorinated GHGs contained in

imported and exported pre-charged equipment and closed-cell foams.

EPA recognized the concerns raised by stakeholders, and decided to re-propose significant pieces of these subparts. The revised proposed rule was published in the **Federal Register** on April 12, 2010. A public hearing on the proposed rule was held on April 20, 2010 in Washington, DC, and the 60-day public comment period ended on June 11, 2010.

For subparts I and L this rule incorporates a number of technical changes including, but not limited to, the addition of different methodologies that provide improved emissions coverage at a lower cost burden to facilities as compared to the initial April 2009 proposal. Where aspects of the initial proposals for subparts I and L are retained in this rule, such as in the basic mass-balance methodology for subpart L (as an option for some facilities) and in many of the equations for subpart I, this rule adds more flexibility in how and how frequently the underlying data are gathered. In addition, EPA is requiring facilities to report emissions from manufacture or refurbishment of electrical equipment and to report the quantities of fluorinated GHGs imported and exported inside pre-charged equipment and foams.

We have concluded that the monitoring approaches required in this rule, which combine direct measurement and facility-specific calculations, effectively balance accuracy and costs, and that they are warranted because the resulting data will enable EPA to analyze and develop a range of potential CAA GHG policies and programs. A consistent and accurate data set is crucial to serve this intended purpose.

Under this rule, facilities and suppliers will begin data collection in 2011 following the methods outlined in this rule and will submit data to EPA by March 31, 2012. EPA is allowing facilities and suppliers to use the Best Available Monitoring Methods (BAMM) through June 30, 2011 without submitting a petition to EPA. EPA is also allowing facilities to request an extension for the use of BAMM beyond the initial 6-month period. For details on BAMM extension requests, including their due dates and required contents, refer to the Monitoring and QA/QC Requirements section of each subpart and to the preamble discussions for subparts I and L.

C. Legal Authority

EPA is finalizing requirements for five source categories (electronics manufacturing, production of fluorinated gases, use of electrical transmission and distribution equipment, manufacture or refurbishment of electrical equipment, and imports and exports of pre-charges equipment and closed cell-foams) under its existing CAA authority; specifically, authorities provided in CAA section 114. As discussed in detail in Sections I.C and II.Q of the preamble to the 2009 final rule (74 FR 56260, October 30, 2009), CAA section 114(a)(1) provides EPA with broad authority to require emissions sources, persons subject to the CAA, manufacturers of process or control equipment, or persons whom the Administrator believes may have necessary information to monitor and report emissions and provide such other information the Administrator requests for the purposes of carrying out any provision of the CAA. Further information is available in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Legal Issues" (available in EPA–HQ–OAR–2008–0508)

II. Requirements for Specific Source Categories

A. Overview of the Greenhouse Gas Reporting Program

On October 30, 2009, the U.S. Environmental Protection Agency (EPA) published a rule for the mandatory reporting of greenhouse gases (GHG) (also referred to as 40 CFR part 98) from large GHG emissions sources in the United States. Implementation of 40 CFR Part 98 is referred to as the Greenhouse Gas Reporting Program (GHGRP).

The rule requires reporting of GHG emissions and supply from certain sectors of the economy, and apply to certain downstream facilities that emit GHGs, as well as to certain upstream suppliers of fossil fuels and industrial GHGs. The regulations require annual reporting of GHGs including carbon dioxide (CO_2, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulfur hexafluoride (SF_6), and other fluorinated compounds (e.g., hydrofluoroethers (HFEs)).

Part 98 regulations require only that source categories subject to the rule monitor and report GHGs in accordance with the methods specified in the individual subparts. In this action, EPA is adding five source categories to part 98. For a list of the specific GHGs to be reported and the GHG calculation procedures, monitoring, missing data procedures, recordkeeping, and reporting required for facilities subject to subparts I, L, DD, QQ, and SS see the relevant subpart description below.

B. Overview of Confidentiality Determination for Data Elements in the Greenhouse Gas Reporting Rules

This action does not address whether data reported under subparts I, L, DD, QQ, or SS will be treated as confidential business information (CBI). EPA published a proposed confidentiality determination on July 7, 2010 (75 FR 39094) which addressed this issue. In that action, EPA proposed which specific data elements would be treated as CBI and which data elements must be available to the public under CAA section 114. EPA has received several comments on the proposal, and is in the process of considering these comments. A final determination will be issued before any data is released, and the final determination will include all of the data elements under these subparts.

C. Summary of Changes to the General Provisions of the General Provisions of 40 CFR Part 98 Related to the Addition of Subparts I, L, DD, QQ, and SS

Changes to Applicability. We are making changes to 40 CFR 98.3(c)(5) to be consistent with previous revisions that were made on July 12, 2010. On July 12, 2010 (75 FR 39736), we made a number of conforming changes to the General Provisions (subpart A to part 98) to accommodate the addition of new source categories that were being added to Part 98. In the July 12, 2010 notice, we added Tables A–3 through A–5 to replace the list of source categories and supplier categories in 40 CFR 98.2(a)(1), (a)(2), and (a)(4), respectively. Under this revised approach, as new subparts are adopted, a new row is added to the appropriate table for the year in which reporting is required to commence for the new source category or supplier category. As a conforming change, the text of 40 CFR 98.3(c)(4) was reworded to refer to "Table A–3 and Table A–4" instead of "subparts C–JJ."

In this action, we are amending Tables A–3, A–4, and A–5 to subpart A to add entries for five subparts: DD, SS, I, L, and QQ. Because we are now adding a new supplier category to the reporting requirements, we are also making a conforming change to 40 CFR 98.3(c)(5)(i) and (ii) to replace the reference to "subparts KK through PP" with a reference to "Table A–5." This conforming change does not alter any reporting requirements.

The following source categories have been added to the list of source categories in Table A–3 to subpart A because they have a production capacity

or gas consumption threshold rather than a CO_2e emission threshold.

• Electric power transmission or distribution facilities that include the total nameplate capacity located within the facility, when added to the total nameplate capacity of SF_6 and PFC containing equipment that is not located within the facility but is under common ownership or control, exceeds 17,820 pounds of sulfur hexafluoride (SF_6)or perfluorocarbons (PFCs) (subpart DD).

• Electric power equipment manufacturing or refurbishing facilities with total annual SF_6 and PFC purchases (combined) that exceed 23,000 pounds per year (subpart SS).

The following source categories are subject to the rule if facility emissions are equal to or greater than 25,000 metric tons CO_2e per year. Therefore, these source categories have been added to the list of emission threshold source categories referenced in Table A–4 to subpart A.

• Fluorinated gas production facilities whose emissions would exceed 25,000 $mtCO_2e$ in the absence of control technologies (subpart L).

• Electronics manufacturing facilities whose emissions would exceed 25,000 $mtCO_2e$ in the absence of control technologies (subpart I).

For all of these facilities, whether they are listed in Table A–3 or A–4 to subpart A, the annual GHG report must cover stationary fuel combustion sources, miscellaneous uses of carbonates, and all applicable source categories listed in Table A–3 and Table A–4 to subpart A.

Importers and exporters of certain types of pre-charged equipment or closed-cell foam products containing fluorinated GHGs, N_2O, or CO_2 (subpart QQ) have been added to Table A–5 to subpart A because they are suppliers of GHGs.

As is true for the source categories covered by the final Part 98, a facility or supplier in any of these source categories may cease reporting if their emissions are less than 25,000 $mtCO_2e$ per year for five consecutive years or less than 15,000 $mtCO_2e$ per year for three consecutive years, subject to the procedures at 40 CFR 98.2(i).

Reporting CO_2e emissions. EPA is adding a paragraph to 40 CFR 98.3(c)(4) to clarify that facilities that emit fluorinated GHGs are required to calculate and report CO_2e emissions only for those fluorinated GHGs that are listed in Table A–1 of this subpart, not for other fluorinated GHGs. However, it is important to note that fluorinated GHG emitters are still required to report all fluorinated GHGs emitted under 40 CFR 98.3(c)(4)(iii) (in metric tons of GHG). This change clarifies that emitters are not required to develop GWPs for fluorinated GHGs that are not listed in Table A–1 and ensures consistent reporting of such fluorinated GHGs among different reporters. The change is being made in parallel with a similar change to 40 CFR 98.3(c)(5) through a separate rulemaking.

Definitions. EPA is revising one definition in 40 CFR part 98 subpart A and is adding a number of definitions applicable to specific source categories to the corresponding subparts. The definition that is being revised in subpart A is the definition of "destruction efficiency," which is being revised to be expressed in tons of specific greenhouse gases rather than tons of CO2e. This revision and the rationale for it are discussed in more detail in Section II.E of this preamble.

The definitions that are applicable to specific source categories are not being added to the definitions section in 40 CFR part 98 subpart A because they do not have broader applicability to part 98. EPA has sought to avoid any conflict between these subpart-specific definitions and the definitions in Subpart A. In one instance, for electric power systems, EPA is applying a category-specific definition of facility rather than the general definition of facility in the General Provisions. The reasons for this source-category-specific definition of facility are set forth in Section II.G of this preamble. The remaining definitions are intended as supplements to the definitions section in the General Provisions. EPA does not expect these definitions to create conflicts with the General Provisions. To the extent regulated entities are in doubt as to which definition applies, they should assume that the category-specific definitions are controlling.

Incorporation by Reference (IBR). We are amending 40 CFR 98.7 (incorporation by reference) to include standard methods used in the subparts. In particular, for subpart I, we are adding the following three standards: the 2006 International SEMATECH Manufacturing Initiative's Guideline for Environmental Characterization of Semiconductor Process Equipment (International SEMATECH #06124825A–ENG), the 2001 International SEMATECH's Guidelines for Environmental Characterization of Semiconductor Equipment (International SEMATECH #01104197A–XFR), and EPA's Protocol for Measuring Destruction or Removal Efficiency (DRE) of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing, Version 1, EPA 430–R–10–003. These standards are referenced in 40 CFR 98.94 (Monitoring and QA/QC requirements for subpart I), 40 CFR 98.96 (Data reporting requirements for subpart I), 40 CFR 98.97 (Records that must be retained for subpart I), and 40 CFR 98.98 (Definitions for subpart I).

In addition, for subpart L, we are revising the paragraphs listing several ASME standards and one ASTM standard that are already contained in 40 CFR 98.7 to indicate that these standards are also referenced by 40 CFR 98.124 (Monitoring and QA/QC requirements in 40 CFR part 98, subpart L, fluorinated gas production). We are also adding the following seven standards: ASTM D2879–97 (Reapproved 2007) Standard Test Method for Vapor Pressure-Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope; ASTM D7359–08 Standard Test Method for Total Fluorine, Chlorine and Sulfur in Aromatic Hydrocarbons and Their Mixtures by Oxidative Pyrohydrolytic Combustion followed by Ion Chromatography Detection (Combustion Ion Chromatography-CIC); Tracer Gas Protocol for the Determination of Volumetric Flow Rate Through the Ring Pipe of the Xact Multi-Metals Monitoring System (also known as Other Test Method 24); Approved Alternative Method 012: An Alternate Procedure for Stack Gas Volumetric Flow Rate Determination (Tracer Gas); the Emission Inventory Improvement Program, Volume II: Chapter 16, Methods for Estimating Air Emissions from Chemical Manufacturing Facilities; Protocol for Equipment Leak Emission Estimates; and EPA's Protocol for Measuring Destruction or Removal Efficiency (DRE) of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing, Version 1, EPA 430–R–10–003. These are referenced in 40 CFR 98.123 (Calculating GHG emissions for subpart L), 40 CFR 98.124 (Monitoring and QA/QC requirements for subpart L), and 40 CFR 98.128 (Definitions for subpart L).

D. Electronics Manufacturing (Subpart I)

1. Summary of the Final Rule

Source Category Definition. The electronics manufacturing source category consists of any of the following five production processes. Facilities that use these processes include, but are not limited to, those facilities that manufacture micro-electro-mechanical systems (MEMS), liquid crystal displays (LCDs), photovoltaic cells (PV), and semiconductors (including light-emitting diodes).

• Electronics manufacturing production processes in which the etching process uses plasma-generated fluorine atoms and other reactive fluorine-containing fragments, which chemically react with exposed thin-films (e.g., dielectric, metals) or substrate (e.g., silicon) to selectively remove portions of material.

• Electronics manufacturing production processes in which chambers used for depositing thin films are cleaned periodically using plasma-generated fluorine atoms and other reactive fluorine-containing fragments.

• Electronics manufacturing production process in which wafers are cleaned using plasma generated fluorine atoms or other reactive fluorine-containing fragments to remove residual material from wafer surfaces, including the wafer edge.

• Electronics manufacturing production processes in which the chemical vapor deposition process (CVD) or other manufacturing processes use N_2O.

• Production processes which use fluorinated GHGs as heat transfer fluids to cool process equipment, to control temperature during device testing, to clean substrate surfaces and other parts, and for soldering (e.g., vapor phase reflow). Heat transfer fluids commonly used in electronics manufacturing include those sold under the trade names "Galden®" and "Fluorinertsu.™"

Reporting Threshold. Electronics manufacturing facilities that meet the applicability criteria in the General Provisions (40 CFR 98.2) must report GHG emissions. Electronics manufacturing facilities covered by subpart I are those that have emissions equal to or greater than 25,000 $mtCO_2e$. For electronics manufacturing, EPA is requiring that uncontrolled emissions be used for purposes of determining whether a facility's emissions are equal to or greater than 25,000 $mtCO_2e$.[2] Facilities must determine if they meet the applicability criteria in the General Provisions (40 CFR 98.2(a)(2)) by using the methods in 40 CFR 98.91 and summarized as follows:

• Semiconductor, MEMS, and LCD manufacturing facilities are required to use gas specific emission factors and 100 percent of annual manufacturing capacity. Because heat transfer fluids are widely used in semiconductor manufacturing, to account for emissions from heat transfer fluids, semiconductor manufacturing facilities are required to add 10 percent of total clean and etch emissions at a facility to their total estimate. For semiconductor and LCD manufacturing facilities, the gas specific emission factors are consistent with the 2006 IPCC Tier 1 emission factors. For MEMS manufacturing facilities, because there is no IPCC factor available, the emission factor was developed by EPA and is based on the IPCC Tier 2b SF_6 emission factor for semiconductors.[3]

• PV manufacturing facilities are required to multiply annual fluorinated GHG purchases or consumption by the gas-appropriate 100-year GWPs (provided in Table A–1 to subpart A of this part).

It is important to clarify that these methods for determining whether a manufacturer exceeds the threshold are different from those used to calculate and report annual GHG emissions. The methods for calculating GHG emissions and consumption for reporting purposes are provided in the following paragraphs.

GHGs to Report. Each facility must calculate and report the following GHG emissions and consumption:

• Fluorinated GHG emissions from plasma etching, chamber cleaning, and wafer cleaning.

• N_2O emissions from chemical vapor deposition and other electronics manufacturing processes.

• Fluorinated GHG emissions from heat transfer fluid use.

• Consumption for all fluorinated GHGs and N_2O including gases used for manufacturing processes other than those listed above.

• CO_2, CH_4, and N_2O combustion emissions from stationary combustion units by following the requirements of 40 CFR part 98, subpart C (General Stationary Fuel Combustion Sources).

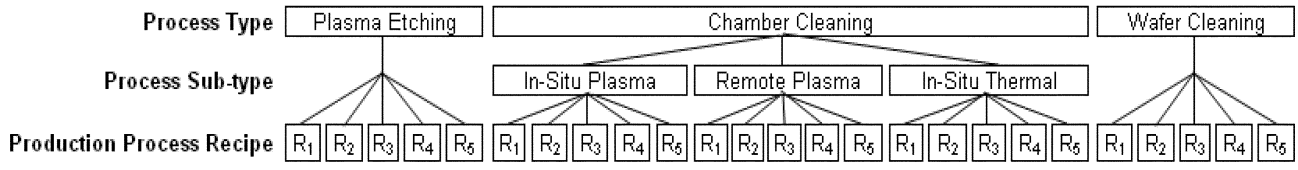
GHG Emissions Calculation and Monitoring. To calculate fluorinated GHG and N_2O emissions from electronics manufacturing, reporters must use the following methods, as appropriate for each electronics manufacturing facility (depending on the product manufactured, i.e., MEMS, LCD, PV, or semiconductors).

Fluorinated GHG Emissions

All electronics manufacturing facilities are required to calculate fluorinated GHG emissions from etch and clean processes by estimating emissions of input fluorinated GHGs and of by-product fluorinated GHGs. This is done by applying utilization factors and by-product formation factors (collectively referred to as "emission factors" below) to the consumption of each fluorinated GHG by each process type, process sub-type or recipe, as appropriate. However, the methods prescribed for use by different types of electronics manufacturing facilities differ in the values of these emission factors, the level of aggregation to which the factors are applied (process type, process sub-type, or recipe), and whether defaults or recipe-specific factors are applied. This framework is discussed in detail in the following paragraphs.

To calculate and report fluorinated GHG emissions, reporters must adhere to the typology shown in Figure 1 of this preamble.

Figure 1. Typology for Calculating Fluorinated GHG Emissions from Electronics Manufacturing



[2] For purposes of calculating and reporting emissions for this subpart, facilities may report controlled emissions if they abide by provisions in 40 CFR 98.94(f) of this rule.

[3] For a more detailed explanation of the MEMS default factor, please refer to the Electronics Manufacturing TSD (EPA–HQ–OAR–2009–0927).

At the top of the typology figure are process types, which consist of plasma etching, chamber cleaning, and wafer cleaning. The second level in the figure consists of process sub-types, which are identified for only the chamber cleaning process type. As explained in Section II.D.2 of this preamble (Summary of Major Changes Since the Proposal) and Section II.D.3 of this preamble (Summary of Comments and Responses), EPA is only establishing sub-types for the chamber cleaning process type because sufficient information was available for these sub-types to establish default emission factors. The three chamber cleaning process sub-types are in-situ plasma, remote plasma, and in-situ thermal cleans. The bottom of the figure displays production process recipes. Definitions are provided in the paragraphs below.

Process Type. EPA is defining a process type as a broad group of manufacturing steps used at a facility associated with substrate (e.g., wafer) processing during device manufacture for which fluorinated GHG emissions and fluorinated GHG usages are calculated and reported. The process types are plasma etching, chamber cleaning, and wafer cleaning.[4]

Process Sub-type. EPA is defining a process sub-type as a set of similar manufacturing steps, more closely related within a broad process type. (For clarity, EPA is referring to what was previously termed process categories in the April 2010 proposed rule (75 FR 18652) as process sub-types).

In situ plasma process sub-type consists of the cleaning of thin-film production chambers, after processing substrates, with a fluorinated GHG cleaning reagent that is dissociated into its cleaning constituents by a plasma generated inside the chamber where the films are produced.

Remote plasma process sub-type consists of the cleaning of thin-film production chambers, after processing substrates, with a fluorinated GHG cleaning reagent dissociated by a remotely located (e.g., upstream) plasma source.

In situ thermal process sub-type consists of the cleaning of thin-film production chambers, after processing substrates, with a fluorinated GHG cleaning reagent that is thermally dissociated into its cleaning constituents inside the chamber where one or more thin films are produced.

Production Process Recipe (Recipe). EPA has included definitions of "individual recipe" and "similar" with respect to recipes in this final rule as an aid to understanding the portions of the rule where a facility is required or allowed to calculate emissions on a recipe-specific basis. The final rule uses the term "individual recipe" to refer to a specific combination of gases, under specific conditions of reactor temperature, pressure, flow, radio frequency (RF) power and duration, used repeatedly to fabricate a specific feature on a specific film or substrate. EPA is also introducing the term "similar," with respect to recipes, to refer to recipes that are composed of the same set of chemicals and have the same flow stabilization times and where the documented differences, considered separately, in reactor pressure, individual gas flow rates, and applied RF power are less than or equal to plus or minus 10 percent. For purposes of comparing and documenting recipes that are similar, facilities may use either the best known method provided by an equipment manufacturer or the process of record, for which emission factors for either have been measured (see the Electronics Manufacturing TSD (EPA–HQ–OAR–2009–0927) for supporting information). Generally, where facilities develop recipe-specific utilization and by-product formation rates, they may apply the utilization and by-product formation rates developed for an individual recipe to any "similar recipe.[5]"

Electronics manufacturing facilities must calculate and report emissions of each fluorinated GHG used at the facility by adhering to typologies discussed and defined earlier in this section, as appropriate, and using the following methods based on the use of (1) Gas consumption, and (2) emission factors for fluorinated-GHG utilization and by-product formation rates. Where facilities are required to estimate and calculate emissions for sub-types or recipes, they are also required to report those emissions in aggregate by process type.

The required methods are summarized in Table 3 of this preamble. EPA is naming the methodologies described below using a format similar to that used in the 2006 IPCC Guidelines for National Greenhouse Gas Inventories. While EPA's methodologies may be viewed generally as an extension from and building upon the IPCC's methods, EPA's approach is distinct in terms of its applicability and level of detail.

TABLE 3—SUMMARY OF FINAL PROVISIONS FOR ELECTRONICS MANUFACTURING FACILITIES TO ESTIMATE AND REPORT FLUORINATED GHG EMISSIONS FROM ETCHING AND CLEANING PROCESSES

Product manufactured	Manufactured wafer size	Annual capacity[a]	Required methodology	Optional methodology
PV, MEMS, LCDs.	NA	NA	Modified Tier 2b—Use EPA default emission factors[b] for plasma etching and chamber cleaning process types.[c]	Tier 3—Use recipe-specific emission factors for all production processes that use fluorinated GHGs.
Semiconductors	300 mm and smaller.	Less than or equal to 10,500 m^2 of substrate.	Tier 2c—Use EPA default emission factors for plasma etching, chamber cleaning (including in-situ plasma cleaning, remote plasma cleaning, in-situ thermal cleaning sub-types), and wafer cleaning process types.[c]	Tier 3—Use recipe-specific emission factors for all production processes that use fluorinated GHGs.

[4] As defined in the final rule, the plasma etching process type consists of any production process using fluorinated GHG reagents to selectively remove materials that have been deposited on a substrate during electronics manufacturing. Also as defined in the final rule, the wafer cleaning process type consists of any production process using fluorinated GHG reagents to clean wafers at any step during production.

[5] To be included in a set of similar recipes for the purposes of this subpart, a recipe must be similar to the recipe in the set for which recipe-specific utilization and by-product formation rates have been measured.

TABLE 3—SUMMARY OF FINAL PROVISIONS FOR ELECTRONICS MANUFACTURING FACILITIES TO ESTIMATE AND REPORT FLUORINATED GHG EMISSIONS FROM ETCHING AND CLEANING PROCESSES—Continued

Product manufactured	Manufactured wafer size	Annual capacity[a]	Required methodology	Optional methodology
Semiconductors	300 mm and smaller.	Greater than 10,500 m^2 of substrate.	Tier 2d—Use EPA default emission factors for chamber cleaning (including in-situ plasma cleaning, remote plasma cleaning, in-situ thermal cleaning sub-types), and wafer cleaning process types, and recipe-specific emission factors for plasma etching.[c]	Tier 3—Use recipe-specific emission factors for all production processes that use fluorinated GHGs.
Semiconductors	Larger than 300 mm.	NA	Tier 3—Use recipe-specific emission factors for all production processes that use fluorinated GHG.	None.

[a] Manufacturing capacity is 100 percent of annual manufacturing capacity of a facility as determined by summing the area of maximum designed substrate starts of a facility per month over the reporting period.
[b] These emission factors are consistent with emission factors published in the 2006 IPCC Guidelines.
[c] Where default emission factors are not provided in Tables I–3, I–4, I–5, I–6, or I–7 for a particular fluorinated GHG and process type or subtype combination, a facility must either use utilization and by-product formation rates of 0 or use directly measured recipe-specific emission factors using the procedures of this subpart.

Gas Consumption

Electronics manufacturing facilities must use the following methods to calculate and apportion fluorinated GHG consumption:

• Total annual gas consumption, for all fluorinated GHGs, calculated using the facility's purchase records, disbursements, gas container inventories, and gas- and facility-specific heel factors.

• Total annual gas consumption apportioning factors developed using facility-specific engineering models based on quantifiable metrics (i.e., a metric that is proportional to gas usage) of fluorinated GHG-using activity. Facilities must document these models in their site GHG Monitoring Plans (as required under 40 CFR 98.3) and verify them. At a minimum, facilities must verify and document the information listed in 40 CFR 98.94(c) and 40 CFR 98.97(c), respectively. This information must be updated each reporting year.

Fluorinated GHG Utilization and By-Product Formation Rates (Emission Factors)

Electronics manufacturing facilities must use the following methods for applying (and in some cases, developing) fluorinated GHG emission factors, as appropriate. Where a facility uses less than 50 kg of a fluorinated GHG in one reporting year, rather than calculate emissions using an emission factor, they may report the emissions of that gas as equal to consumption.

Facilities That Manufacture MEMS, LCDs, and PV

Facilities that manufacture MEMS, LCDs, and PV are required to calculate and report their fluorinated GHG emissions from two process types: Plasma etching and chamber cleaning. These facilities are required to use default emission factors presented in Tables I–5, I–6, or I–7 to subpart I for MEMS, LCDs, PV, respectively. EPA is using the term "Modified Tier 2b Method" to refer to this methodology.

A facility may use directly measured recipe-specific emission factors in lieu of defaults for all production processes that use fluorinated GHGs only if the recipe-specific emission factors are measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exceptions.[6] The facility must develop recipe-specific factors for each individual recipe except that a factor developed for one individual recipe may be applied to similar recipes. In a given reporting year, a facility must develop new recipe-specific emission factors only for recipes which are not similar to any recipe used in a previous reporting year. Facilities that choose the recipe-specific approach must also aggregate the recipe-specific emissions and report the total emissions by process type (plasma etching and chamber cleaning). In addition, where a facility reports using recipe-specific emission factors, they are required to report the film or substrate that was etched/cleaned and the feature type that was etched.

A facility that is using a method based on default emission factors, but uses a fluorinated GHG for a particular process type for which default emission factors are not provided in Tables I–5, I–6, or I–7, must either use utilization and by-product formation rates of 0 or, in that particular instance, use directly measured recipe-specific emission factors measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exceptions.[7] The facility must develop and report the recipe-specific emission factors using the same procedures as discussed in the paragraph above.

With the exception of where default emission factors are not provided in Tables I–5, I–6, or I–7 for a particular process type, EPA is prohibiting a facility from creating and using a hybrid method to ensure consistent methods of calculating and reporting emissions. This means that a single facility must choose between using only default emission factors or using recipe-specific emission factors for all process types; hybrid methods using both default emission factors and recipe-specific factors within the same reporting year are not permitted. This restriction will enable EPA to analyze emissions and trends using a consistent set of data.

Facilities That Manufacture Semiconductors

EPA is requiring facilities that manufacture semiconductors to use a method to calculate and report their fluorinated GHG emissions which varies depending on the size of wafers that the facility is manufacturing (i.e., whether the facility manufactures wafers measuring 300 mm and less or greater than 300 mm). This distinction was proposed in the April 2010 proposed rule (75 FR 18652). For facilities that manufacture wafers measuring 300 mm and less, EPA is requiring the use of one of two following methods for calculating and reporting emissions, depending on the facility's manufacturing capacity: (1) A method for facilities that have an annual manufacturing capacity that is less than or equal to 10,500 m^2 of substrate, and (2) a method for those

[6] EPA is permitting facilities to use emission factors measured using the 2001 ISMI Guidelines, International SEMATECH #01104197A–XFR, provided the emissions factors were measured prior to January 1, 2007. Documentation for the measurements is required.

[7] See footnote 6.

that have an annual manufacturing capacity greater than 10,500 m^2 of substrate. A facility's manufacturing capacity (as calculated using Equation I–5 of subpart I) is 100 percent of the maximum designed substrate starts, expressed as surface area, for the reporting year. This distinction in manufacturing capacity was part of EPA's initial April 2009 proposed rule (74 FR 16448).

Semiconductor Manufacturing Facilities That Fabricate Devices on Wafers Measuring 300 mm or Less in Diameter and That Have an Annual Manufacturing Capacity of Less Than or Equal to 10,500 m^2 of Substrate

Semiconductor manufacturing facilities that fabricate devices on wafers measuring 300 mm or less in diameter and that have an annual manufacturing capacity of less than or equal to 10,500 m^2 of substrate [8] must calculate and report their fluorinated GHG emissions using the following five process types and sub-types, and the corresponding default emission factors presented in Tables I–3 and I–4 to subpart I:

- Plasma etching process type.
- Chamber cleaning process type which includes the following three process sub-types:
  - —In-situ plasma chamber cleaning process sub-type.
  - —Remote plasma chamber cleaning process sub-type.
  - —In-situ thermal chamber cleaning process sub-type.
- Wafer cleaning process type.

Default emission factors are differentiated by 150/200 mm and 300 mm wafer technologies. The default emission factors were developed using the data provided in Table 5 of the report Draft Emission Factors for Refined Semiconductor Manufacturing Process Categories (EPA–HQ–OAR–2009–0927–0073). EPA is using the term "Tier 2c Method" to refer to this methodology.

A facility may use directly measured recipe-specific emission factors for each individual recipe or recipe that is not a similar recipe in lieu of defaults only if the recipe-specific emission factors are measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exceptions.[9] The facility must develop recipe-specific factors for each individual recipe except that factors developed for one individual recipe may be applied to similar recipes. In a given reporting year, a facility must develop recipe-specific emission factors only for new recipes which are not similar to any recipe used in a previous reporting year. Facilities that choose the recipe-specific approach must also aggregate the recipe-specific emissions and report the total emissions by process type (plasma etching, chamber cleaning, and wafer cleaning). In addition, where a facility reports using recipe-specific emission factors, they are required to report the film or substrate that was etched/cleaned and the feature type that was etched.

A facility that is using a method based on default emission factors, but uses a fluorinated GHG for a particular process type or sub-type for which default emission factors are not provided in Tables I–3 and I–4, must either use utilization and by-product formation rates of 0 or, in that particular instance, use directly measured recipe-specific emission factors measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exceptions.[10] The facility must develop and report the recipe-specific emission factors using the same procedures as discussed in the paragraph above.

With the exception of where default emission factors are not provided in the Tables I–3 and I–4 for a particular process type or sub-type, a facility must use either default emission factors only, or recipe-specific emission factors only for all process types and sub-types; creating and using a hybrid method is not permitted for the reasons discussed earlier in this section.

Semiconductor Manufacturing Facilities That Fabricate Devices on Wafers Measuring 300 mm or Less in Diameter and That Have an Annual Manufacturing Capacity of Greater Than 10,500 m^2 of Substrate

Semiconductor manufacturing facilities that fabricate devices on wafers measuring 300 mm or less in diameter and that have an annual manufacturing capacity greater than 10,500 m^2 of substrate (the "largest" semiconductor manufacturing facilities) [11] must calculate and report their emissions using a combination of default emission factors and directly measured recipe-specific emission factors.

For the following four process types and sub-types, facilities must calculate emissions using only the default emission factors in Tables I–3 and I–4 of subpart I:

- Chamber cleaning process type:
  - —In-situ plasma chamber cleaning process sub-type.
  - —Remote plasma chamber cleaning process sub-type.
  - —In-situ thermal chamber cleaning process sub-type.
- Wafer cleaning process type.

Default emission factors are differentiated by 150/200 mm and 300 mm wafer technologies. These emission factors, which are the same emission factors as specified for the Tier 2c method, were developed using the data provided in Table 5 of the report Draft Emission Factors for Refined Semiconductor Manufacturing Process Categories (EPA–HQ–OAR–2009–0927–0073). EPA is using the term "Tier 2d Method" to refer to this methodology.

For the plasma etching process type, facilities must calculate emissions using only directly measured recipe-specific emission factors. The facility must develop recipe-specific factors for each individual recipe except that factors developed for one individual recipe may be applied to similar recipes. In a given reporting year, a facility must develop new recipe-specific emission factors only for recipes which are not similar to any recipe used in a previous reporting year. Plasma etching recipe-specific emission factors must be measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exemptions.[12] Facilities must also aggregate the recipe-specific emissions and report the total emissions by plasma etching process type. In addition, the facility is required to report the film or substrate that was etched/cleaned and the feature type that was etched for recipes used.

A facility also has the option of using directly measured recipe-specific emission factors in lieu of default emission factors for the chamber and wafer cleaning process types, but only if the recipe-specific factors are measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exceptions.[13] The facility must develop recipe-specific factors for each individual recipe except that factors developed for one individual recipe may be applied to similar recipes. In a given reporting year, a facility must develop new recipe-

[8] As calculated in Equation I–5 of subpart I, manufacturing capacity is 100 percent of annual manufacturing capacity of a facility as determined by summing the area of maximum designed substrate starts of a facility per month over the reporting period.

[9] See footnote 6.

[10] See footnote 6.

[11] EPA estimates that the largest semiconductor facilities comprise 29 facilities out of 175 total semiconductor facilities. See the Electronics Manufacturing TSD available in the docket (EPA–HQ–OAR–2009–0927) for EPA's analysis.

[12] See footnote 6.

[13] See footnote 6.

specific emission factors only for recipes which are not similar to any recipe used in a previous reporting year. Facilities that choose the recipe-specific approach for the chamber and wafer cleaning process types must also aggregate the recipe-specific emissions and report the total emissions by those process types. In addition, where a facility reports using recipe-specific emission factors, they are required to report the film or substrate that was etched/cleaned and the feature type that was etched.

A facility that is using a method based on default emission factors, but uses a fluorinated GHG for a particular process type or sub-type for which default emission factors are not provided in Tables I–3 and I–4, must either use utilization and by-product formation rates of 0 or, in that particular instance, use directly measured recipe-specific emission factors measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exceptions.[14] The facility must develop and report the recipe-specific emission factors using the same procedures as discussed in the paragraph above.

With the exception of where default emission factors are not provided in the Tables I–3 and I–4 for a particular process type or sub-type, a hybrid method using both default emission factors and recipe-specific factors for the chamber cleaning and wafer cleaning process types within the same reporting year is not permitted for reasons discussed earlier in this section.

Semiconductor Facilities That Fabricate Devices on Wafers Measuring Greater Than 300 mm in Diameter

Semiconductor manufacturing facilities that fabricate devices on wafers measuring greater than 300 mm in diameter, regardless of capacity, must calculate and report all of their emissions from processes that use fluorinated GHGs (including plasma etching, chamber cleaning, and wafer cleaning process types) using directly measured recipe-specific emission factors (i.e., an approach consistent with the 2006 IPCC Tier 3 methodology). EPA is using the term "Tier 3 Method" to refer to this methodology. In a given reporting year, a facility must develop new recipe-specific emission factors only for recipes which are not similar to any recipe used in a previous reporting year. Emission factors must be measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exceptions.[15] Facilities must also aggregate the recipe-specific emissions and report the total emissions by process type (plasma etching, chamber cleaning, and wafer cleaning). In addition, each facility is required to report the film or substrate that was etched/cleaned and the feature type that was etched for recipes used.

N_2O Emissions: Electronics manufacturing facilities must calculate emissions of N_2O using:

- Requirements for calculating and apportioning gas consumption as outlined above for "Fluorinated GHG Emissions."
- Production process emission factors for chemical vapor deposition and other electronics manufacturing processes using either defaults provided in Table I–8 to subpart I or facility-specific N_2O emission factors based on facility measurements of N_2O. Emission factors must be measured using the 2006 ISMI Guidelines, International SEMATECH #06124825A–ENG, with limited exceptions.[16] Where a facility uses less than 50 kg of N_2O in one reporting year, rather than calculate emissions using an emission factor, they may report the emissions as equal to consumption.

Heat Transfer Fluid Emissions: Electronics manufacturing facilities must calculate and report emissions from heat transfer fluids using a mass balance approach.

Reporting Controlled Emissions from Abatement Systems: Electronics manufacturing facilities that wish to calculate and report controlled fluorinated GHG and N_2O emissions from the use of abatement systems must certify that their abatement systems are installed, operated, and maintained in accordance with the manufacturers' specifications, as well as account for uptime of abatement systems.[17] Facilities must calculate controlled emissions from abatement systems using either:

- Destruction or removal efficiencies based on a default value of 60 percent. This approach requires certification that the abatement system is specifically designed for fluorinated GHG and N_2O abatement. A facility must support its certification that the abatement system is specifically designed for fluorinated GHG and N_2O abatement by documenting the suppliers specifications; or
- Directly measured destruction or removal efficiencies measured in accordance with EPA's Protocol for Measuring Destruction or Removal Efficiency of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing (EPA's DRE Protocol), Version 1, EPA 430–R–10–003. These destruction or removal efficiencies must be measured at a frequency specified by EPA's random sampling abatement system testing program (RSASTP).

Best Available Monitoring Methods. EPA is allowing electronics manufacturing facilities to use Best Available Monitoring Methods (BAMM) through June 30, 2011 for this source category without submitting a request. The owner or operator must use the calculation methodologies and equations in the Calculating GHG Emissions section of subpart I (40 CFR 98.93), but may use BAMM for any parameter for which it is not reasonably feasible to acquire, install, or operate a required piece of monitoring equipment in a facility, or to procure measurement services from necessary providers. EPA is allowing facilities to use BAMM for 6 months based on EPA's experience implementing the Final MRR issued in October 2009 and because it has determined that some electronics manufacturing facilities may need additional time to comply with the requirements in the final rule.

Facilities wishing to extend the use of BAMM beyond the initial 6-month period, but no later than December 31, 2011, must submit a petition to EPA by February 28, 2011. Requests for BAMM extensions must include detailed explanations and supporting documentation to describe why it is not reasonably feasible for the facility to comply with the required provisions. In general, extension requests must include detailed descriptions and evidence that it is not reasonably feasible to acquire, install, or operate a required piece of monitoring equipment in a facility, or to procure necessary measurement services from providers by July 1, 2011.

Where a facility is required to estimate emissions using recipe-specific utilization and by-product formation rates for the plasma etching process type (i.e., the Tier 2d method) and they are unable to develop those factors, EPA is requiring the facility to provide reasons why it is not reasonably feasible to obtain, install, or operate the needed equipment, or to procure necessary measurement services, before December 31, 2011 (in lieu of July 1, 2011) because recipe-specific emission factors may be measured at any time during the reporting year. These facilities must

[14] See footnote 6.

[15] See footnote 6.

[16] See footnote 6.

[17] In the final rule, EPA is defining controlled emissions as the quantity of emissions that are released to the atmosphere after application of an emission control device (e.g., abatement system).

submit a petition to EPA by June 30, 2011.

BAMM extension requests must also document the facility's efforts to comply with the requirements and explain the best available monitoring method that the facility will use, should EPA approve the request.

EPA is requiring that if a facility is allowed to use BAMM in 2011 the facility must recalculate and resubmit 2011 emissions with their report for the 2012 reporting year (to be submitted in 2013). For example, such a facility having been granted BAMM may use a default etch emission factor to calculate and report its 2011 emissions. This facility must then recalculate and report its 2011 emissions with its 2012 report. Where a facility is allowed to use BAMM for apportioning gas consumption it is not required to verify its 2011 engineering model with its recalculated report.

EPA does not anticipate approving the use of BAMM beyond December 31, 2011; however, EPA reserves the right to approve any such requests submitted by June 30, 2011 for unique and extreme circumstances which include safety, technical infeasibility, or inconsistency with other local, State or Federal regulations. Facilities requesting BAMM past December 31, 2011 would have to submit similar documentation to support the request as was required for BAMM requests in 2011. In addition, these facilities would be required to describe the unique and extreme circumstances which necessitate the extended use of BAMM. Facilities allowed to use BAMM through 2012 would be required to recalculate and resubmit their 2012 emissions. The recalculated emissions must be reported with the 2013 report (submitted in 2014). Where a facility is allowed to use BAMM for apportioning gas consumption it is not required to verify its 2012 engineering model with its recalculated report.

Data Reporting. In addition to the information required to be reported by the General Provisions (40 CFR 98.3(c)), reporters must annually submit additional data used to calculate GHG emissions and consumption. A list of the specific data to be reported for this source category is contained in 40 CFR 98.96.

Recordkeeping. In addition to the records required by the General Provisions (40 CFR 98.3(g)), reporters must keep records of additional data used to calculate GHG emissions and consumption. A list of specific records that must be retained for this source category is included in 40 CFR 98.97.

2. Summary of Major Changes Since Proposal

The major changes in this rule since the April 2010 proposal are identified in the following list. The rationales for these, and the identification of and rationale for other significant changes to the proposed rule can be found below or in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart I: Electronics Manufacturing" (available in the docket, EPA–HQ–OAR–2009–0927). Relevant comments on EPA's initial April 2009 proposal for electronics manufacturing are included below or in the Response to Comment Document. In addition to the changes identified below, EPA reorganized sections of the proposed regulatory text and made editorial changes to improve clarity and readability.

Definition of the source category:

• EPA has clarified that semiconductors include, among others, light-emitting diodes (LEDs). As explained in more detail in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart I: Electronics Manufacturing," (available in the docket, EPA–HQ–OAR–2009–0927), LEDs are a semiconductor light source. When a LED is switched on, electrons are able to recombine with holes within the device, releasing energy in the form of light whose color is governed by the nature of the semiconductor. Many LEDs are manufactured on a wafer (usually different than silicon) using methods that are similar to the manufacture of integrated circuits.

Reporting threshold:

• EPA has clarified what manufacturing capacity of a facility means by providing a new equation (Equation I–5 of this rule) in the final rule that specifies manufacturing capacity is 100 percent of annual manufacturing capacity of a facility as determined by summing the area of maximum designed substrate starts of a facility per month over the reporting period. EPA has also provided a definition of maximum designed substrate starts.

Calculating GHG emissions:

• EPA has revised the requirements for semiconductor manufacturing facilities that fabricate devices on wafers measuring 300 mm or less in diameter to calculate and report fluorinated GHG emissions from etching and cleaning process types. In the final rule, EPA is requiring these facilities to use one of two different methodologies, depending on the manufacturing capacity of the facility.

• EPA has modified the requirement for semiconductor manufacturing facilities that fabricate devices on wafers measuring 300 mm or less in diameter to require those facilities that have an annual manufacturing capacity of less than or equal to 10,500 m^2 of substrate to calculate and report fluorinated GHG emissions based on five process types and sub-types, as opposed to nine emitting process sub-types as proposed in the April 2010 rule. These facilities must calculate and report fluorinated GHG emissions from the etching process type, the chamber cleaning process type and its associated sub-types (in-situ plasma, remote plasma, in-situ thermal), and the wafer cleaning process type. The five process types and sub-types are differentiated by two wafer technologies (150/200 mm and 300 mm wafer size). EPA is using the term "Tier 2c" to refer to this methodology. EPA is combining default emission factors for 150 mm and 200 mm wafer technologies because EPA did not have sufficient measured emissions data to establish different factors for these two technologies. For each of these process types and associated sub-types, EPA provides default emission factors accounting for (1) The mass fraction of the input gas that is utilized during manufacturing (i.e., not emitted from the process type or sub-type), and (2) the mass of each reportable fluorinated GHG by-product formed as a fraction of the mass of the fluorinated GHG input gas with the largest mass flow used.

• EPA has added provisions to require the largest semiconductor facilities (defined as facilities with annual capacities of greater than 10,500 m^2 of substrate) to calculate and report their emissions from the plasma etching process type using directly measured recipe-specific emission factors, while using EPA's default emission factors for chamber cleaning sub-types, and for the wafer cleaning process type. EPA is using the term "Tier 2d" to refer to this hybrid methodology. All emission factors (utilization and by-product formation rates) for the etch processes are required to be measured using the 2006 ISMI Guidelines, with limited exceptions.[18]

The requirement for semiconductor manufacturing facilities to calculate their emissions using process-specific process utilization and by-product formation rates (i.e., recipe-specific emission factors) was originally proposed in EPA's initial April 2009 proposal (74 FR 16448). In that proposed rule, EPA proposed to require the large semiconductor manufacturing

[18] See footnote 6.

facilities to calculate and report emissions from all fluorinated GHG using processes using such an approach. Further, in EPA's April 2010 proposal (75 FR 18652), EPA proposed, as an alternative to the Refined Method, to require all semiconductor manufacturing facilities to estimate and report using recipe-specific emission factors.[19]

• EPA clarified the requirement for recipe-specific measurements to facilitate the implementation of the Tier 2d and Tier 3 methods. EPA provided definitions of "individual recipe" and "similar" with respect to recipes. For recipe-specific emission factors, rather than requiring each and every individual recipe to be measured, EPA is permitting a facility to apply one measured recipe-specific emission factor to a group of "similar recipes." In a given reporting year, a facility must develop new recipe-specific emission factors only for recipes which are not similar to any recipe used in a previous reporting year. In addition, where a facility reports using recipe-specific emission factors, EPA is requiring that they report the film or substrate that was etched/cleaned and the feature type that was etched.

Monitoring and QA/QC requirements:

• EPA has modified the procedures by which facilities must develop gas consumption apportioning factors. In the final rule, facilities must apportion gas consumption using facility-specific engineering models based on quantifiable metrics of activity. Facilities must verify these models as specified by EPA in 40 CFR 98.96(c) and document them in their site GHG Monitoring Plans (as required under 40 CFR 98.3). EPA will permit the use of facility-specific gas apportionment models based on quantifiable metrics, such as wafer pass or wafer starts, provided the facility documents and verifies the model. As part of these new requirements, EPA has added definitions for actual gas consumption, modeled gas consumption, repeatable, and wafer starts. Further, EPA has clarified that all electronics manufacturing facilities must apportion consumption of fluorinated GHGs and N_2O used at a facility using the apportioning methods outlined in the final rule.

• EPA has revised the requirement to recalculate gas- and facility-specific heel factors. EPA is requiring facilities to recalculate gas- and facility-specific heel factors if the trigger point for change out used to establish a gas- and facility-specific heel factor differs by more than 5 percent, expressed as a percent of the previously used trigger point for change out. To clarify requirements to develop gas- and facility-specific heel factors, EPA has added a definition for trigger point for change out.

EPA made this revision in response to comments received on its proposal. EPA agrees with commenters that asserted the proposed requirement to recalculate the heel factor when the percentage change from the original trigger point exceeded 1 percent was too burdensome. Please refer to "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart I: Electronics Manufacturing" (available in the docket, EPA–HQ–OAR–2009–0927) for additional information on EPA's rationale.

• EPA has added equations specifying how to calculate uptime and how to account for uptime in DREs for abatement systems where a facility is calculating and reporting controlled emissions. EPA has also modified how uptime is calculated by defining an "operational mode" for abatement systems and removing the reference to SEMI Standard E–10–0304[E], Specification for Definition and Measurement of Equipment Reliability, Availability, and Maintainability.

• EPA has modified the Best Available Monitoring Methods (BAMM) provisions for subpart I to allow electronics manufacturing facilities to use BAMM through June 30, 2011 without submitting a request to EPA. Facilities wishing to extend the use of BAMM beyond the initial 6-month period, but no later than December 31, 2011, must submit a petition to EPA by February 28, 2011 (or June 30, 2011 where a facility is requesting the use of BAMM for recipe-specific emission factors for the plasma etching process type). EPA anticipates facilities will need to use best available monitoring methods only under limited circumstances. See Section II.D.1 of this preamble for additional information about the BAMM provisions.

Based on comments received on EPA's proposed rules (i.e., EPA's April 2009 and April 2010 proposed rules for electronics manufacturing) regarding the complexities perceived in implementing the methods contained in the final rule, EPA has concluded that some electronics manufacturing facilities may need additional time to fully meet the requirements finalized in this rule. However, EPA expects all electronics manufacturing facilities will be prepared to fully comply with this rule's requirements no later than year-end 2011. Therefore, extension of BAMM provisions beyond 2011 would only be granted in unique and extreme circumstances which include safety, technical infeasibility, or inconsistency with other local, State or Federal regulations. For a more detailed discussion on EPA's rationale, see "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart I: Electronics Manufacturing" (available in the docket, EPA–HQ–OAR–2009–0927).

3. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. A large number of comments were received on this subpart covering numerous topics. Responses to additional significant comments received can be found in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart I: Electronics Manufacturing" (available in the docket, EPA–HQ–OAR–2009–0927).

Comment: EPA received a broad range of comments stating that the initial and revised methodologies for calculating GHG emissions in subpart I were overly burdensome and costly. For example, with respect to EPA's revised proposal (75 FR 18652, April 2010), commenters asserted that the requirements for apportioning of gas usage without the use of "engineering judgment" would require the development of complex software systems and monitoring of activity data at a level of detail that would be costly and time-intensive. In another example, in regards to EPA's initial proposal (74 FR 16448, April 2009), commenters argued that the direct measurement requirement would result in high costs associated with the development of process-specific gas utilization and by-product formation factors for the largest semiconductor manufacturing facilities.

Response: EPA considered all of these comments, and evaluated alternative methods for calculating GHG emissions for electronics manufacturing, controlled and uncontrolled. EPA considered alternative methods that would result in reduced burden on industry while maintaining or improving the quality and breadth of reported data. EPA also considered the gaps in the available emission factor knowledge base and has implemented a method to gain additional data to improve EPA's efforts to characterize the sector's GHG emissions.

[19] EPA's "Refined Method" as proposed in April 2010 (75 FR 18652) is based on nine process sub-types under the etching, chamber cleaning, and wafer cleaning process types (four etching process sub-types, three chamber cleaning process sub-types, and two wafer cleaning process sub-types) and EPA-published default emission factors.

EPA has made every effort to reduce burden to the industry while maintaining requirements that it has determined are necessary to obtain facility-specific emission estimates. For example, based on comments received, EPA has revised the gas apportioning method to allow for the use of quantifiable metrics other than wafer passes. In the final rule, facilities will be allowed to develop apportioning factors based on other quantifiable metrics provided the method is described in writing, is repeatable, and is verified through comparison with actual gas consumption. This approach provides facilities flexibility in the choice of apportioning methods and assures a high degree of data quality. Additional details on the gas apportioning method are described in this Section II.D.3 (Summary of Comments and Responses) of the preamble.

As another means to reduce burden to the industry, EPA is only requiring the largest semiconductor manufacturing facilities to calculate and report emissions using directly measured recipe-specific emission factors, ensuring that burden is commensurate with potential to emit. The largest semiconductor manufacturing facilities account for nearly two-thirds of uncontrolled emissions while accounting for less than 20 percent of all facilities expected to report under subpart I. In addition, the largest semiconductor manufacturing facilities are only required to directly measure etch process emissions. Etch processes are the least understood of the electronics manufacturing processes in terms of GHG emissions, and EPA lacks sufficient data to establish default emission factors for multiple etch processes. Lastly, in the final rule, EPA is also allowing the use of "similar recipe" emission factors to reduce the number and burden of direct measurements required.

Additional details on steps taken to reduce the burden are described in this section II.D.3 (Summary of Comments and Responses) and in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart I: Electronics Manufacturing" (available in the docket, EPA–HQ–OAR–2009–0927).

In general, while commenters asserted that EPA's proposed requirements were too burdensome and costly, comments lacked sufficient quantitative detail or substantiation. However, in response to concerns that EPA did not fully account for compliance costs in its economic analysis, EPA did update its costs estimates to reflect the costs associated with the requirements finalized in the rule. EPA has concluded that its final cost estimates appropriately account for the compliance burden under this rule. For details on how EPA developed its final costs for this rule, please see Sections 4 & 5 of the Economic Impact Analysis (EIA) (available in the docket, EPA–HQ–OAR–2009–0927).

Method for Calculating GHG Emissions

Comment: While some commenters supported EPA's intent for the Refined Method to gather representative and accurate facility level emissions estimates, they argued that the Refined Method itself was not supported for several reasons.[20] Commenters asserted that the Refined Method stemmed from a technically flawed uncertainty analysis and apparent misunderstandings of current process realities. Commenters also stated that extending the 2006 IPCC Tier 2b etch category ("process type") from one to four refined categories ("sub-types") was not justified given the limited data available for developing emissions factors. Several commenters suggested that etch emission factors could be developed through another process (i.e., not part of the rule) such as through the existing Memorandum of Understanding between EPA and the semiconductor industry.[21] As an alternative to EPA's Refined Method, many commenters suggested an "Alternative Refined Method," that they argued would achieve greater accuracy than the 2006 IPCC Tier 2b method and would avoid uncertainty issues created by EPA's Refined Method.

The "Alternative Refined Method," as described in comments, would be comprised of five process types and sub-types, which include: The three chamber clean sub-types (remote plasma clean, in-situ plasma clean, and in-situ thermal clean), the wafer cleaning process type, and one process type for all etch processes. Commenters suggested that this method would be superior to EPA's proposed Refined Method in terms of accuracy and cost.

One commenter stated that the use of EPA's Refined Method to estimate emissions would result in less accurate emission data as compared to the 2006 IPCC Tier 3 Method. This commenter encouraged EPA to require the use of the 2006 IPCC Tier 3 method for all semiconductor facilities given the need for accurate data and the significant emissions from this sector, but argued that at a minimum EPA should rely on Tier 3 estimation for "large facilities," as it did in its initial proposal.

Response: In general, EPA agrees with commenters that stated the available data as of the proposal was sufficient to establish default emissions factors for multiple chamber clean process sub-types, but insufficient to support establishing default emission factors for multiple etch process sub-types. EPA did not receive enough additional data during the comment period to address this insufficiency.[22] Accordingly, EPA is not establishing default emissions factors for etch sub-types in this final rule. EPA also agrees with the commenter that stated an estimation approach based on the IPCC Tier 3 method would result in the most accurate data. However, EPA is mindful of the burden that would be imposed by requiring all covered facilities to use an approach based on the 2006 IPCC Tier 3 method for all emissions.

In this final rule, EPA is requiring semiconductor facilities to calculate and report fluorinated emissions by adhering to one of three different emission estimation methodologies, depending on the wafer size manufactured and the facility's manufacturing capacity.[23] These requirements are presented in section II.D.1 (Summary of the Final Rule) of this preamble and summarized in Table 3 of this preamble. EPA has determined that the requirements in the final rule effectively balance EPA's objectives with an appropriate level of burden to industry.

In response to comments received on EPA's proposed methodology for semiconductor manufacturing facilities, EPA undertook another analysis to evaluate the uncertainty associated with emission estimation methods. Specific information on the analysis can be

[20] See footnote 19.

[21] Since 1996, EPA has maintained a partnership with the U.S. semiconductor industry, EPA's PFC Reduction/Climate Partnership for the Semiconductor Industry. As part of the Partnership, semiconductor facilities have committed to reduce fluorinated GHG emissions by at least 10 percent below the industry's 1995 baseline level by year-end 2010.

[22] In its proposed rule (75 FR 18652, April 2010), for each emission factor for the nine proposed process categories, EPA published a range of values. EPA proposed a range of values because it had not received sufficient data to select a specific value within each range. Based on additional information received after publication of the proposed rule, EPA published a Notice of Data Availability where it made available to the public draft default emission factors for semiconductor manufacturing refined process categories (75 FR 26904, May 2010). As of publication of this final rule, EPA has not received additional data (i.e., utilization and by-product formation rates).

[23] As calculated in Equation I–5 of this rule, manufacturing capacity is 100 percent of annual manufacturing capacity of a facility as determined by summing the area of maximum designed substrate starts of a facility per month over the reporting period.

found in the Electronics Manufacturing TSD (EPA–HQ–OAR–2009–0927). In summary, results from this exercise showed (a) emissions estimated with a Tier 2b method are understated, (b) more facility-level, emissions-relevant information would permit an uncertainty analysis to be performed with more meaningful and robust results, and (c) moving from the use of a default factor(s) for etch sub-types to the use of recipe-specific measurements appears to increase certainty in emission calculations. These results support the methodology finalized in the final rule.

Given the current lack of available facility-level gas usage and emission information for etching in particular, and EPA's need for increased accuracy in emission estimates relative to the 2006 Tier 2b method, EPA is requiring that the largest semiconductor facilities estimate and report recipe-specific emission factors for all etch processes. EPA views the generation of such data as essential to improving future efforts to characterize this sector's GHG emissions.

While EPA recognizes that more than half of the gas consumed in semiconductor manufacturing is for chamber cleaning, EPA also recognizes that most of the variability in gas consumption, and hence emissions, across many facilities is found for recipes used under the plasma etch process type. Etch recipes utilize many gases (approximately six or more either alone or in combination) with varying GWPs. Process recipes vary between facilities because they are a crucial part of company competitiveness and innovation.

While EPA is finalizing the Tier 2c method for some semiconductor facilities (i.e., not the largest semiconductor manufacturing facilities) and has determined that it is an improvement over the 2006 IPCC Tier 2b method, EPA maintains that estimating emissions based on process sub-types for etch with robust default factors would result in more accurate facility-level emission estimates as compared to estimating emissions using a single broad etch process type. To this end, in future years, EPA may evaluate the recipe-specific emission factors received through this final rule to determine whether a sufficiently robust data set exists to establish default emission factors for plasma etching process sub-types. In the future, EPA may consider requiring the semiconductor facilities that will be using a default emission factor for the etch process type under this final rule to estimate and report emissions using an approach based on multiple etch and chamber clean process sub-types similar to the Refined Method EPA proposed in April 2010.

EPA is requiring only the largest facilities to report recipe-specific emission factors for etching processes, rather than requiring all semiconductor facilities to report all etch processes regardless of capacity, or requiring the largest facilities to report all process emissions using recipe-specific emission factors, because EPA has concluded that this approach minimizes burden to industry. Further, this requirement ensures that the burden associated with reporting is proportional to the magnitude of a facility's potential emissions.

EPA selected 10,500 m^2 of substrate as the threshold for large facilities because facilities above this threshold are expected to account for nearly two-thirds of uncontrolled emissions while accounting for less than 20 percent of all facilities expected to report under subpart I. Based on EPA's analysis, the expected number of the "largest" facilities is 29 of the 175 total facilities. EPA originally proposed this distinction (i.e., facilities with an annual manufacturing capacity of greater than 10,500 m^2) in its initial proposal for semiconductor manufacturing facilities (75 FR 18652, April 2009). In response to EPA's proposal, some commenters stated that in the semiconductor industry, "large" facilities do not inherently have higher emissions of fluorinated GHGs. These commenters noted that beginning with the second generation of 200 mm facilities, transitions to NF_3 remote cleans and deployment of point of use abatement resulted in significantly lower emissions as compared to older facilities. In response, while EPA acknowledges qualitative reports on second generation 200 mm wafer facilities adopting NF_3 remote plasma cleans and point of use abatement systems as presented in comments, it is unaware of published studies that quantitatively document the market penetration of either NF_3 remote plasma source (RPS) or point of use fluorinated GHG abatement systems in those facilities.

In the final rule, EPA is also clarifying what meets the requirement for recipe-specific measurements to facilitate implementation of the Tier 2d and Tier 3 methods. EPA recognizes a facility may employ potentially hundreds of recipes. Therefore, as a means to reduce burden for facilities that are required or elect to develop recipe-specific measurements, EPA is permitting a facility to apply the same emission factor to a group of "similar recipes." In this regard, once a facility develops a recipe-specific emission factor for an individual recipe, it may apply that emission factor to recipes that are similar. This provision allows a facility to measure fewer manufacturing processes to develop the emission factors required for Tier 2d and Tier 3, thereby reducing burden in comparison to a more stringent approach which would require measurements for each and every individual recipe used at a facility. As another means to reduce burden EPA is clarifying that in a given reporting year, a facility must develop new recipe-specific emission factors only for recipes which are not similar to any recipe used in a previous reporting year.

EPA is defining an individual recipe as a specific combination of gases, under specific conditions of reactor temperature, pressure, flow, RF power, and duration, used repeatedly to fabricate a specific feature on a specific film or substrate. EPA is defining similar, with respect to recipes, as those recipes that are composed of the same set of chemicals and have the same flow stabilization times and where the documented differences, considered separately, in reactor pressure, individual gas flow rates, and applied RF power are less than or equal to plus or minus 10 percent. For purposes of comparing and documenting recipes that are similar, facilities may use either the best known method provided by an equipment manufacturer or the process of record, for which emission factors for either have been measured (see the Electronics Manufacturing TSD for supporting information).

Monitoring and QA/QC Requirements

Comment: Many commenters voiced concerns regarding the burden associated with EPA's proposed requirement to measure DRE of abatement equipment in accordance with EPA's DRE Protocol, (EPA 430–R–10–003). Some commenters also argued the required frequency of measurements in the proposed random sampling abatement system testing program (RSASTP) is overly burdensome and unnecessary.

With respect to EPA's requirement to measure DRE in accordance with EPA's Protocol, commenters noted few facilities have characterized the DRE of installed abatement systems using EPA's DRE Protocol because the Protocol was published in 2010. One commenter requested that EPA permit the use of measurements made prior to the publication of EPA's DRE Protocol as long as the facility can demonstrate the measurements were based on test

methods substantially similar to those outlined in EPA's Protocol. In addition to providing comments on the required use of the DRE Protocol, commenters also requested that EPA allow the use of CF_4 as a tracer to determine dilution when an abatement system is in "low fire" and that EPA permit the use of a Fourier Transform Infrared Spectroscopy (FTIR) without the additional use of Quadrapole Mass Spectroscopy (QMS).

In regards to EPA's proposed RSASTP, many commenters asserted that the burden placed on facilities to comply with the RSASTP is not necessary. One commenter noted that that RSASTAP is an excessive burden as large facilities may have hundreds of abatement systems. Further, commenters argued that new abatement systems should not be required to be tested as long as the facility has installed, operated, and maintained the equipment properly. Some commenters asserted that testing should be required only for new models of abatement systems that are not simply a variant of an existing system used at a facility. Other commenters also suggested alternative testing regimes to the RSASTP that would place most of the DRE measurement burden in the early years of testing.

Response: In general, EPA does not agree with commenters and is finalizing the requirements for measurement of abatement DRE using EPA's DRE Protocol and for the testing frequency described in the RSASTP.

EPA is finalizing the requirement that facilities measure abatement system DREs in accordance with EPA's DRE Protocol because it will ensure that measured DREs are accurate through properly accounting for dilution and by meeting EPA's established performance standard (as specified in EPA's DRE Protocol). EPA's DRE Protocol is the only protocol (i.e., standard measurement method, not guideline) that exists to date for measuring DREs of abatement equipment used in electronics manufacturing. EPA's DRE Protocol is reliable because it was based upon and validated by actual experience and data collection in fully operational manufacturing facilities during multiple measurement studies performed by EPA in collaboration with industry.[24] EPA's DRE Protocol has been through two public peer review processes over the course of two years and is based on input from national and international industry experts. For documentation of the comments received during these peer reviews, and EPA's response, please refer to the docket (EPA–HQ–OAR–2009–0927).

It is important to clarify that EPA is not specifically prohibiting the use of previously measured DREs; a facility may use previously measured DREs provided the facility can demonstrate that the measurements were made in accordance with EPA's DRE Protocol. EPA's DRE Protocol permits flexibility in measurement practices provided the measurements achieve a performance standard that, among other things, ensures dilution is properly measured.

EPA does not wholly prohibit the use of CF_4 as a tracer in the DRE Protocol. Specifically, with respect to measuring systems that do not abate CF_4 and/or SF_6, EPA's DRE Protocol states, "In such systems, CF_4 or SF_6 can be used in place of an inert gas since their DREs are zero percent. Table 2 of the Protocol provides a list of acceptable gases for measuring total abatement system flows, along with their use conditions." As discussed in this excerpt, EPA's DRE Protocol does not permit the use of either CF_4 or SF_6 as tracer gases in abatement systems designed to abate these gases. Additionally, EPA prohibits use of CF_4 as a tracer in fluorinated GHG abatement systems operating in "low fire" because reviewers of early drafts of EPA's DRE Protocol made repeated claims that one could not be certain some abatement was not occurring.

EPA does not agree with commenters who suggested that the use of only an FTIR and not a QMS to measure dilution, and hence DREs, should always be permitted. The DRE Protocol permits the use of an FTIR in place of a QMS when tracer gases, such as CF_4 and SF_6, are used in place of an inert gas to measure dilution (provided the abatement system which is being tested does not abate the tracer gas (CF_4 or SF_6)). The DRE Protocol does not permit, however, the use of an FTIR in place of a QMS for measuring dilution with tracers that are inert because while a method that uses FTIR-measurable gases may become available, EPA is not aware of robust measurements that demonstrate such a method.

With respect to EPA's requirement to measure DREs with the frequency prescribed in the RSASTP, EPA does not agree with commenters who suggested the RSASTP is burdensome and unnecessary. Commenters did not provide EPA sufficient information or data to support their claim that the RSASTP is unnecessary. As described below, the RSASTP provides a much less burdensome device measurement scheme when compared to requiring a facility to test all abatement systems used annually, but still allows EPA to ensure a facility has measured DREs accurately and at least once every five years.

EPA considered commenters' concerns about the RSASTP and EPA does not agree with commenters who state that new abatement systems should not be required to be tested as long as the facility has installed, operated, and maintained the equipment properly. Abatement manufacturer specified installation, operation and maintenance practices are based upon the testing and development of abatement systems in controlled settings. When using these systems in actual facility settings, ensuring the proper installation, operation, and maintenance of abatement systems may not always be a means to guarantee that the abatement system will run exactly as abatement manufacturers intended, or that the manufacturer supplied DRE will be achieved. However, EPA is maintaining the requirement for facilities to properly install, operate, and maintain abatement systems according to system manufacturer specifications. This practice is expected to reduce the likelihood of inaccurate estimations of DREs.

Even if abatement systems rely on the same operating principle (e.g., thermal oxidation) and are used to abate the same gases, their performance can vary depending on their operation and maintenance. Thus, maintenance that is adequate for abatement systems in some applications may not be adequate for abatement systems in others (e.g., those that handle high volumes of etched or cleaned material, which can be deposited inside abatement equipment and clog lines).

EPA has concluded that there is a need for gradually testing all of the abatement systems within a class, and for retesting individual abatement systems over time. As EPA stated in the preamble to the April 2010 proposed rule (75 FR 18652), some fluorinated GHGs, such as CF_4, are harder to destroy than others; thus, the performance of abatement systems with one fluorinated GHG cannot necessarily be assumed to

[24] For more information about the three studies, please see the following reports: *Developing a Reliable Fluorinated Greenhouse Gas (F–GHG) Destruction or Removal Efficiency (DRE) Measurement Method for Electronics Manufacturing: A Cooperative Evaluation with IBM* (EPA 430–R–10–004); *Developing a Reliable Fluorinated Greenhouse Gas (F–GHG) Destruction or Removal Efficiency (DRE) Measurement Method for Electronics Manufacturing: A Cooperative Evaluation with NEC Electronics, Inc.* (EPA 430–R–10–005); and *Developing a Reliable Fluorinated Greenhouse Gas (F–GHG) Destruction or Removal Efficiency (DRE) Measurement Method for Electronics Manufacturing: A Cooperative Evaluation with Qimonda* (EPA 430–R–08–017).

apply to other fluorinated GHGs. It is well known across the industry that abatement system performance varies greatly depending on a variety of abatement device and process parameters such as temperature, flow and exhaust composition.[25] As stated by many commenters, facilities develop and ultimately use new processes potentially every year, and the parameters of these processes vary. To this end, by requiring the gradual testing and retesting of abatement systems over time through the RSASTP, EPA can ensure properly measured DREs and DRE class averages used at a facility will accurately reflect controlled emissions. In addition, through the use of the RSASTP, EPA is reducing burden, for instance, for facilities that continually modify their processes. EPA is basing the RSASTP around classes defined as abatement systems grouped by manufacturer model number(s) and by the gas which the system is used to abate; varying process parameters, such as flows, temperature and exhaust composition do not factor into the requirements of the RSASTP.

Comment: In general, most commenters supported the inclusion of a default DRE value, but opposed EPA's proposed default DRE value of 60 percent. Commenters argued EPA's proposed default DRE factor of 60 percent was unreasonably low, in part because the 60 percent default factor was based on CF_4 destruction data and therefore, should not be applied to other fluorinated GHGs. Commenters noted that CF_4 is the most stable compound and the most difficult among all fluorinated GHG to destroy and, as a result, it should be addressed separately to avoid significantly overestimating emissions. Further, one commenter asserted that the unreasonably low value for the default DRE penalizes semiconductor manufacturers who have operated voluntarily and in good faith under EPA's MOU and other GHG reduction programs to install and maintain control devices.[26]

As an alternative, commenters recommend that IPCC and/or abatement system manufacturer default DREs should be permitted, and potentially discounted by 10 percent to account for differences between field and lab certification conditions. Commenters also suggested that EPA provide additional default factors for C_2F_6 and other fluorinated GHGs that are easier to abate than CF_4.

One commenter opposed EPA's default DRE value and asserted that default DREs should not be permitted at all because a default DRE does not capture the potentially high variability in DREs across different systems and across similar systems installed at different facilities. In addition, the commenter noted that EPA's default value was based on only 11 actual measured DRE values. The commenter encouraged EPA to require only direct measurement of DREs in accordance with EPA's DRE Protocol and disallow any application of a default DRE.

Response: EPA disagrees with commenters that asserted EPA should permit electronics manufacturing facilities to report controlled emissions from abatement systems using 2006 IPCC default factors or the manufacturer's DRE values, with or without applying a 10 percent discount. As EPA stated in the proposal, EPA is not permitting the use of the IPCC 2006 default factors or the manufacturer's DRE values because once installed, abatement equipment may fail to achieve the IPCC 2006 default or supplier's claimed DRE. DRE performance claimed by equipment suppliers and upon which the 2006 IPCC default factors were based may have been incorrectly measured due to a failure to account for the effects of dilution (e.g., CF_4 can be off by as much as a factor of up to 10 (Burton, 2007). This understanding is supported by industry assessments as presented in Beu, 2005. As EPA stated in the proposal, the 60 percent default DRE value was calculated using data from measurements assured to properly account for the effects of dilution. In addition, the tested systems were properly installed, operated, and maintained.

EPA is including the option for facilities to use a default DRE in the final rule to permit those facilities that have fluorinated GHG and N_2O abatement systems to calculate and report controlled emissions using an approach that is less burdensome than directly measuring abatement systems in accordance with EPA's DRE Protocol. The default DRE is based on EPA's practical experience measuring the performance of abatement systems during the development of the DRE Protocol.[27] Further, for a facility to use the default DRE, they are required to certify that their abatement systems are installed, operated, and maintained in accordance with the manufacturers' specifications, and provide certification that the abatement system is specifically designed for fluorinated GHG and N_2O.

EPA is proud of its extensive collaboration with the semiconductor industry via the PFC Reduction/Climate Partnership for the Semiconductor Industry.[28] EPA and its Partners have investigated the origins and magnitude of GHG emissions as well as technologies to minimize this pollution. EPA does not agree with one commenter's claim that the 60 percent default DRE penalizes Partner's facilities. One of many important lessons learned by the Partnership concerns the challenge of properly measuring and maintaining fluorinated GHG abatement system performance. As discussed above, the 60 percent default DRE value is based upon EPA's technical experience studying abatement systems, properly installed, operated and measured in actual production settings.

Further, EPA does not agree with commenters' suggestion to apply a 10 percent discount to the manufacturer's DRE values to account for differences between field and lab certification conditions. The 10 percent discount appears arbitrary and was not accompanied by any empirical data. To this end, EPA is not permitting electronics manufacturing facilities to apply a 10 percent discount to manufacturers' DRE values.

EPA agrees with commenters, in principle, that default DRE values could be developed for specific fluorinated GHGs, for example those that are easier to abate than CF_4. However, EPA does not have sufficient DRE data for other fluorinated GHGs that were measured using EPA's DRE Protocol and thus assured to properly account for the effects of dilution. Further, commenters did not provide any such data in their comments to the proposed rule. In future years, EPA may consider establishing default DRE values for other fluorinated GHGs and N_2O using data received from DRE measurements made in accordance with EPA's DRE Protocol.

Comment: Most commenters opposed EPA's proposed procedures to account for abatement system uptime. Although several commenters agreed that accounting for uptime of abatement systems used at a facility is reasonable, some commenters asserted that EPA's proposed procedures may not reflect actual practices at most facilities.

In some cases, commenters stated that tools and abatement systems are

[25] Beu, L. (2005). "Reduction of Perfluorocarbon (PFC) Emissions: 2005 State-of-the-Technology Report", TT#0510469AENG, International SEMATECH Manufacturing Initiative (ISMI), December 2005. Available at: *http://www.epa.gov/highgwp/semiconductor-pfc/documents/final_tt_report.pdf.*

[26] See footnote 21.

[27] See footnote 24.

[28] *http://www.epa.gov/semiconductor-pfc/.*

interlocked (i.e., a tool can not be operated if an abatement device is not operating). As an alternative, commenters suggested that EPA allow facilities to monitor uptime by documenting where abatement systems and production tools are interlocked and recording instances when abatement systems fail.

One commenter asserted that EPA's inclusion, in the uptime calculation procedures, of SEMI Standard E–10–0304^{E}, Specification for Definition and Measurement of Equipment Reliability, Availability, and Maintainability was incorrect. The commenter noted that the SEMI Standard E–10–0304^{E} does not include the concept of co-dependent uptime of different equipment in any of its metrics. As a result, the commenter urged EPA to remove the reference to the SEMI standard and to define the appropriate calculation and its individual terms in the regulation unless EPA determines that one of the SEMI E–10–0304^{E} formulas may in fact be used.

Response: EPA took into consideration all concerns from commenters about the methods by which EPA proposed to calculate uptime of abatement systems. In response, EPA has modified the procedures required for monitoring and accounting for uptime by removing reference to SEMI E–10–0304^{E} because EPA agrees with the commenter that SEMI E–10–0304^{E} does not fit appropriately in this rule. To this end, the final rule allows a facility to calculate an abatement system's uptime by taking the ratio of (1) The total time during which the abatement system is in an operational mode with fluorinated GHGs or N_2O flowing through production process tool(s) connected to that abatement system, to (2) the total time during which fluorinated GHGs or N_2O are flowing through production process tool(s) connected to that abatement system. Further, EPA has defined operational mode as the time in which an abatement system is being operated within the range of parameters as specified in the operations manual provided by the system manufacturer. For clarification purposes, EPA has also added a discrete equation for calculating uptime into this rule. Lastly, also for clarification, EPA has added an equation that provides direction for facilities to account for uptime in overall facility emissions calculations.

With respect to the commenter who suggested that EPA allow facilities to monitor and track uptime by documenting that tools are interlocked and instances in which abatement systems have failed, EPA appreciates the comment, but is not modifying the uptime requirements as suggested by the commenter. EPA expects facilities with interlocked abatement systems should be able to easily monitor and account for uptime of abatement systems using the methods provided in this rule. Also, EPA is not permitting facilities to use the method suggested by the commenter as this would allow the use of multiple methods to monitor and account for uptime. Where feasible, EPA would like to ensure that facilities are using consistent methods as part of estimating emissions because these methods will create a consistent basis on which to compare industry emissions and will also reduce EPA's administrative burden. Lastly, EPA is requiring detailed monitoring and reporting of uptime because this information will allow EPA to carry out emissions verification to ensure the consistency and accuracy of data collected under this rule.

Comment: Many commenters expressed concern with EPA's proposed method to apportion gas consumption to the nine sub-types of the Refined Method (previously referred to as refined process categories in the April 2010 proposal) for semiconductor facilities using a quantifiable metric. According to commenters, the proposed method of apportioning gas to the nine process sub-types of the Refined Method using a facility-specific engineering model based on wafer passes is overly burdensome and not currently feasible. More specifically, commenters asserted that because many facilities do not currently track wafer passes, to do so would impose a burden in the form of capital costs for the software needed to collect these data. Some commenters argued that it is not feasible to apportion gas to the nine proposed process sub-types solely based on wafer pass information. For example, one commenter noted that when one recipe is used to etch multiple films in one wafer pass, emissions from the use of that one recipe would fall under multiple process sub-types for etch (which were based on film type). The commenter further stated that because tools do not, and can not, track how much of each gas in the recipe was specifically used for each film etched in that one wafer pass, it is not feasible in this situation to apportion gas based on wafer pass.

In most cases, commenters provided alternative methods for apportioning gas consumption. For example, some commenters suggested more flexible methods in which the apportioning is based on at least one quantifiable indicator and engineering knowledge. Commenters also asserted that apportionment should be determined by the facility and that EPA should not prescribe specific quantifiable indicators for apportioning gas consumption in the final rule.

Response: EPA appreciates the concerns raised by commenters about EPA's proposed method to apportion facility gas consumption. EPA is sensitive to the burden imposed by the rule and seeks to minimize it when possible without compromising the accuracy of reported emission estimates.

Apportioning gas consumption to process types, process sub-types, or recipes, as defined in 40 CFR 98.98, regardless of the type of electronics manufacturing facility, is an essential part of the emission estimation methodology required by EPA in this subpart. Apportionment is required because emission factors are for specific process types, process sub-types, or recipes, and are based on knowledge of the amount of gas consumed. Requiring facilities to apportion gas consumption based on a metric that is quantifiable and measurable (a metric that is proportional to gas usage) is necessary for EPA to ensure that methods by which gas is apportioned, and hence emissions are estimated, are verifiable and accurate.

In the final rule, to effectively balance commenters' concerns about burden and feasibility with EPA's objectives, EPA has decided to permit the use of facility-specific engineering models based on a quantifiable metric selected by the facility, (such as wafer passes or wafer starts) to apportion gas consumption. Under this final requirement, to develop apportioning factors, facilities must develop an engineering model that utilizes measureable process information.[29] EPA is not specifying the quantifiable metric that must be used in these models; rather EPA is allowing reporters the flexibility to select the most appropriate quantifiable metric on which to base the facility-specific engineering model, provided model documentation and verification requirements as described below are met.

Documentation: As part of recordkeeping requirements, EPA is requiring facilities to document, in their site GHG Monitoring Plans (as required under 40 CFR 98.3), specific information about their facility-specific engineering model, including definitions of variables, derivations of

[29] An apportioning factor denotes the amount of a specific gas consumed during a specific manufacturing process relative to the total amount of that gas used during all processes at the facility.

equations and formulas, and example calculations to ensure apportioning factors are repeatable. This information must be updated annually in the facility's site GHG monitoring plan. EPA is requiring this documentation as a means to verify that facility-specific engineering models are developed and then verified and documented each year for each facility, and that the apportioning factors developed from these models are based on a quantifiable metric. EPA is requiring facilities to update model documentation and verification each year to account for changes to tools or process at a facility between reporting periods.

Verification: EPA is requiring facilities to verify their engineering models used to apportion gas consumption by demonstrating that the results from the model are repeatable [30] and by comparing the difference between modeled gas usage and actual gas usage. EPA is requiring this comparison to be made yearly for two different gases, one corresponding to the gas used in the largest quantity for etching on a mass basis, and one used in the largest quantity for chamber cleaning on a mass basis during a reporting period, based on the total amount of gas usage measured by a facility. EPA would consider a model as verified when the apportioned plasma etching gas usage as modeled differs from the actual gas usage by less than or equal to 5 percent relative to actual gas consumption, reported to one significant figure using standard rounding conventions. This verification requirement only applies to the comparison for the plasma etching gas, and does not have to be completed for the comparison for the chamber cleaning gas.

EPA selected a verification standard of 5 percent as a means for a facility to demonstrate to EPA that the uncertainty in modeled estimates of gas usage does not appreciably affect the uncertainty in that facility's reported emissions.[31] EPA is focusing the verification of facility-specific engineering models on etching because information received in comments [32] on the proposed rule and from Partner reports from EPA's PFC Reduction/Climate Partnership for the Semiconductor Industry show that reportable gases used for etching rank second and third in total quantities of usage industry-wide, and have the highest emission factors, which together make gas usage for etching process types a significant contributor to total facility emissions.[33]

To reduce burden associated with verification, in the final rule, EPA is requiring that gas usage data for verification purposes be collected only for a single 30-day period of operation during which the capacity utilization equals or exceeds 60 percent of the design capacity. EPA selected a 30-day period for model verification to minimize disruptions to normal manufacturing operations while, at the same time, establishing a time period that is sufficiently long and a utilization that is sufficiently high to be representative of facility operations.

E. Fluorinated Gas Production (Subpart L)

1. Summary of Final Rule

Source Category Definition.

• The fluorinated gas production source category consists of processes that manufacture a fluorinated gas from any raw material or feedstock chemical, except for processes that generate HFC–23 during the production of HCFC–22. Producing a fluorinated gas includes the following:

—Producing a fluorinated GHG as defined at 40 CFR 98.410(b).

—The manufacture of a chlorofluorocarbon (CFC) or hydrochlorofluorocarbon (HCFC) from any raw material or feedstock chemical, including the manufacture of a CFC or HCFC as an isolated intermediate for use in a process that will result in its transformation either at or outside of the production facility.

• Producing a fluorinated gas does not include the following:

—The reuse or recycling of a fluorinated gas.

—The creation of HFC–23 during the production of HCFC–22.

—The creation of intermediates that are created and transformed in a single process with no storage of the intermediates.

—The creation of fluorinated GHGs that are released or destroyed at the production facility before the production measurement at 40 CFR 98.414(a). However, although such release and destruction do not themselves constitute fluorinated gas production, they must be reported when they occur during fluorinated gas production.

Reporters must submit annual GHG reports for facilities that meet applicability criteria in the (General Provisions (40 CFR 98.2)).

GHGs to Report. For facilities that produce fluorinated gases, report the following:

• CO_2, CH_4, and N_2O combustion emissions from each stationary combustion unit

• The total mass of fluorinated GHG emitted from:

—Each fluorinated gas production process and all fluorinated gas production processes combined.

—Each fluorinated gas transformation process that is not part of a fluorinated gas production process and all such fluorinated gas transformation processes combined.

—Each fluorinated gas destruction process that is not part of a fluorinated gas production process or a fluorinated gas transformation process and all such fluorinated gas destruction processes combined.

—Venting of residual fluorinated GHGs in containers (e.g., returned heels).

GHG Emission Calculation and Monitoring. Reporters must calculate F–GHG emissions for each process as follows:

• *Initial Scoping speciation.* Perform an initial scoping speciation under 40 CFR 98.124(a) to identify all fluorinated GHGs that occur in the process. The deadline for completing the scoping speciation is February 29, 2012.

• *Estimating emissions.* There are two methods for estimating fluorinated GHG emissions from fluorinated gas production and transformation processes: The mass balance method and the emission factor method.

• Mass balance method.

—*Accuracy and Precision Requirements.* Before using the mass-balance approach to estimate emissions from a process, you must ensure that the process and the equipment and methods used to measure it meet either the error limits specified at 40 CFR 98.123(b) or the requirements specified at 40 CFR 98.124(b)(8).

• *Error limits.* Based on one of the approaches described in the rule, determine the absolute error and the relative error of using the mass balance method to estimate emissions from the process. If these calculations show that use of the mass-balance approach to estimate emissions from the process will result in an absolute error less than or equal to 3,000 metric tons CO_2e per year or a relative error less than or equal to 30 percent of the estimated emissions,

[30] Repeatable means that the variables used in the formulas for the facility's engineering model for gas apportioning factors are based on observable and measurable quantities that govern gas consumption rather than engineering judgment about those quantities or gas consumption.

[31] Please refer to the Electronics Manufacturing TSD (EPA–HQ–OAR–2009–0927) for more details on the verification metric.

[32] Refer to comment number EPA–HQ–OAR–2009–0927–0131.

[33] Although EPA understands that chamber cleaning processes require the largest quantities of gas usage, the emission factors for chamber cleaning are low compared to etching emission factors.

then you may use the mass-balance approach to estimate emissions from the process. Otherwise, you must either comply with the alternative to the error limits or use the emission factor (or emission calculation factor) method.

• *Alternative to error limits.* You must ensure that the process, and the equipment and methods used to measure it, meet the following requirements:

• The process must have a total annual throughput of 500,000 $mtCO_2e$ or less, where the throughput is defined as the sum of the CO_2-weighted masses of the fluorinated GHG reactants, products, and by-products.

• You must measure the masses and concentrations identified in the rule at least weekly, and you must calculate emissions at least weekly.

• You must measure the masses identified in the rule with an accuracy and precision of ±0.2 percent of full scale or better.

• You must measure the concentrations identified in the rule using analytical methods with an accuracy and precision of ±10 percent or better.

—*Mass-balance calculation.* To perform the mass balance calculation, you must track and measure the fluorine-containing compounds that are added to or removed from the process, including reactants, by-products and products, to determine the emissions in terms of fluorine. (Alternatively, you may track the flows of another element, such as carbon, as long as this element is contained in all of the fluorinated GHGs fed into or generated by the process.) To track the fluorine removed from the process and destroyed or recaptured, you must either speciate the contents of the streams removed from the process or you must use analytical methods that measure the total fluorine in these streams.

—To characterize emissions (i.e., divide them among reactants, products, and by-products), you must either assume that all emissions consist of the fluorinated GHG that has the highest GWP among the fluorinated GHGs that occur in more than trace concentrations in the process, or you must possess emission characterization measurements. For process vents that emit more than 25,000 $mtCO_2e$ per year, these measurements must include sampling and analysis of emitted streams. For other process vents, these measurements may also include previous measurements, provided the measurements are representative of the current operating conditions of the process, or bench-scale or pilot-scale test measurements representative of the process operating conditions.

• Emission factor (and emission calculation factor) methods.

—For each continuous process vent, perform a preliminary estimate of emissions, considering any controls, using one of the methods outlined below. For any continuous process vent with estimated emissions greater than or equal to 10,000 $mtCO_2e$, you must conduct emissions testing to develop an emission factor. For any batch process vent, and for any continuous process vent with estimated emissions less than 10,000 $mtCO_2e$, you have the option to use engineering calculations or assessments to develop an emission calculation factor.

—In the preliminary estimate, account for the demonstrated destruction efficiency and expected downtime of the destruction device, if applicable. Both the expected downtime of the device and the expected activity level for the process must be based on typical recent values unless there is a compelling reason to adopt a different value. If there is such a reason (e.g., introduction of controls for a previously uncontrolled vent), it must be documented in the facility's GHG Monitoring Plan. If your process vent emits one or more fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A, you may use a default global warming potential (GWP) of 2,000 for these fluorinated GHGs, or you may request to use provisional GWPs for these fluorinated GHGs if:

• The fluorinated GHGs are emitted in quantities that, with a default GWP of 2,000, result in total calculated annual emissions equal to or greater than 10,000 $mtCO_2e$ for the vent, and

• You possess data and analysis that indicate that the fluorinated GHGs have GWPs that would result in total calculated annual emissions less than 10,000 $mtCO_2e$ for the vent.

—For the preliminary estimate, facilities may use the following methods:

• Facilities may use the Emissions Inventory Improvement Process, Volume II: Chapter 16, Methods for Estimating Air Emissions from Chemical Manufacturing Facilities. U.S. Environmental Protection Agency, August 2007.

• Facilities may determine the uncontrolled fluorinated GHG emissions from any process vent within the process using the procedures specified in 40 CFR 63.1257(d)(2)(i), "National Emission Standards for Pharmaceutical Production," except as specified in 40 CFR 98.123, paragraphs (b)(1)(i)(B)(1) through (b)(1)(i)(B)(4).

• Facilities may use commercial software products that follow chemical engineering principles, including the calculation methodologies in 40 CFR 98.123, paragraphs (b)(1)(i)(A) and (B).

• Facilities may use previous test results, bench scale, or pilot-scale data, provided they are representative of the current process operating conditions.

• Facilities may use design analysis based on chemical engineering principles, measurable process parameters, or physical or chemical laws or properties.

• Facilities may use maximum flow rate, fluorinated GHG emission rate, concentration, or other relevant parameters specified or implied within a permit limit applicable to the process vent.

—*Emission and emission calculation factors for continuous processes:* For continuous process vents with emissions, considering controls, that are greater than or equal to 10,000 $mtCO_2e$, conduct emissions testing to determine the site-specific, process vent-specific emissions factor.

• If the vent is controlled and annual emissions bypassing, i.e., not venting to, the control device are less than 10,000 $mtCO_2e$, then you may conduct emissions testing after the control device.

• Otherwise, conduct emissions testing before the control device. You may conduct emissions testing for fluorinated GHG following an acid gas scrubber, if there is no appreciable fluorinated GHG reduction occurring.

—For batch process vents and for continuous process vents with annual emissions of less than 10,000 $mtCO_2e$, either conduct emissions testing or use one of the engineering calculation or assessment methods outlined above (except the approach based on maximum flow rates, concentrations, etc.) to develop the site-specific, process-vent specific emission calculation factor. If and when emissions from a continuous process vent meet or exceed 10,000 $mtCO_2e$ (e.g., due to activity increases, process changes, or destruction device malfunctions), you must conduct emissions testing and develop an emission factor for the vent by the end of the following year.

—*Emission and emission calculation factors for batch processes:* For process vents from batch processes, either perform emissions testing as described above or use one of the engineering calculation or assessment methods outlined above (except the approach based on maximum flow rates, concentrations, etc.) to develop the site-

specific, process-vent specific emission calculation factor.

—*All processes:* Determine the emissions factor or the emissions calculation factor using the fluorinated GHG emission rate and the process activity rate.

—The deadline for completing development of emission factors and emission calculation factors is February 29, 2012.

—Estimate annual fluorinated GHG emissions from each process vent using the emission factor or the emission calculation factor and the actual activity data along with the use and uptime of the destruction device.

—Sum the fluorinated GHG emission for all vents in the process.

—If using the emission factor or emission calculation factor approach, estimate emissions from equipment leaks using EPA's Protocol for Equipment Leak Emission Estimates (EPA–453/R–95–017). The equipment leak emission estimates may include use of Method 21 for appropriate fluorinated GHGs. Alternatively, use a site-specific leak detection method that you have validated for the fluorinated GHGs (or their surrogates) that occur in the process.

• To establish the destruction efficiency, conduct a performance test or use the destruction efficiency determined during a previous performance test that meets the rule requirements. For certain difficult-to-destroy fluorinated GHGs such as CF_4, SF_6, and saturated PFCs other than CF_4, a destruction efficiency must be developed specifically for that compound or for a more difficult-to-destroy surrogate (e.g., CF_4 may be used as a surrogate for SF_6). For other fluorinated GHGs, the destruction efficiency may be developed using any Class 1 compound on the Thermal Stability Rankings List.

• For destruction processes, estimate emissions using the calculation methods in the rule.

• To estimate emissions from venting of container heels in cases where the heels are not recaptured or destroyed, either:

—Weigh each container upon its return to the facility and before venting or

—Develop a representative heel factor for each fluorinated GHG and container size and type and multiply it by the number of containers of that gas and size and type vented annually.

• *Request to use a GWP other than 2,000 for fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A.* As noted above, for purposes of the preliminary emissions estimate under the emission factor approach, facilities may request to use a GWP other than 2,000 for fluorinated GHGs that do not have GWPs listed in Table A–1 to subpart A. Facilities must submit this request by February 28, 2011.

—For each fluorinated GHG that does not have a GWP listed in Table A–1 to subpart A and that constitutes more than one percent by mass of the stream emitted from the vent, the facility must provide the identity of the fluorinated GHG (including its chemical formula), the estimated GWP of the fluorinated GHG, the data and analysis that supports the facility's estimate of the GWP of the fluorinated GHG, and the engineering calculations or assessments and underlying data that demonstrate that the process vent is calculated to emit less than 10,000 $mtCO_2e$ only when the proposed provisional GWPs, not the default GWP of 2,000, are used for fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A.

—If EPA makes a preliminary determination that the request is complete, that it substantiates each of the provisional GWPs, and that it demonstrates that the process vent is calculated to emit less than 10,000 $mtCO_2e$ only when the provisional GWPs, not the default GWP of 2,000, are used for fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A, then EPA will publish a notice including a summary of the data and analysis supporting the GWPs. If, after review of public comment on the notice, EPA finalizes its preliminary determination, then EPA will permit the facility to use the provisional GWPs for the preliminary emissions calculations.

• *Best available monitoring methods (BAMM).* We are allowing facilities to use Best Available Monitoring Methods (BAMM) for any parameter that cannot reasonably be measured according to the monitoring and QA/QC requirements of subpart L. The owner or operator must use the calculation methodologies and equations in the "Calculating GHG emissions" section of subpart L, but may use the best available monitoring method for any parameter for which it is not reasonably feasible to achieve the following by either July 1, 2011 or March 1, 2012 (these dates are discussed further below):

—Acquire, install, or operate a required piece of monitoring equipment.

—Procure services from necessary providers (e.g., contractors specializing in stack testing to support the development of emission factors).

—Gain physical access to make required measurements (e.g., because a measurement requires the installation of a port and it is unsafe to install the port during process operation).

• *BAMM Deadlines.* Facilities may use BAMM to estimate emissions that occur through June 30, 2011 without submitting a request to EPA.

• Facilities wishing to use BAMM to estimate emissions that occur throughout 2011 for parameters other than scoping speciations, emission factors, and emission characterizations must submit a request to EPA by February 28, 2011.

• Facilities wishing to use BAMM to estimate emissions that occur throughout 2011 (or in unique or extreme circumstances, until after that date) for scoping speciations, emission factors, and emission characterizations must submit a petition to EPA by June 30, 2011.

• *Contents of BAMM Extension Requests.* Requests for BAMM extensions must include detailed explanations and supporting documentation to describe why it is not reasonably feasible for the facility to comply with the applicable monitoring requirements. In general, extension requests must include detailed descriptions and evidence that it is not reasonably feasible for the facility to acquire, install, or operate a required piece of monitoring equipment, to procure services from necessary providers, or to gain physical access to make required measurements in a facility before July 1, 2011 (for parameters other than scoping speciations, emission factors, and emission characterizations) or March 1, 2012 (for scoping speciations, emission factors, and emission characterizations). BAMM extension requests must also document the facility's efforts to comply with the requirements and explain the BAMM that the facility will use, should EPA approve the request. EPA does not anticipate approving the use of BAMM beyond December 31, 2011; however, EPA reserves the right to approve any such requests submitted by June 30, 2011 under unique and extreme circumstances which include safety, technical infeasibility, or inconsistency with other local, State or Federal regulations. Facilities requesting BAMM past December 31, 2011 would have to submit documentation to support the request similar to that required for BAMM requests in 2011. In addition, these facilities would be required to describe the unique and extreme circumstances which necessitate the extended BAMM.

• We anticipate that facilities will need to use best available monitoring methods only under limited circumstances.

• *BAMM for facilities pursuing the emission factor approach.* For facilities pursuing the emission factor approach for a given process, we expect that most activity data is already monitored using measurement devices with an accuracy and precision of ±1 percent of full scale or better. However, where this is not the case and where it is not reasonably feasible to acquire, install, or operate the measurement device by January 1, 2011 (or July 1, 2011), the facility would use the currently installed device (or would request to use it) through June 30, 2011 (or December 31, 2011).

• Facilities already have until February 29, 2012 to develop emission factors and emission characterizations; thus, they would not need to use BAMM for these parameters unless they could not complete stack testing and parameter development until after that date. In this case, if the request for extended BAMM were granted, the facility would have until February 28, 2013 to complete emissions testing and develop the emission factor or emission characterization for the affected vent and process. In the meantime, the facility would use an emission calculation factor or emission characterization developed through engineering calculations or assessments to estimate 2011 emissions. As a condition for any approval of 12-month BAMM during the development of emission factors and emission characterizations, we are requiring facilities to recalculate and re-submit their 2011 emission estimates for the affected processes to reflect the scoping speciations, emission factors, and emission characterizations that they complete or develop for those processes after February 29, 2012.

• We do not expect facilities to require BAMM for estimating emissions from equipment leaks because we are already providing a great deal of flexibility in how such leaks may be estimated, including allowing the use of default emission factors.

• *BAMM for facilities pursuing the mass-balance approach.* For facilities using the mass-balance approach for a given process, we anticipate that the main reason for using BAMM will be an inability to meet the error limit due to an inability to acquire, install, or operate measurement devices with sufficient accuracies and precisions by January 1, 2011. In such cases, facilities will have a choice regarding the monitoring method they select to estimate emissions from the process under the BAMM provisions. They may use engineering calculations or assessments to develop emission calculation factors, or they may apply the mass-balance equations to the data they acquire using their current measurement devices. Before pursuing the latter method, facilities must estimate the relative and absolute errors that would be associated with using the mass-balance method to estimate emissions based on their current monitoring data. We anticipate approving the use of BAMM with the mass-balance method only if those errors are less than 50 percent or less than 2,500 $mtCO_2e$ for 6 months of emissions from the process, respectively. If facilities cannot meet these error limits, they should use engineering calculations or assessments as their BAMM.

• *BAMM for facilities pursuing either approach.* Facilities requesting BAMM while they prepare to implement either the emission-factor or the mass-balance approach must explain and document why it is not reasonably feasible for them to apply the other approach to estimate emissions from the relevant process. Thus, facilities requesting BAMM until January 1, 2012 while they prepare to implement the mass-balance approach must explain and document why it is not reasonably feasible for them to apply the emission factor approach by July 1, 2011, and vice versa.

• *Destruction efficiencies.* We do not anticipate approving the use of BAMM for destruction efficiencies for two reasons. First, facilities have the option of not reflecting, in their reporting, the destruction of fluorinated GHGs for which destruction efficiencies have not been demonstrated. Second, it would be difficult to select or justify the selection of a provisional destruction efficiency value if the destruction efficiency had not been measured for the fluorinated GHG at issue (or for a fluorinated GHG that is more difficult to destroy according to the hierarchy laid out at § 98.124(g)(1)).

Data Reporting. In addition to the information required to be reported by the General Provisions (40 CFR 98.3(c)), reporters must submit additional data that are used to calculate GHG emissions. A list of the specific data to be reported for this source category is contained in 40 CFR 98.126.

Recordkeeping. In addition to the records required by the General Provisions (40 CFR 98.3(g)), reporters must keep records of additional data used to calculate GHG emissions. A list of specific records that must be retained for this source category is included in § 98.127.

1. Summary of Major Changes Since Proposal

The major changes since proposal are identified in the following list. The rationale for these and any other significant changes can be found below or in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart L: Fluorinated Gas Production Processes."

• We are adding a number of clarifications to assist reporters in determining when and how the initial scoping speciation must be performed. Specifically, the initial scoping speciation applicability criteria are applied on a process vent basis rather than a process basis; facilities may conduct sampling and analysis on process vents or on process streams; and testing methods specific to stack testing do not have to be used. Other validated industry sampling analysis standards may be used.

• We have added more flexibility and robustness to the mass-balance approach by:

—Allowing use of the mass-balance approach with processes that do not produce fluorinated GHGs but may nevertheless emit them (e.g., processes that transform fluorinated GHGs). The mass-balance equations no longer assume that the mass that is lost from the process is emitted in the form of the product; instead, the equations express losses as emissions of fluorine. To divide emissions among reactants, products, and by-products, facilities either must assume that all emissions consist of the fluorinated GHG that has the highest GWP among the fluorinated GHGs that occur in more than trace concentrations in the process, or they must use emission characterization measurements.

—Incorporating process variability into the error calculation.

—Providing an alternative to the error limits for facilities that do not wish to calculate these limits.

• We have added more flexibility to the emission factor approach by:

—Allowing the use of engineering calculations or assessments to develop emission calculation factors for all batch process vents, regardless of emissions.

—Changing the method for determining whether the emissions of a continuous process vent fall below the 10,000 $mtCO_2e$ cutoff that allows the use of engineering calculations rather than stack testing. First, we are allowing the use of controlled rather than uncontrolled emissions in this determination and are consequently eliminating the separate exemption for vents that are 99.9 percent controlled.

Second, where one or more fluorinated GHGs emitted from the vent do not have a GWP listed in Table A–1 to subpart A, we are allowing the use of a default GWP of 2,000 for these GHGs in the determination rather than setting a cutoff of one ton of chemical. We are also allowing facilities to request to use a provisional GWP where the facility believes that the fluorinated GHG's GWP is less than 2,000 and where the difference would reduce the calculated vent emissions from above the 10,000 $mtCO_2e$ cutoff to below it.

—Providing an additional two months (until February 29, 2012) to develop emission factors, emission calculation factors, emission characterizations, and destruction efficiencies.

—Allowing emissions testing after the control device if the vent is controlled and annual emissions bypassing (i.e., not vented to) the control device are less than 10,000 $mtCO_2e$. This change is expected to reduce the number of situations in which testing of hazardous streams on the inlet side to the control device may be required, to limit the number of potential sampling ports that may need to be installed, and to increase the number of situations in which testing of outlet emissions only will be required, i.e., without need for additional destruction efficiency testing.

—For vents from continuous processes with emissions over 10,000 $mtCO_2e$, summed across operating scenarios, requiring testing of only the largest-emitting operating scenario and any other operating scenario that (1) emits more than 10,000 $mtCO_2e$ through the vent, and (2) has an emission calculation factor that differs by 15 percent or more from the emission calculation factor of the tested operating scenario. (In the proposed rule, stack testing would have been required for each operating scenario.)

—Expanding the set of test methods that can be used for emissions testing. We are allowing industry standard sampling and analytical methods that have been validated using EPA Method 301 or other validation methods.

—Expanding the set of methods that can be used for quantifying emissions from equipment leaks. We are now allowing use of the default average emission factor approach in EPA's Protocol for Equipment Leaks and are allowing facilities to implement their own methods for detecting and quantifying fluorinated GHG emissions from equipment leaks. Site-specific leak detection methods must be validated and both the methods and their validation must be documented in the facility's GHG Monitoring Plan.

—For purposes of quantifying emissions from equipment leaks, defining "in fluorinated GHG service" as containing or contacting a feedstock, by-product, or product that contains 5 percent or more total fluorinated GHG by weight.

• We are adding a requirement to monitor and report fluorinated GHG emissions from containers when the residual fluorinated GHG (heel) is vented to the atmosphere rather than recaptured and reused or destroyed. As discussed in the proposed rule and in the technical support document, venting of residual gas from containers can have a significant impact on the overall emission rate of a fluorinated GHG production facility. Estimating such emissions is straightforward and is not expected to impose a significant burden on facilities.

• We are adding a one-time requirement to report existing data and analysis regarding the formation of products of incomplete combustion (PICs) that are fluorinated GHGs during the destruction of fluorinated gases. Studies of high-energy processes in the electronics industry indicate that PFC PICs may form in significant quantities during the destruction of fluorinated GHGs. Once formed, such PICs are likely to be very difficult to destroy. We considered requiring regular reporting of fluorinated GHG PIC generation and emissions under this rule, but we concluded that more information on the nature and magnitude of such emissions was needed to determine whether and how to craft reporting requirements. The one-time reporting requirement regarding PICs is intended to begin addressing this need.

• To clarify that PICs are excluded from reporting under this rule (except for the one-time reporting requirement), we are amending the definition of destruction efficiency in subpart A to express it in terms of the tons of a particular GHG that is fed into and exhausted from the device, rather than in terms of the tons of CO_2e of all GHGs fed into and exhausted from the device. We are also deleting the phrase "including GHGs formed during the destruction process" from the definition of the quantity exhausted from the device.

• We are modifying the proposed BAMM provision to allow fluorinated gas production facilities to use BAMM to estimate emissions through June 30, 2011 without submitting a request to EPA. In the proposal, facilities would have been allowed to use BAMM to estimate emissions only through March 31, 2011 without submitting a request. We are also reserving the right to allow, in extremely limited circumstances, facilities to use BAMM to estimate 2012 emissions. We are allowing facilities to use BAMM for 6 months rather than three and are potentially allowing the use of BAMM beyond 2011 based on comments received on the April 12, 2010 proposed rule and our experience implementing the final reporting rule issued in October 2009. For a more detailed discussion on EPA's rationale, see "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart L: Fluorinated Gas Production" (available in the docket, EPA–HQ–OAR–2009–0927).

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. A number of comments on fluorinated GHG production were received covering numerous topics. Responses to additional significant comments received can be found in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart L: Fluorinated Gas Production Processes."

Monitoring and QA/QC Requirements

Comment: A number of commenters argued against requiring emission testing of vents from batch processes, stating that the episodic and variable nature of batch emissions make them extremely difficult to measure accurately. These commenters noted that both the flow rates and fluorinated GHG concentrations in batch emissions can change rapidly, making them difficult to characterize and quantify correctly, and that vents often consist of small diameter process piping where traditional gas flow measurement devices are not effective. Commenters specifically cited depressurizations and vapor displacements as batch events whose emissions are hard to measure because they are characterized by varying and very low flows, respectively. They also observed that batch processes can last for days, meaning that it could take weeks to complete three test cycles, or even one year or more if the process is run infrequently. The commenters concluded that due to these concerns, other regulations that required estimation of emissions from batch processes allowed estimates to be based on a broad range of engineering calculations and assessments, which yield accurate emission estimates for batch processes. They recommended that EPA provide similar flexibility for batch processes in subpart L. Rather

than requiring stack testing for high-emitting batch process vents, one commenter suggested that EPA require the verification of emission calculations using "stack gas measurements that characterize the major emission events."

Response: In response to comments describing the technical issues associated with emission testing for batch processes, we have revised the requirements for estimating fluorinated GHG emissions from batch processes. In the final rule, facilities with batch process vents are required to develop emission calculation factors rather than conduct emission testing. As several commenters noted, there are several difficulties associated with conducting emissions testing for batch processes. Many batch processes have short to moderate batch lengths, short emission episode periods, low flow rates, and intermittent flow rates, and these characteristics make emissions from batch processes difficult to measure accurately. It is generally accepted that emission calculations for batch processes yield reasonably accurate results. As commenters noted, certain other rules for batch processes in the chemical manufacturing industry require emission calculations. Emission calculations are required for batch processes in the Pharmaceutical NESHAP and in the Miscellaneous Organic NESHAP, and emission calculations for batch processes are also laid out for industry in the Emissions Inventory Improvement Program (EIIP) guidance and in the Batch CTG document. The Pharmaceutical NESHAP and Miscellaneous Organic NESHAP do not require emissions testing to determine the emission rates for individual process vents from batch processes under these rules. (However, emissions testing to demonstrate the control efficiency achieved by an add-on air pollution control device on batch processes is conducted, based on the worst-case scenario).

We considered requiring field verification of emission estimates for the largest batch emission episodes, but determined that we did not have enough information to finalize a requirement that could be consistently applied across different processes and facilities. Follow-up discussions with the commenter that suggested the verification testing (as an alternative to full emissions testing) indicated that the methods used to verify emissions would almost certainly vary from process to process and would be difficult to prescribe. Moreover, it was unclear what the criteria for a successful verification would be, and how a facility would address an unsuccessful verification. For example, if measurements indicated that emissions from a particular episode were significantly lower than expected based on engineering calculations, the discrepancy could be due either to a process-wide overestimate of emissions (perhaps due to overestimated by-product generation rates) or to a misallocation of emissions among emission episodes. Different responses would be appropriate for addressing these two possibilities. Thus, although we strongly encourage facilities to test large emissions episodes from batch processes where feasible, we are not requiring that they do so in this final rule.

Comment: Several commenters stated that the proposed Process Vent Threshold was too stringent, particularly in conjunction with a default GWP of 10,000 for compounds not listed in Table A–1 to subpart A. One commenter stated that by assigning this default GWP to all unknown fluorinated organic compounds, an emphasis is being placed on compounds that are not the focus of the rule. Another commenter noted that since many of their compounds are not included in Table A–1 to subpart A, they will not be able to use the 10,000 $mtCO_2e$ threshold. Several commenters requested that they be allowed to develop and use their own GWPs for compounds that are not listed in Table A–1 to subpart A, following the general guidance presented in various IPCC reports.

Multiple commenters expressed concern regarding the proposed destruction efficiency (DE) criterion of 99.9 percent for allowing use of engineering calculations and assessments. These commenters requested that EPA allow post-control efficiencies for vents that are controlled by DEs of less than 99.9 percent. Additionally, the commenter noted that when a very low concentration of the analyte of interest is present in a stream, a 99.9 percent DE may not be achievable.

One commenter recommended that EPA modify the threshold to reflect a sum of controlled and uncontrolled emissions to allow for situations when a destruction device is not in use. One commenter suggested that EPA establish a schedule that would require larger sources (greater than 50,000 or 100,000-$mtCO_2$/year) to report for the first two years, with smaller sources tested in subsequent years as technologies improve. Another commenter requested that EPA implement the 10,000 $mtCO_2e$ threshold and that it be applied as an additive threshold amongst all portions of a facility that are covered under Part 98. This commenter also noted that the 10,000 $mtCO_2e$ threshold is in accord with the requirements of many States and the Western Climate Initiative.

Response: EPA appreciates the comments and has modified the method for determining whether the emissions of a process vent fall below the 10,000 $mtCO_2e$ cutoff below which the facility may use engineering calculations rather than stack testing to estimate emissions. As noted in the response to the previous comment, we are allowing facilities to use engineering calculations and assessments to estimate emissions from all batch processes, regardless of emissions; thus, facilities must perform the determination only for continuous process vents.

First, we are allowing the use of controlled rather than uncontrolled emissions in the determination and are consequently eliminating the separate exemption for vents that are 99.9 percent controlled. Second, where one or more fluorinated GHGs emitted from the vent do not have a GWP listed in Table A–1 to subpart A, we are allowing the use of a default GWP of 2,000 for these GHGs in the determination rather than setting a cutoff of one ton of chemical. Third, where facilities believe that the default GWP overestimates the actual GWP and where use of the estimated actual GWP would lower the calculated emissions from the vent from above the 10,000 $mtCO_2e$ cutoff to below it, we are allowing facilities to request to use a GWP other than 2,000.

We believe that this revised approach allows reasonable flexibility and ensures that the rigor of emission calculations is proportional to the likely magnitude of the emissions. While the proposed rule would have permitted the use of engineering calculations and assessments to estimate emissions from vents that were always 99.9 percent controlled, they would have required stack testing for vents controlled below the 99.9 percent level, even if the emissions from these vents were considerably below 10,000 $mtCO_2e$. This final rule establishes a more consistent approach to accounting for destruction by permitting the use of engineering calculations and assessments where controlled emissions fall below 10,000 $mtCO_2e$.

This final rule also allows for a more sophisticated treatment of fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A. Under the proposed rule, facilities would have been required to perform stack testing on fluorinated GHG streams that exceeded one ton and that included any fluorinated GHG that did not have a

GWP listed in table A–1 to subpart A, even if this fluorinated GHG made up a small fraction of the stream. Implicitly, this assigned a GWP of 10,000 not only to the GHG without a GWP in table A–1 to subpart A, but to the rest of the stream. Assigning a default GWP of 2,000 to GHGs without GWPs in table A–1 to subpart A allows streams to be evaluated based on a reasonable estimate of the total CO_2e rather than just on total F–GHG tonnage.[34] The 2,000 value was selected based on an evaluation of all the known GWPs for fluorocarbon F–GHGs as listed in Table A–1 to subpart A.[35] It is intended to be a short-term default value. In the long run, EPA intends to establish a broader program for evaluating the GWPs of fluorinated GHGs. However, such a program will not be established in time to evaluate all of the GWPs that must be evaluated for purposes of determining whether or not to perform stack testing on process vents.

The option to request to use a provisional GWP addresses situations where the GWP of 2,000 would significantly overestimate the CO_2e emissions from a process vent and inappropriately trigger stack testing. In general, we expect such situations to be rare.

Comment: Several commenters expressed concern that the analytical methods as proposed were too limited or prescriptive. They argued that the set of proposed methods, analytical technologies, and detectors may not be appropriate for all fluorinated compounds. Commenters specifically observed that the prescribed detectors (e.g., ECD) do not work well with all fluorinated compounds. Commenters also expressed concern that the proposed rule did not address the need to adapt the methods to accommodate site-specific issues or safety concerns. The commenters recommended that EPA increase the flexibility in the testing section, include the same level of flexibility as was proposed for subpart OO, allow more methods as alternatives for use in analysis, and rely heavily on the facility GHG Monitoring Plan.

Response: EPA agrees that additional flexibility is appropriate and is allowing facilities to use alternative test methods and procedures to identify and quantify fluorinated GHGs in process and emissions streams. These alternative methods and procedures must be validated and documented in the facility's GHG Monitoring Plan. EPA has concluded that this change will provide the flexibility necessary to allow facilities to develop and apply new analytical procedures that may be required to identify and quantify all of the fluorinated GHGs in process and emissions streams. At the same time, the quality assurance, validation, and documentation requirements for analytical procedures will assure that facilities are able to obtain and report accurate emissions measurements.

Comment: Several commenters requested clarification of or changes to the error test that facilities must perform before applying the mass-balance approach to estimate emissions from a process. Some commenters requested that EPA establish an error limit in terms of the quantity of reactants fed into the process, an option on which EPA had requested comment. These commenters were concerned that the error limit that was presented in the proposed regulatory text, which would require the error to fall below either 30 percent of emissions or 3,000 $mtCO_2e$, would disadvantage fluorinated GHG production processes with low emissions for which facilities might prefer to use the mass-balance approach.

Response: EPA has carefully evaluated various options to ensure that emissions estimates developed using the mass-balance approach are reasonably accurate while avoiding placing a burden on facilities with low emissions. In our deliberations, we have considered the fact that for processes that do not pass the error test for the mass-balance approach, facilities may use the site-specific, process-vent-specific emission factor approach (PSEF), which is expected to have a relative error of less than 30 percent. The availability of the PSEF approach argues against allowing use of the mass-balance approach where relative and absolute errors are large.

The approach that EPA proposed, which would require the error to fall below either 30 percent of emissions or 3,000 $mtCO_2e$, limits the relative error of large emissions and the absolute error of small emissions. We anticipate that processes that have large throughputs, moderate to large emission rates (2 percent), and measurements with good precisions and accuracies will pass this error test, because the error will fall under 30 percent of emissions. EPA also anticipates that processes that have small to medium throughputs, small to medium emission rates, and measurements with moderate to good precisions and accuracies will pass the error test, because the error will fall either under 30 percent of emissions or under 3,000 $mtCO_2e$. However, processes with large throughputs and small emission rates may not pass the error test even if their measurements are highly accurate and precise, because the error will exceed both 3,000 $mtCO_2e$ and 30 percent of emissions.

The last set of processes described might be able to use the mass-balance approach if the error test were applied to the ratio of the absolute error (numerator) and the reactants or products of the process (denominator). In this case, the quantity to which the error test was applied would remain constant regardless of the emission rate rather than increasing as emissions decreased. However, while such an approach would maintain the mass-balance approach as an option for large processes with small emission rates, it would do so at the cost of reducing the precision and accuracy of the resulting emission estimates well below what could be achieved using the emission factor approach. For example, consider a process producing 10 million $mtCO_2e$ of product (well within the range for HFCs) and emitting one percent of this, or 100,000 $mtCO_2e$. If error was limited to 0.6 percent of the fluorinated GHG product,[36] the error of the emissions estimate for this process could be 60 percent, or 60,000 $mtCO_2e$. Using the emission factor approach, the error of the emissions estimate would be half this, 30,000 $mtCO_2e$. Thus, EPA is not adopting the alternative error test. Instead, EPA is adopting the error test that was proposed.

Comment: One commenter stated that the relative error associated with each measurement is not necessarily known. This commenter also requested clarification on when the error test must take place and how multiple measurements should be handled in the test. The commenter noted that over the reporting year, at least 12 measurements

[34] This would avoid problematic situations that could arise if facilities simply switched to a 5-ton cut-off whenever part of an emissions stream lacked a GWP. One of these would be having to use stack testing on a 6-ton vent stream that consisted mostly (e.g., 98%) of a fluorinated GHG with a GWP of 50, but consisted slightly (e.g., 2%) of a fluorinated GHG with an unknown GWP. Another problematic situation would be NOT having to use stack testing on a 4-ton vent stream that consisted mostly (98%) of a fluorinated GHG with a GWP of 3000, but slightly (2%) of a fluorinated GHG with an unknown GWP.

[35] The average for all of the fluorocarbons in this list was 2,300. For purposes of estimating the GWPs of fluorocarbons that do not appear in Table 1, this average may actually be high because it includes the GWPs of PFCs, which have an average GWP of about 7,600. EPA believes that most PFCs whose vapor pressures qualify them as fluorinated GHGs already have their GWPs listed in Table A–1. The average GWP of the fluorocarbons other than the PFCs is approximately 1,600. (HFCs have an average GWP of about 2,000, while HFEs have an average GWP of about 1,200 to 1,400).

[36] The 0.6 percent fraction was selected as an example because it equates to a 30 percent error for emissions of two percent of production.

would be made of masses and concentrations. If facilities waited until the end of the year to perform the error test and then found that the process "failed" it, they would not have time to pursue the alternative of developing and applying process-specific emission factors.

Response: EPA agrees that there may be multiple sources of error in the mass and concentration measurements used to estimate emissions under the mass balance approach. However, while some of these sources of error may not be known or easily quantifiable, the most important sources of error can be assessed and quantified. These include the error of the measurement devices and the variability of the process. In general, facilities would be expected to know the accuracies and precisions of their devices (e.g., flowmeters) for measuring mass and their analytical methods for measuring concentrations. Facilities would also be expected to know how variable their process is and, in general, what drives that variability (e.g., catalyst age). Since mass measurements are cumulative (that is, the monthly estimates of mass flowing into or out of the process should be totals for the month), process variability will generally have much more of an impact on the accuracy and precision of the concentration measurements than on those of the mass measurements.

If a facility has a record of concentration measurements that are representative of the current process (including its full variability) and analytical methods, then these concentration measurements may be used to assess the variability of the process. The variability in these measurements will also capture the random error (imprecision) of the analytical method. (The variability will not capture the systematic error or inaccuracy of the method, but this is generally expected to be smaller than the error associated with process variability.) To incorporate this variability into the error calculation, facilities must consider the fact that at least 12 concentration measurements would be taken over the course of the year.[37] As explained further in the revised technical support document, this can be accomplished using the student's distribution.

If a facility does not have a record of concentration measurements that capture the variability of the process, the facility can assess this variability by either (1) relying on engineering calculations, or (2) taking several measurements over the first month or two of the reporting year. The facility can then incorporate the results of these measurements into the mass-balance error calculation. Since these two methods for assessing variability may be less reliable than long-term monitoring, the facility may wish to pursue the process-vent-specific emission factor approach if the results show that the process barely passes the error test.

As discussed above, in response to this and other comments regarding the complexity of the mass-balance error calculation, we are including in the final rule an alternative set of requirements that are designed to ensure that emission estimates developed using the mass-balance approach are reasonably accurate and precise. Under this alternative set of requirements, which can only be used for processes that have a total annual throughput of 500,000 $mtCO_2e$ or less of fluorinated GHG reactants, products, and by-products, facilities are required to measure the masses identified in the rule with an accuracy and precision of ±0.2 percent of full scale or better, to measure the concentrations identified in the rule using analytical methods with an accuracy and precision of ±10 percent or better, and to conduct these measurements at least weekly. The rationale for this alternative approach is discussed further in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart L: Fluorinated Gas Production Processes."

Comment: Commenters also addressed the issue of the use of surrogates in determining destruction efficiency. They noted that in the destruction and removal efficiency (DRE) testing that is performed at hazardous waste combustors pursuant to 40 CFR 63.1219, facilities are allowed to test any principal organic hazardous constituent (POHC) within a thermal stability class to establish the DRE of all the other POHCs in that class. The commenters argued that EPA should take a similar approach in the requirements for determining the destruction efficiency (DE) for fluorinated GHGs, clarifying that Class 1 POHCs, such as naphthalene, are acceptable surrogates.

Response: We understand that in the destruction and removal efficiency (DRE) testing that is performed at hazardous waste combustors pursuant to part 63, subpart EEE, facilities that demonstrate 99.99 percent DRE for a POHC within a thermal stability class are allowed to assume that 99.99 percent DRE would also be achieved for the other compounds in that class and for compounds in other thermal stability classes with lower thermal stability rankings. This approach is based on the general conclusion that, for POHCs that are in the same class and that occur in significant volumes, differences in DREs tend to be small, and that compounds in other thermal stability classes with lower stability rankings are easier to destroy.

However, it would be a misapplication of the thermal stability index to conclude that a combustor that has demonstrated 99.99 percent DRE for any Class 1 compound[38] would also achieve 99.99 percent DRE for SF_6, a Class 1 compound, and for perfluoromethane (CF_4). While achieving 99.99 percent DRE for SF_6 ensures 99.99 percent DRE for other Class 1 compounds, the converse may not be true. As discussed below, SF_6 is substantially more thermally stable than other Class 1 compounds (and CF_4 is substantially more thermally stable than SF_6). Note that this does not undermine EPA's policy of assuming for purposes of the hazardous waste combustion standards that achieving 99.99 percent DRE for a Class 1 compound ensures 99.99 percent DRE for other Class 1 compounds (and, therefore, for all POHCs). Given that SF_6 is nontoxic and is not a RCRA Part 261, Appendix VIII organic compound for which 99.99 percent DRE would be required under the hazardous waste combustion standards, the fact that demonstrating 99.99 percent DRE for other Class 1 compounds may not ensure 99.99 percent DRE for SF_6 is irrelevant to that policy.

The theoretical considerations that support the conclusion that fluorinated GHGs are extremely thermally stable relate to the high energies of the C–F and S–F bonds. These energies make it difficult to break the bonds through reaction with oxygen, hydrogen, or the hydroxyl radical, the typical means of destroying other class 1 compounds. Essentially, the only path available to destroy these fully fluorinated compounds in hazardous waste combustors or thermal oxidizers is through thermal decomposition at very

[37] Facilities are required to time their monthly (or more frequent) concentration measurements so that they obtain a representative set of these measurements over the course of the year. For example, if the catalyst is renewed on the first of every month, facilities should take measurements at the beginning, middle, and end of the month, even if this means that three weeks or five weeks rather than one month may elapse between measurements.

[38] Class 1 is the group of POHCs and surrogates with the highest thermal stability, meaning they are the most difficult compounds to destroy.

high temperatures.[39] These temperatures are significantly higher than those required for the thermal decomposition of most other class 1 compounds. For SF_6, the thermal stability index indicates that the temperature to achieve 99 percent destruction with a two-second residence time is 1,090°C; for CF_4, we project that the temperature would be on the order of 1,380°C.[40] Researchers have suggested that CF_4 may break down only in the flame zone.[41]

Experimental evidence supports the idea that SF_6 and CF_4 are difficult to destroy. Due in part to the theoretical considerations outlined above, several studies have evaluated the use of SF_6 as a possible surrogate for POHCs in evaluating DREs. Most studies have verified that the DRE measured for SF_6 is likely to be lower than that for POHCs, i.e., that it is likely to yield a conservative estimate of the DREs for POHCs under most conditions. In one experiment at a full-scale hazardous waste incinerator, the investigators found that even at high-temperature conditions, SF_6 had a DRE that led to emissions approximately an order of magnitude higher than those of other POHCs, including both class 1 and class 2 compounds. At lower-temperature conditions, SF_6 had a DRE that was over 100 times lower than those of other POHCs.[42] As noted above, CF_4 is even more difficult to destroy than SF_6. This has been confirmed in testing of point-of-use thermal abatement devices used in electronics manufacturing, which destroyed CF_4 with an efficiency that was significantly lower (sometimes orders of magnitude lower) than the efficiency with which they destroyed SF_6.[43]

Sulfur hexafluoride is ranked fourth in the POHC Thermal Stability Index; CF_4 is not ranked. Three compounds are ranked higher than SF_6 (i.e., ranked as having higher thermal stability). Hydrogen cyanide and cyanogen are ranked first and second in the thermal stability Index, but these POHCs are rarely present at levels that qualify them as POHCs. Benzene is ranked third, but it frequently occurs as a product of incomplete combustion (PIC) and is therefore rarely selected as a POHC for DRE testing. For these reasons, the compounds above SF_6 in the Index have not been used to measure the performance of most hazardous waste combustors.[44] [45] However, at fluorinated gas production sites that vent SF_6, CF_4, or other perfluorocarbons to destruction devices, these high-GWP compounds have the potential to profoundly affect the actual, CO_2-weighted destruction efficiencies of those devices. The long atmospheric lifetimes of CF_4 (50,000 years) and SF_6 (3,000 years) amplify the desirability of accurate measurements of their destruction. Thus, using these compounds themselves to measure their DEs, rather than compounds that may overestimate their DEs (and underestimate their emissions) by an order of magnitude or more, is critical.

Other fluorinated compounds are not likely to be as stable as CF_4 and SF_6 because they can be dissociated at C–H and C–C bonds (which are weaker than C–F and S–F bonds). Nevertheless, higher molecular weight perfluorocarbons such as C_2F_6 are still expected to be relatively difficult to incinerate.[46] As is true for CF_4, the mechanism of destruction is expected to be thermal decomposition rather than attack by radicals, although the decomposition temperature will be lower than for CF_4 due to the fact that the C–C bond is weaker than the C–F bond.

For these reasons, EPA is requiring that facilities that destroy CF_4, SF_6, and other PFCs test the DE of their destruction devices with the most difficult-to-destroy compound in this set that they actually destroy. (This requirement applies if the facility wishes to reflect the destruction in its emissions estimates; the facility has the option of forgoing testing if it does not wish to reflect the destruction.) Specifically, facilities that destroy CF_4 must test the DE of their destruction device with CF_4 to be able to apply an efficiency to this compound. Facilities that destroy SF_6 must test the DE of their destruction device with SF_6 or CF_4 to be able to apply an efficiency to this compound. Facilities that destroy higher molecular weight PFCs must test the DE of their destruction device with the lowest molecular weight saturated PFC that they destroy, a lower molecular weight saturated PFC, or SF_6 to apply an efficiency to these compounds. Facilities that destroy other fluorinated GHGs, such as HFCs, may test the DE of their destruction device using any class 1 compound in the POHC Thermal Stability Index.

Comment: Commenters stated that the methods proposed for detecting and quantifying equipment leaks are burdensome and as currently written, are inappropriate for many fluorinated GHGs. The commenters noted that, in their experience in monitoring emissions of VOCs or HAP from equipment leaks, such leaks typically make up only a small percentage of facility emissions. Several commenters noted that the proposed methods are drawn from EPA's Protocol for Equipment Leak Estimates and would be used in conjunction with Method 21. Method 21 was developed to detect and quantify emissions of volatile organic compounds (VOCs) from various sources. The technologies that are commonly used for quantifying leaks of VOCs do not detect many fluorinated GHGs at the sensitivity required by Method 21, and detectors that are capable of quantifying leaks of a range of these fluorinated GHGs do not meet all of the specifications for detectors set forth in Method 21, including, for example, probe diameter and sampling rate.

Several commenters requested that EPA allow the use of alternative methods to detect and quantify fluorinated GHG equipment leaks. Some of these alternatives addressed the inability of Method-21-compliant technology to detect fluorinated GHGs. Others addressed the cost of screening large equipment sets for leaks, and some addressed both. The alternative methods included alternative detection technologies that did not meet all of the specifications of Method 21, any EPA monitoring approach in use in regulations, soap bubble testing either as

[39] W. Tsang et al make this case for perfluoromethane in Tsang, W., Burgess Jr., D. R., and Babushok, V. (1998) "On the Incinerability of Highly Fluorinated Organic Compounds," *Combustion Science and Technology,* 139:1, 385–402. An analogous argument can be made for sulfur hexafluoride.

[40] SF_6 temperature is from Appendix VIII ranking of POHCs; CF_4 temperature is estimated based on the rate constant provided in Tsang, p. 393.

[41] Tsang, p. 387.

[42] A. Trenholm, C. Lee, and H. Jermyn, "Full-Scale POHC Incinerability Ranking and Surrogate Testing," 17th Annual RREL Hazardous Waste Research Symposium, EPA Office of Research and Development, EPA/600/9–91/002 April, 1991, pp. 79–88.

[43] USEPA, "Developing a Reliable Fluorinated Greenhouse Gas (F–GHG) Destruction or Removal Efficiency (DRE) Measurement Method for Electronics Manufacturing: A Cooperative Evaluation with Qimonda," March 2008, EPA 430–R–08–017; USEPA, "Developing a Reliable Fluorinated Greenhouse Gas (F–GHG) Destruction or Removal Efficiency (DRE) Measurement Method for Electronics Manufacturing: A Cooperative Evaluation with IBM," June 2009, EPA 430–R–10–004; and USEPA, "Developing a Reliable Fluorinated Greenhouse Gas (F–GHG) Destruction or Removal Efficiency (DRE) Measurement Method for Electronics Manufacturing: A Cooperative Evaluation with NEC Electronics, Inc.," December 2008, EPA 430–R–10–005.

[44] Nonetheless, if a combustor has demonstrated 99.995 DRE for any of these three compounds, it is reasonable to assume that it would also achieve 99.99% DRE for SF_6.

[45] If hydrogen cyanide or cyanogens were present in a hazardous waste at levels high enough to consider them as principal organic hazardous compounds (POHCs), the regulatory authority would likely ensue that they were tested as POHCs given that they are substantially more thermally stable than other Class 1 compounds.

[46] Tsang, p. 401.

a screening approach to be followed up with leak quantification or as a leak designator in itself, pressure and vacuum tests on batch process equipment, various sampling regimens, and alternative equipment counting approaches (for example, approaches that focus on rotating but not static equipment). One commenter suggested that EPA permit monitoring of room exhaust to quantify leaks from process equipment inside the room where the facility successfully completes an EPA Method 204 capture efficiency demonstration. Commenters requested that EPA allow facilities to establish and modify their own methods to provide appropriate equipment leak estimates for fluorinated GHG emissions, provided the methodology is documented in the GHG Monitoring Plan.

Response: EPA agrees that it is appropriate to give facilities flexibility in designing and conducting their leak monitoring. In this final rule, we are expanding the set of methods that can be used for quantifying emissions from equipment leaks. We are now allowing use of the default Average Emission Factor approach in EPA's Protocol for Equipment Leak Estimates and are allowing facilities to implement their own methods for detecting and quantifying fluorinated GHG emissions from equipment leaks. Site-specific leak detection methods must be validated, e.g., through comparison with other methods, and both the methods and their validation must be documented in the facility's GHG Monitoring Plan.

Three considerations have persuaded us to allow this flexibility. First, the equipment and methods for detecting and quantifying emissions of fluorinated GHGs from equipment leaks have not advanced as far as those for monitoring emissions of VOC from equipment leaks. While some fluorinated GHGs can be detected using instruments that meet EPA Method 21 specifications, many others cannot. Although instruments for detecting leaks of HFCs and SF_6 from air-conditioning, refrigeration, and electrical equipment have existed for some time, most of these instruments do not quantify emissions and/or detect only one or two gases. In many cases, therefore, these instruments are not capable of quantifying emissions of the broad range of fluorinated GHGs that can leak from process equipment in fluorinated gas production facilities. For some fluorinated GHGs, the only instruments that are capable of detecting and quantifying emissions do not meet all of the Method 21 specifications or reach their maximum ("peg") at relatively low concentrations. Thus, EPA is permitting use of monitoring equipment that departs from Method 21 specifications.

Second, information submitted by several fluorinated gas producers indicates that equipment leaks account for a very small share of facility-wide fluorinated GHG emissions. Although this generalization is largely based on experience with VOCs and HAP, two fluorinated gas producers have surveyed at least some of their process equipment with detectors sensitive to fluorinated GHGs and have found a similar, very low, level of emissions. Consequently, if some leak quantification methods used to monitor equipment leak emissions under this rule, despite initial validation efforts, are later found to have relatively poor precisions or accuracies, these errors are unlikely to have had a large impact on facility emissions estimates in the meantime. The potential costs of experimentation in this area are relatively low.

Third, the goal of this rule is to quantify fluorinated GHG emissions from leaks rather than to regulate them. Hence, leak quantification approaches that yield unbiased, if imprecise, estimates are preferable to approaches that yield biased (e.g., conservatively high) estimates (e.g., the Average Emission Factor Approach). Also, approaches that quantify leaks without locating them (i.e., the room exhaust test suggested by one commenter) are acceptable in this context.

One area where we are setting a quantitative monitoring standard is in sampling fractions and frequencies. In addition to requiring the sampled equipment to be representative of the equipment used in the process (e.g., in terms of proportions of rotating equipment, etc.), we are requiring that at least one third of the equipment for each process be monitored each year. (There is an exception for equipment that is difficult-to-monitor and unsafe-to-monitor.) This requirement sets a consistent standard across facilities and ensures that all equipment is sampled over a three-year period.

One option that we considered and rejected was to require facilities to use the Average Emission Factor Approach in the Protocol for Equipment Leak Estimates.[47] This approach requires facilities to count the number of pieces of equipment of each type in a process and multiply the number of each type by a default emission factor. Fluorinated gas producers noted that this approach tends to grossly overestimate emissions from leaks, e.g., by a factor of 100 to 1000. As noted above, unbiased estimates, even if they are imprecise, are preferable to extremely conservative estimates in the context of a reporting rule. Thus, although we are giving facilities the option to use the Average Emission Factor Approach (which may be desirable in a facility for which even this approach will yield an equipment leak estimate that is a tiny percentage of overall facility emissions), we are not requiring it.

We are requiring facilities to include brief descriptions of their leak detection methods in their annual GHG report. After facilities have gained experience designing and implementing leak detection approaches, we may revisit this issue to identify the approaches that are most effective.

F. Electrical Transmission and Distribution Equipment Use (Subpart DD)

1. Summary of the Final Rule

Source Category Definition. The electrical transmission and distribution equipment use source category consists of all electric transmission and distribution equipment and servicing inventory insulated with or containing SF_6 or PFCs used within electric power systems. Such equipment includes all gas-insulated substations, circuit breakers, switchgear (including both closed-pressure and hermetically sealed-pressure equipment) electric power transformers, gas-insulated lines containing SF_6 or PFCs, and new equipment owned but not yet installed. Servicing inventory includes pressurized cylinders, gas carts, and other containers of SF_6 or PFC.

Reporting Threshold. EPA is finalizing a reporting threshold based on nameplate capacity of equipment. Electric power systems must report if the total nameplate capacity of SF_6 and PFC containing equipment located within the facility, when added to the total nameplate capacity of SF_6 and PFC containing equipment that is not located within the facility but is under common ownership or control, exceeds 17,820 pounds. Hermetically sealed-pressure equipment is excluded from the reporting threshold. Electricity generating units that have SF_6 and PFC containing equipment onsite do not need to report GHG emissions from this source category unless the total nameplate capacity of SF_6 and PFC containing equipment located within the Subpart D facility exceeds 17,820 pounds.

GHGs to Report. Electrical Equipment Users must report the total SF_6 and PFC

[47] This approach was not proposed but is less burdensome than the other three methods in the Protocol, which were proposed.

emissions (including emissions from fugitive equipment leaks, installation, servicing, equipment decommissioning and disposal, and from storage cylinders) resulting from the transmission and distribution equipment and servicing inventory listed in § 98.300(a). For equipment installation, you must report emissions from new equipment or equipment being installed at your facility once the title to the equipment is transferred to the electric power transmission or distribution entity.

GHG Emissions Calculation and Monitoring. Reporters must calculate emissions using the following system-level mass-balance approach:

• User Emissions = Decrease in SF_6 Inventory + Acquisitions of SF_6 + Disbursements of SF_6 − Net Increase in Total Nameplate Capacity of Equipment

Where:

—Decrease in SF_6 Inventory is pounds of SF_6 stored in containers (but not in equipment) at the beginning of the year minus pounds of SF_6 stored in containers (but not in equipment) at the end of the year.

—Acquisitions of SF_6 is pounds of SF_6 purchased from chemical producers or distributors in bulk + pounds of SF_6 purchased from equipment manufacturers or distributors with or inside of equipment, including hermetically sealed-pressure switchgear + pounds of SF_6 returned to site after off-site recycling.

—Disbursements of SF_6 is pounds of SF_6 in bulk and contained in equipment that is sold to other entities + pounds of SF_6 returned to suppliers + pounds of SF_6 sent off-site for recycling + pounds of SF_6 sent off-site for destruction.

–Net Increase in Total Nameplate Capacity of Equipment is the nameplate capacity of new equipment, in pounds, including hermetically sealed-pressure switchgear, in pounds, minus nameplate capacity of retiring equipment, in pounds, including hermetically sealed-pressure switchgear. (Note that nameplate capacity refers to the full and proper charge of equipment rather than to the actual charge, which may reflect leakage.)

The same method must be used to estimate emissions of PFCs.

Data Reporting. In addition to the information required to be reported by the General Provisions (40 CFR 98.3(c)) and summarized in Section II.A of this preamble, reporters must submit additional data that are used to calculate GHG emissions. A list of the specific data to be reported for this source category is contained in § 98.306.

Recordkeeping. In addition to the records required by the General Provisions (40 CFR 98.3(g)) and summarized in Section II.A of this preamble, reporters must keep records of additional data used to calculate GHG emissions. A list of specific records that must be retained for this source category is included in 40 CFR 98.307.

2. Summary of Major Changes Since Proposal

Major changes in this source category since proposal are identified in the following list. The rationale for these and other additional significant changes can be found below or in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Electric Transmission and Distribution Equipment Use—2009 proposal" and "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Electric Transmission and Distribution Equipment Use—2010 proposal."

• We are providing a definition of *facility* for subpart DD that is based on the system-wide physical collection of transmission and distribution equipment between the point at which electricity is obtained by an electric power system and the point at which electricity is provided to the customer or another electric power transmission or distribution entity not under common ownership.

• We are clarifying that the term *operator,* when applied to this source category, does not include entities whose sole responsibility is to balance load or otherwise address electricity flow. As specified in the General Provisions for part 98, the term *Operator* does include any other person who operates or supervises an electric power transmission or distribution facility.

• We are requiring scales to be accurate within +/− 2 pounds of true weight. This absolute accuracy requirement is less stringent than the 1 percent relative accuracy requirement that was originally proposed.

• We are requiring scales to be recalibrated at the frequency recommended by the manufacturer rather than annually as originally proposed.

3. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. A large number of comments on this subpart were received covering numerous topics. Responses to significant comments received can be found in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart DD: Electrical Transmission and Distribution Equipment Use" (available in the docket, EPA–HQ–OAR–2009–0927).

Definition of Source Category.

Comment: Nearly all commenters stated that the proposed definition of an electric power transmission and distribution facility was generally appropriate and consistent with current industry practice of system-wide servicing equipment and tracking data. Several commenters suggested that the definition of a facility for this subpart could be further modified to more clearly define where an electric power systems begins and ends as well as who is responsible for reporting emissions that occur from electrical equipment that might be owned and serviced by multiple entities.

A few commenters recommended that the term "facility" for this source category be defined on the basis of corporate-level ownership. These commenters stated that a corporate-based facility boundary would help ensure that potential emitters of SF_6 are covered by the rule (by their aggregate emissions falling above the threshold) and ensure more accurate emissions reporting while minimizing the burden on owners and operators of electric power systems in figuring out how to define facility boundaries. One commenter stated that a corporate-level facility definition would allow the most accurate and quickest determination of whether an entity is above the reporting threshold by enabling the entity to review the service and maintenance records for equipment that it owns. This commenter also expressed concern over who should be considered an operator of an electric power transmission and distribution facility, stating that the "operation" of an electric system relates to entities that coordinate operations across company lines to ensure reliability, balance load, and address congestion through generation dispatch and system planning.

Two additional commenters from the electric power industry were supportive of defining the boundaries of a facility on the basis of equipment operation and thought this would be the most straightforward method for determining which equipment to include in their emission estimates.

Response: In developing the proposed definition of a facility for this source category, EPA carefully considered definitions based on numerous concepts, including corporate-level

ownership as well as equipment collectively operated by a single entity.

A definition of a facility that mandated corporate-level boundaries was not considered optimal in the context of the facility definition for this source category. First, there are many non-corporate entities in the electric power industry, including municipalities and federal government agencies, that do not fit into a corporate-based definition of a facility.

Second, a corporate-based facility definition is not well-suited to cases where there are multiple owners and operators of equipment that is interconnected or located within the same substation. The monitoring methods for subpart DD are designed to measure system-wide emissions from groups of equipment and SF_6 storage stocks that are serviced and maintained together rather than emissions from individual pieces of equipment or individual cylinders. Some commenters expressed that they service and maintain equipment that they do not own using their centralized SF_6 gas stocks, which are also used to service equipment they do own. In this example, a facility definition based on corporate ownership would require emissions for a few pieces of the equipment to be estimated separately from the rest of the equipment, which would not be a good fit with the system-wide mass-balance monitoring methods required by subpart DD.

Instead, EPA has defined facility for this source category to mean the electric power system, which comprises all electric transmission and distribution equipment insulated with or containing SF_6 or PFCs which is linked through electric power transmission or distribution lines, functions as an integrated unit, is owned, serviced, or maintained by a single electric power transmission or distribution entity (or multiple entities with a common owner), and is located between: (1) The point(s) at which electric energy is obtained by the facility from an electricity generating unit or a different electric power transmission or distribution entity that does not have a common owner and (2) the point(s) at which the customer(s) or another electric power transmission or distribution entity that does not have a common owner receives the electric energy. The facility also includes all servicing inventory for this equipment that contains SF_6 or PFCs.

In addition, EPA has defined Electric Power Transmission or Distribution Entity as any entity that transmits, distributes, or supplies electricity to a consumer or other user, including any company, electric cooperative, public electric supply corporation, a similar Federal department (including the Bureau of Reclamation or the Corps of Engineers), a municipally owned electric department offering service to the public, an electric public utility district, or a jointly owned electric supply project.

Per the General Provisions (40 CFR 98.2–98.4) summarized in Section II.A of this preamble, although the reporting requirements are applicable to both the owners and operators of a facility, each facility must have one and only one designated representative who will be responsible for certifying, signing, and submitting GHG emissions reports to EPA. The designated representative is to be selected by an agreement binding on the owners and operators of the facility. Since the definition of *operator* in the General Provisions (40 CFR 98.6) is ambiguous in the context of the electric transmission and distribution equipment use source category, EPA has provided a clarification of *operator* for this source category, which is the following: "Operator excludes entities whose sole responsibility is to ensure reliability, balance load or otherwise address electricity flow."

Definition of Source Category.

Comment: EPA received comments stating that electrical generating units (EGUs) (Subpart D) should not be required to report SF_6 emissions from electrical equipment located within the boundary of their generating facilities as part of the EGUs' facility emission reports. This comment is in reference to the requirement in 40 CFR 98.2(a)(1) requirement that reports for facilities that contain any source category (as defined in subparts C through JJ) must cover all source categories and GHGs for which calculation methodologies are provided in those subparts. Commenters noted that since the mass-balance monitoring methods in subpart DD are designed to monitor emissions at the system-wide level, it would be very difficult and time-consuming for an integrated electric power entity that operates electrical equipment at both generation facilities and across transmission and distribution systems (using the same SF_6 gas stocks) to estimate emissions only for the generation facilities. Furthermore, commenters noted that since the definition of an electric power system for subpart DD is already inclusive of any equipment operated by the electric power system at a generation facility, there could be double-counting of emissions for both the electric power system and the electricity generation facility.

Response: EPA considered the potential for double-counting emissions from Subpart D electricity generating units and Subpart DD electrical transmission and distribution equipment use as well as the challenge of estimating SF_6 emissions solely from an electricity generating unit that is part of a larger integrated electric power system. EPA is confirming that an electricity generating unit would be required to report emissions associated with the Electric Transmission and Distribution Equipment Use source category, but only if SF_6 and PFC-insulated equipment within the Subpart D facility exceeded the reporting threshold for Subpart DD. EPA expects that in general, the Subpart DD facility will not independently meet this threshold and thus is unlikely to incur the reporting obligation. Therefore, EPA does not anticipate double counting as a significant issue for electricity generating units covered by other subparts and Subparts DD Electrical Transmission and Distribution Equipment Use.

Monitoring and QA/QC requirements.

Comment: Several commenters were critical of the requirement for weighing SF_6 cylinders each time they enter and leave storage (40 CFR 98.306(b)2)). Commenters noted the high burden associated with such frequent weighing of cylinders and also the lack of a perceived benefit since the cylinders already must be weighed at the beginning and end of each year for the beginning and end-of-year storage inventory.

Response: EPA agrees that the benefit of weighing SF_6 gas cylinders as they enter and leave inventory does not justify the costs of performing this activity. EPA has removed this requirement from 40 CFR 98.306(b)(2) and clarified that the QA/QC requirements for scale accuracy and calibration apply to cylinders returned to the gas supplier and cylinders weighed at the beginning and end of each year for the beginning and end-of-year storage inventory.

Monitoring and QA/QC requirements.

Comment: Commenters generally expressed agreement that it was excessively burdensome to require scales used to weigh cylinders to be accurate and precise to within 1 percent of the true weight and to be recalibrated at least annually or at the minimum frequency specified by the manufacturer, whichever is more frequent (40 CFR 98.304(b)). Numerous commenters stated that the recalibration frequency specified by the manufacturer would be sufficient, thereby making the annual recalibration minimum

unnecessary. Some commenters also stated that purchasing 1 percent accuracy scales would be expensive. One commenter suggested requiring scales with accuracies of +/− 2 pounds of full scale, which provides an accuracy within or close to 1 percent for the cylinder weights typically measured by electric power entities (i.e., between 105 and 225 pounds including tare weight).

Response: The 1 percent accuracy requirement was proposed by EPA because the mass-balance method for measuring emissions requires accurate inputs, and the overall uncertainty of the emission estimate rises as the potential inaccuracy of each input increases. However, EPA also recognizes that the price of scales does increase as the accuracy of the scale increases and that many facilities containing electrical transmission and distribution equipment use do not currently use scales that are accurate to within 1 percent of the true weight.

In order to balance the reporting burden with the need for accurate mass-balance inputs, this final rule requires the accuracy and precision of scales used to weigh cylinders to be based on pounds, specifically, to be within 2 pounds of true weight. In addition, scale recalibration is required in accordance with manufacturer specifications, with no requirement that scale recalibration occur at least annually. As discussed further in EPA's Response to Public Comments for Subpart DD, EPA believes these adjustments still provide data of sufficient accuracy and certainty.

Data Reporting Requirements.

Comment: EPA received many comments regarding the inclusion of sealed-pressure equipment—which is not intended to leak during its lifetime—into the facility-wide nameplate capacity estimates that must be reported to EPA under 40 CFR 98.306(a). Commenters recommended either (1) A minimum threshold be established to exclude sealed-pressure electrical equipment from the nameplate capacity estimation or (2) alternative methods should be allowed for estimating the nameplate capacity of sealed-pressure equipment (rather than performing a bottom-up inventory of the equipment). The most commonly cited rationale for these recommendations was the high burden associated with determining the nameplate capacity for each piece of sealed-pressure equipment within electric power systems, which can contain thousands of pieces of sealed-pressure equipment. Most commenters correctly acknowledged that even if a minimum threshold was established for reporting total facility-wide nameplate capacity, emissions from sealed-pressure equipment would still be captured in the mass-balance monitoring methods in 40 CFR 98.304, and therefore establishing a minimum threshold for the nameplate capacity inventory would not exclude sealed-pressure equipment from reported emissions.

Response: EPA agrees that the burden associated with performing a bottom-up assessment to determine the nameplate capacity of each piece of sealed-pressure equipment within an electric power transmission and distribution facility is unnecessarily high when compared to the benefits of performing such an assessment. As a result, EPA has excluded sealed-pressure equipment from the data reporting requirement for total facility-wide nameplate capacity existing as of the beginning of the year. (Sealed-pressure equipment is also excluded in the determination of the reporting threshold.)

However, the potential for emissions from sealed-pressure equipment due to catastrophic events or equipment disposal still makes it important to document emissions from sealed-pressure equipment, especially for facilities that specialize in electricity distribution. EPA has clarified that SF_6 arriving inside newly acquired sealed-pressure equipment must still be considered as part of the SF_6 acquisitions input of the mass-balance equation, and sealed-pressure equipment that is new or retired must still be considered as a change to the nameplate capacity in the mass-balance equation. This will ensure that emissions from sealed-pressure equipment are still included in the overall emissions estimate.

Since sealed-pressure equipment is no longer required to be included in the total facility-wide nameplate capacity estimate, EPA is including distribution miles in 40 CFR 98.306 Data Reporting Requirements because distribution miles provide an approximate indication of how much sealed-pressure equipment is within an electric power transmission and distribution system.

G. Importers and Exporters of Fluorinated GHGs Inside Pre-Charged Equipment or Closed-Cell Foams (Subpart QQ)

1. Summary of the Final Rule

Source Category Definition. This source category consists of any entity that is importing or exporting pre-charged equipment that contains a fluorinated GHG and also consists of any entity that is importing or exporting closed-cell foams that contain a fluorinated GHG.

Any importer or exporter of fluorinated GHGs contained in pre-charged equipment or closed-cell foams that meets the applicability criteria in the General Provisions (40 CFR 98.2(a)(4)) must report their GHG emissions.

GHGs to Report. Importers and exporters of fluorinated GHGs inside pre-charged equipment and closed-cell foam report the quantity of each fluorinated GHG contained in pre-charged equipment or closed-cell foams imported or exported during the calendar year. For importers and exporters of closed-cell foams that are not the manufacturers of the foams and do not know the identity and mass of the fluorinated GHG within the closed-cell foams, the report may be limited to the mass in CO_2e of the fluorinated GHGs imported or exported in closed-cell foams.

GHG Emissions Calculation and Monitoring. The total mass of each fluorinated GHG imported and exported inside equipment or foams must be estimated by multiplying the mass of flourinated GHG per unit of equipment or foam type by the number of units of equipment or foam type imported or exported annually, as presented in Equation QQ–1 in 40 CFR 98.433. For importers and exporters of closed-cell foams that do not know the identity and mass of the fluorinated GHG within the closed-cell foams, the mass in CO_2e of the fluorinated GHGs must be estimated by multiplying the mass in CO_2e of flourinated GHGs per unit of equipment or foam type by the number of units of equipment or foam type imported or exported annually, as presented in Equation QQ–2 in 40 CFR 98.433.

Data Reporting. In addition to the information required to be reported by the General Provisions (40 CFR 98.3(c)), reporters must submit additional data that are used to calculate GHG emissions. A list of the specific data to be reported for this source category is contained in 40 CFR 98.436.

Recordkeeping. In addition to the records required by the General Provisions (40 CFR 98.3(g)), reporters must keep records of additional data used to calculate GHG emissions. A list of specific records that must be retained for this source category is included under 40 CFR 98.437.

2. Summary of Major Changes Since Proposal

The major changes in this rule since the April 2010 proposal are identified in the following list. The rationale for these and any other significant changes

to the proposed rule can be found below or in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart QQ: Importers and Exporters of Fluorinated GHGs Inside Pre-charged Equipment or Closed-cell Foams (available in the docket, EPA–HQ–OAR–2009–0927).

- EPA has revised the reporting requirements for closed-cell foams such that, in cases where the importer or exporter does not know the identity and amount of fluorinated GHGs inside the closed-cell foam, they can report the amount of fluorinated GHGS imported or exported on a Co_2e basis, based on information from the manufacturer.
- EPA has revised the definition of closed-cell foams to exclude packaging foam.
- EPA has revised the requirements for importers such that the port of entry and country of origin are no longer listed under data reporting requirements. These two data elements are now listed under recordkeeping requirements.
- EPA has revised the requirement for exporters such that the port of exit and countries to which items were exported are no longer listed under data reporting requirements. These are two data elements are now listed under recordkeeping requirements.
- EPA has clarified that importers and exporters must report the number of pieces of pre-charge equipment and closed-cell foam imported with each unique combination of charge size and charge type. Importers and exporters cannot report the average charge size or most common fluorinated GHG used for a particular type of equipment.

3. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. A number of comments on this subpart were received covering numerous topics. Responses to additional significant comments received can be found in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart QQ: Importers and Exporters of Fluorinated GHGs Inside Pre-charged Equipment or Closed-cell Foams" (available in the docket, EPA–HQ–OAR–2009–0927).

Comment: Commenters stated that data on fluorinated GHGs contained in pre-charged equipment or closed-cell foams does not constitute emissions data and is thus outside EPA's authority to collect under this rulemaking. Commenters also stated that any emissions from these equipment types would depend upon "the ultimate end-use and disposal" of the equipment, activities beyond the reporter's control.

Response: In this final rule, EPA is issuing reporting requirements for importers and exporters of fluorinated GHGs inside pre-charged equipment or closed-cell foams. EPA notes that this source category is added as a supplier source category under 98.2(4).

As discussed in the preamble to the October 2009 Final Part 98 (74 FR 56260), that rule (as well as this action) responds to a specific request from Congress to collect data on GHG emissions from both upstream production and downstream sources, as appropriate. Therefore, EPA has developed reporting requirements for direct emitters of GHGs as well as for suppliers of fuels and industrial gases. For fluorinated GHGs in particular, the U.S. supply is impacted by the production, import, and export of fluorinated GHGs in bulk as well as by the import and export of fluorinated GHGs in pre-charged equipment or closed-cell foams. EPA has already finalized reporting requirements for suppliers of industrial gases (40 CFR 98 Subpart OO) which include importers and exporters of fluorinated GHGs in bulk. This action supplements EPA's previous action by requiring reporting from importers and exporters of fluorinated GHGs in equipment and closed-cell foams.

In many cases, the fluorinated GHGs contained in equipment and closed-cell foams are ultimately emitted by a large number of small sources. To cover these direct emissions would require reporting by hundreds of thousands of small entities, such as individual homes with leaking air conditioning units. To avoid this impact, the rule does not include all of those emitters but instead requires reporting by importers and exporters of fluorinated GHGs in equipment and closed-cell foams. For further discussion of the need for upstream reporting, see the preamble to the October 2009 Final Part 98 (74 FR 56271).

EPA has the legal authority to collect data from suppliers, including importers and exporters of fluorinated GHGS contained in equipment and closed-cell foams. Section 114 of the CAA authorizes EPA to gather information from any person who is subject to a requirement of the CAA (other than engine manufacturers) or who may have information the Administrator believes is necessary for purposes of CAA section 114(a) (which in turn references carrying out any provision of the CAA). Information from suppliers of industrial greenhouse gases is relevant to understanding the quantities and types of gases being supplied to the economy, in particular those that could be emitted downstream, which will aid in evaluating action under CAA section 111, as well as various sections of title VI (e.g., CAA sections 609 and 612) that address substitutes to ozone depleting substances. A complete discussion of these issues, including a discussion of EPA's legal basis for collecting information from upstream reporters, can be found in Section I.C of the preamble to the October 2009 Final Part 98 (74 FR 56271) and Volume 9 of the Response to Comments to the Mandatory Reporting of Greenhouse Gases Rule (HQ–OAR–2008–0508).

EPA notes that some commenters appear to associate comments on whether EPA has authority to collect subpart QQ data, comments on whether subpart QQ data is "emission data," and comments on whether data collected under QQ should be protected as CBI. EPA's authority to collect subpart QQ data is addressed above. This action does not address whether data reported under this subpart are "emission data" or whether these data will be treated as confidential business information (CBI). EPA published a proposed confidentiality determination on July 7, 2010 (75 FR 39094) which addressed these issues. See Section II.B of this preamble for more information.

Comment: Some commenters stated that this subpart is a minor source of GHG emissions. These commenters stated that the quantities of fluorinated GHGs inside individual pieces of equipment are small, ranging from ounces to pounds, and that emissions from such equipment are "de minimis" because the systems are hermetically sealed.

Response: In this final rule, EPA is issuing reporting requirements for importers and exporters of fluorinated GHGs inside pre-charged equipment or closed-cell foams. Despite small charge sizes, the quantities of fluorinated GHGs imported in pre-charged equipment and closed-cell foams are significant because of the high GWP (up to 12,000) of these refrigerants. EPA estimates that approximately 22 $MMTCO_2e$ are imported by entities subject to this subpart, which together comprise the eleventh most significant source of GHGs (in carbon dioxide equivalent terms) covered under the Greenhouse Gas Reporting Program. (More information on these estimates can be found in subpart QQ TSD, EPA–HQ–OAR–2009–0927). Imports of fluorinated GHGs from entities subject to this subpart are estimated to account for seven to 10 percent of the U.S. fluorinated GHG supply, while exports

are estimated to account for one to two percent.

A portion of fluorinated GHGs consumed in the U.S. are eventually emitted into the atmosphere, as these gases leak from the equipment or are vented during service and disposal events. By accounting for all chemical flows into and out of the U.S., including in pre-charged equipment or closed-cell foams, EPA's approach results in an estimate of consumption and ultimately emissions that is more accurate than are estimates that do not account for these flows. As commenters note, these equipment are purchased and used by a diffuse variety of entities. Upstream data gathering is thus the most effective and accurate method to obtain this important data. For further discussion of the need for upstream reporting, see the preamble to the October 2009 Final Part 98 (74 FR 56271).

Comment: EPA received comments from an association representing some motor vehicle manufacturers concerning the reporting of fluorinated GHGs contained in motor vehicle air conditioners (MVACs). The commenter recommended delaying the reporting requirements for MVACs or exempting them altogether. The commenter noted that the Final Rule on Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards (75 FR 25324) (light duty vehicle rule) includes incentives for low-GWP refrigerants. The commenter also noted that manufacturers are contemplating the use of lower GWP refrigerants in MVACs due to the ability to voluntarily generate credits under the light duty vehicle rule and EU regulations. Commenters stated that exempting or delaying the applicability of the reporting requirements would conserve public resources and harmonize existing incentives. The commenter also stated that EPA should modify reporting requirements for MVAC imports and exports to allow reporting of data by model year, that reporting of certain data elements would require reconfiguration of existing systems, and that these particular reporting requirements should be developed off-line for verification purposes.

Response: In this final rule, EPA is not exempting importers and exporters of MVACs or delaying the applicability of the reporting requirements to them. MVACs are a significant source of fluorinated GHGs; EPA estimates that currently approximately 18 percent of fluorinated GHGs (in carbon dioxide equivalent terms) imported under this subpart are contained within MVACs. EPA recognizes there is significant interest and research into new low-GWP refrigerants; however, the timing and the extent of the MVAC market to make such a transition are uncertain. Under CAA section 612, EPA has proposed to find the low-GWP refrigerant HFO–1234yf acceptable, subject to use conditions, in MVACs (75 FR 53445); however, this rule has not been finalized. In addition, although the light duty vehicle rule allows automakers to earn additional leakage credits if they use a low GWP refrigerant, EPA actually predicted that automakers would meet the standards in the Model Year 2012 through 2016 timeframe by reducing refrigerant leakage, not by switching to lower-GWP alternatives (see the Regulatory Impact Analysis for the Final Rule on Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards, EPA–HQ–OAR–2009–0472). Based on these factors, EPA concluded there is not sufficient evidence that the transition to low GWP refrigerants in MVACs is underway such that the importers and exporters of MVACs should be exempt or that the reporting requirements should be delayed.

Reporting imports and exports of MVACs on a model year basis would be inconsistent with the reporting requirements for all other subparts under 40 CFR Part 98 where EPA is collecting information on a calendar year basis. EPA plans to use data collected under Part 98 to support analyses of various GHG policy options; therefore, EPA requires the data on a calendar year basis to allow meaningful comparison of data across and within subparts. Model year reporting for new vehicle and engine manufacturers was included under the Final Mandatory Reporting of Greenhouse Gases Rule, but those reporting requirements were not developed to fit into Part 98. Instead, they were created to fit into the existing reporting framework for long-established EPA vehicle and engine programs as discussed in Section V.QQ of the preamble to the April 2009 Mandatory Reporting of Greenhouse Gases Proposed Rule (74 FR 16586). The data collected under subpart QQ of part 98 is needed on a calendar year basis, in particular, because EPA intends to analyze and compare the data on imports and exports of fluorinated GHGs in MVACs with data on fluorinated GHGs imported and exported in other types of pre-charged equipment and closed-cell foams. EPA also intends to compare this data with data on fluorinated GHGs collected under other subparts, all of which is collected on a calendar year basis.

In developing these requirements, EPA recognized that some reporting requirements may require the reconfiguration of existing tracking systems or the development of new tracking systems. In fact, EPA included the development of tracking system as an implementation cost in the "Economic Impact Analysis for the Mandatory Reporting of Greenhouse Gas Emissions F–Gases: Subparts I, L, QQ, SS Draft Report" (EPA–HQ–OAR–2009–0927). EPA did not receive any comments related to these implementation costs for subpart QQ developed under the Economic Impact Analysis. This commenter, in particular, did not provide specific information related to the burden of reporting data on a calendar year basis. Therefore, given the utility of the data and the need for meaningful annual analysis, EPA is finalizing the requirement to report the imports and exports of fluorinated GHGs within pre-charged equipment or closed-cell foams on an annual basis.

Finally, the commenter suggested that the port of entry (or exit), the country from which (or to which) items were shipped, and the date of import (or export) could be developed off-line for verification purposes. These three reporting requirements are similar to those for importers and exporters of industrial gases under 40 CFR subpart OO, which involves imports and exports of bulk chemicals. However this subpart involves more detailed reporting requirements regarding the contents of each particular shipment (such as the number of units, charge size, and charge type) and not just the amount of the particular industrial gas imported and exported. Some types of equipment, such as refrigerators, may hold a refrigerant charge of fluorinated GHGs and include fluorinated GHG within the closed-cell foams, which will further complicate reporting on this shipment. Given these additional reporting requirements under this subpart, EPA agrees that the port of entry (or exit) and the country from which (or to which) items were shipped can be maintained as records and has therefore moved these two items to record keeping requirements. However, EPA is maintaining the date of import (or export) as a reporting requirement as the date of import (or export) is necessary for verification activities. EPA can use the date of import or export in combination with other information to conduct verification activities. For example, EPA can crosswalk information collected under this rule with records maintained by U.S. Customs and Border Protection to

ensure importers and exporters are properly reporting imports and exports of pre-charged equipment and closed-cell foams.

Comment: EPA received comments regarding the calculation of fluorinated GHGs within closed-cell foams. One commenter stated that fluorinated GHGs are emitted from closed-cell foams at varying rates, and therefore, the best way to determine the amount of fluorinated GHGs contained in closed-cell foams is to require reporting on the total amount of fluorinated GHGs consumed by the foreign manufacture at the point of manufacture. One commenter stated that the proposed reporting requirements would result in a cumbersome process between appliance manufacturers and foam suppliers where the foam suppliers would be required to disclose proprietary information on the closed-cell foam composition to equipment manufacturers. The commenter stated that EPA should therefore allow reporting on a $C0_2e$ basis.

Response: EPA has finalized the requirement to report only the amount of fluorinated GHGs imported or exported within closed-cell foams. EPA has added an alternative reporting method for instances when the type and mass of fluorinated GHGs within the closed-cell foams are not known by the importers and exporters.

The intent of this rule is to better understand U.S. GHG emissions in order to inform policy decisions. This rule does not attempt to quantify emissions that occur during the production of materials that are eventually imported into the U.S. such as emissions that occur during the manufacture of closed-cell foams. Therefore, EPA is finalizing the requirement to report only the amount of fluorinated GHGs contained in the closed-cell foams that are imported or exported, not the total amount of fluorinated GHGs consumed during the manufacture of these products. EPA notes that the identity and mass of the fluorinated GHGs within closed-cell foams impact the foams' ability to insulate and that these parameters are known to the entities that manufacture and market these products.

EPA recognizes the unique situation that may arise when an importer of closed-cell foams is not the same entity that manufactured the closed-cell foam. In such cases, the importer may not know the mass and identity of the fluorinated GHG within the closed-cell foam. Therefore, EPA has added an alternative reporting provision that allows reporting by CO_2e basis for closed-cell foams under these circumstances.

EPA is requiring importers and exporters to report the identity and mass of the fluorinated GHG within closed-cell foams when it is known. This is consistent with EPA's approach for pre-charged equipment, where EPA requires importers and exporters to report the identity and amount of fluorinated GHGs within equipment. EPA will use this information to better understand the types and amounts of fluorinated GHGs imported and exported into the U.S. This information will support analysis under this subpart as well as analysis across subparts, particularly subparts that collect data on fluorinated GHGs.

For importers and exporters that are unable to obtain detailed information on the closed-cell foams from the manufacturer, EPA is requiring that the importers and exporters identify the foam manufacturer and to certify that they were unable to obtain this information from them. These importers and exporters are also required to document the communications with the foam manufacturer and retain the information in their records. When verifying data collected under this rule, EPA may contact foam manufacturers independently to obtain more detailed information on the identity and mass of the fluorinated GHGs contained within these closed-cell foams.

Further discussion of issues related reporting requirements for closed-cell foams can be found in the "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart QQ: Importers and Exporters of Fluorinated GHGs Inside Pre-charged Equipment or Closed-cell Foams" (EPA–HQ–OAR–2009–0927).

Comment: EPA also received comments as to whether packaging foams would be included under this subpart.

Response: EPA has excluded packaging foam from this subpart. EPA's original analysis of this source category identified only imports and exports of closed-cell foams used to insulate, such as closed-cell foams used in refrigeration equipment, as a significant source of fluorinated GHGs. In subsequent conversation with industry, EPA learned that closed-cell foams can sometimes be used in general packaging. EPA never intended to include these sources. Packaging foams are widely used when shipping materials, and EPA anticipates it would be too burdensome for entities to ascertain the type of packaging foam and the blowing agent used in that foam when shipping materials, particularly as the packaging foam is incidental to the items being imported or exported. Therefore, EPA has clarified the definition of closed-cell foams to explicitly exclude packaging foam.

H. Electrical Equipment Manufacture or Refurbishment (Subpart SS)

1. Summary of the Final Rule

Source Category Definition. This source category consists of electrical equipment manufacturers and refurbishers of SF_6 or PFC-insulated closed-pressure equipment and sealed-pressure equipment including gas-insulated substations, circuit breakers and other switchgear, gas-insulated lines, or power transformers containing sulfur-hexafluoride (SF_6) or perfluorocarbons (PFCs).

Reporting Threshold. Reporters must submit annual GHG reports for facilities that meet the applicability criteria in the General Provisions of 40 CFR 98.2(a)(1). Facilities undertaking electrical equipment manufacturing and refurbishing are covered by this rule if total annual purchases of SF_6 and PFCs exceed 23,000 pounds.

GHGs to Report. For electrical equipment manufacturers and refurbishers of SF_6 or PFC-insulated closed-pressure equipment and sealed-pressure equipment, report the following emissions:

- SF_6 and PFC emissions from electrical equipment manufacturing.
- SF_6 and PFC emissions from electrical equipment refurbishing.
- SF_6 and PFCs emissions from electrical equipment testing.
- SF_6 and PFCs emissions from electrical equipment decommissioning and disposal.
- SF_6 and PFCs emissions from storage cylinders and other containers.
- SF_6 and PFC emissions from electrical equipment installation that occurs before title to the equipment is transferred to the customer.

In addition, report GHG emissions for other source categories at the facility for which calculation methods are provided in the rule, as applicable. For example, report CO_2, N_2O and CH_4 combustion-related emissions from each stationary combustion unit on site under 40 CFR part 98, subpart C (General Stationary Fuel Combustion Sources).

GHG Emissions Calculation and Monitoring. Reporters must calculate SF_6 and PFC emissions using a mass-balance approach, which includes the following inputs (For brevity, the inputs refer only to SF_6; however, the method also applies PFCs):

- The decrease in SF_6 Inventory must be determined by subtracting SF_6, in

pounds, stored in containers at the end of the year from SF_6, in pounds, stored in containers at the beginning of the year.

• Acquisitions of SF_6 must be determined by summing pounds of SF_6 purchased from chemical producers or distributors in bulk, pounds of SF_6 returned by equipment users or distributors with or inside equipment, and pounds of SF_6 returned to site after off-site recycling.

• Disbursements of SF_6 must be determined by summing pounds of SF_6 contained in new equipment delivered to customers, pounds of SF_6 delivered to equipment users in containers, pounds of SF_6 returned to suppliers, pounds of SF_6 sent off-site for recycling, and pounds of SF_6 sent off-site for destruction.

Reporters also must calculate SF_6 and PFC emissions from the equipment being installed on the electric power system's premises when the installation occurs before the title to the equipment is transferred to the electric power entity. Reporters may use a mass-balance approach or an engineering calculation to estimate installation losses.

Data Reporting. In addition to the information required to be reported by the General Provisions (40 CFR 98.3(c)) and summarized in Section II.A of this preamble, reporters must submit additional data that are used to calculate GHG emissions. A list of the specific data to be reported for this source category is contained in 40 CFR 98.456.

Recordkeeping. In addition to the records required by the General Provisions (40 CFR 98.3(g)) and summarized in Section II.A of this preamble, reporters must keep records of additional data used to calculate GHG emissions. A list of specific records that must be retained for this source category is included in 40 CFR 98.457.

2. Summary of Major Changes Since Proposal

The major changes in this rule since the proposal are identified in the following list. The rationale for additional significant changes to subpart SS can be found below or in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart SS: Sulfur Hexafluoride and Perfluorocarbons from Electrical Equipment Manufacture or Refurbishment."

• EPA is modifying the accuracy and precision requirements for scales and flowmeters used to measure mass for the mass-balance equation. Specifically, rather than requiring flowmeters and scales to have an accuracy and precision of ±1 percent of the true mass or weight, we are requiring them to have an accuracy and precision of ±1 percent of either full scale (for flowmeters) or the maximum weight of the containers typically weighed on the scale (for scales). For scales that are used to weigh cylinders containing 115 pounds of gas when full, this equates to ±1 percent of the sum of 115 pounds and approximately 120 pounds tare, or slightly more than ±2 pounds. This absolute accuracy requirement, expressed as a percentage of the filled weight of the container that is weighed on the scale, is less stringent than the 1 percent (of true weight) relative accuracy requirement in the proposed rule.

• To reduce burden and increase flexibility, EPA is allowing use of a calculated emission factor for determining emissions downstream of the flow meter measuring the mass of SF_6 being transferred from the storage container to the equipment being filled. A value must be determined for each combination of hose and valve of a given sized diameter. The calculated emission factor must be multiplied by the number of annual fill operations that uses the hose and valve combination. The calculation must be performed annually to account for changes to the specifications of the valves or hoses that may occur throughout the year.

• To increase flexibility, EPA is providing an additional option for determining the mass of SF_6 or the PFCs disbursed to customers in new equipment. EPA is allowing the equipment's nameplate capacity or, in cases where equipment is shipped with a partial charge, the equipment's partial shipping charge to be assumed as equal to the disbursement. A sufficiently precise estimate of the nameplate capacity for each make and model of equipment must be determined through a number of measurements. The number of measurements required must be calculated to achieve a precision of one percent of the true mean, using a 95 percent confidence interval.

• To improve data accuracy, the quantity of gas charged into delivered equipment and added during installation by the manufacturer must be certified by the manufacturer and expressed in pounds of SF_6 or PFC.

• To clarify the reporting boundary between subparts DD and SS, EPA is requiring electrical equipment manufacturers to estimate and report the annual SF_6 and PFC emissions from the equipment being installed on the electric power system's premises until the title of the equipment has transferred to the electric power transmission or distribution entity. An equipment installation mass balance equation must be used.

3. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. A small number of comments which covered several topics were received on this subpart. Responses to additional significant comments received can be found in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart SS: Electrical Equipment Manufacture or Refurbishment" (available in the docket, EPA–HQ–OAR–2009–0927).

Selection of Reporting Threshold

Comment: EPA received comment that gas cylinders which are sealed and unused should not count toward the reporting threshold. These cylinders are purchased by the electrical equipment manufacturer for shipment to customers. According to the commenter, since these cylinders are never opened and their seals remain intact, no leakages can occur. The commenter explained that the 10 percent leak rate used to determine the threshold is based upon losses during testing, manufacturing, and commissioning. Activities such as storage should not count toward the leak rate.

Response: EPA disagrees that sealed and unused cylinders should not count toward the reporting threshold. EPA recognizes that sealed cylinders are unlikely to be a major source of emissions and that it has been the standard practice by some manufacturers to deliver sealed cylinders with new equipment. However, EPA is concerned that not including these cylinders could introduce complications in tracking gas in cylinders and other containers because of the need to differentiate those cylinders that are sealed and destined for the customer and those cylinders that are sealed and destined for use by the electrical equipment manufacturer. Further it would be virtually impossible for an audit of threshold and cylinder record keeping requirements to distinguish the different use of cylinders at the beginning and end of the year. Therefore, EPA is finalizing the requirement that sealed and unused cylinders count toward the determination of the reporting threshold.

Monitoring and QA/QC Requirements

Comment: EPA received comment that measuring residual gas amounts to within 1 percent of accuracy is not

attainable in practice. Scales currently in use have an accuracy of ± 2 pounds; a 1 percent measurement of "new or residual gas amounts" would require a scale with an accuracy of ± 0.1 pounds, or 200 times more precise than currently in use. The commenter suggested that the required accuracy be no stricter than 10 percent for residual gas amounts.

Response: EPA has reviewed this commenter's concern as well as similar concerns of several commenters on the accuracy requirement of scales for Subpart DD, Electric Transmission and Distribution Equipment Uses.

After further evaluation of the types of scales available, the range of accuracies and precisions, and the effect of those accuracies and precisions on the accuracy and precision of facility-level emissions estimates, we have eased the requirements for scale accuracy and precision. As noted above, we proposed that scales be accurate and precise to within ± 1 percent of the true mass or weight or better. When the mass being weighed on the scale is small, as is the case for the residual gas being returned to the supplier, this requires a very good absolute precision and accuracy, e.g., better than ± 0.1 pounds. EPA conducted an analysis that examined the impact of different scale accuracies on the relative uncertainty of emission estimates from two hypothetical electrical equipment manufacturer facilities; the findings indicate that the incremental increase in relative uncertainty from a requirement of ± 1 percent of true mass or weight scale accuracy to ± 2 pounds scale accuracy was not enough to justify a more stringent accuracy of 1 percent and its associated burden.

This final rule requires the accuracy and precision of scales used to weigh cylinders to be ± 1 percent of full scale or better of the filled weight (gas plus tare) of the containers of SF_6 or PFCs that are weighed on the scale. This absolute error would be allowed for container heels as well as for the full container. For scales that are generally used to weigh cylinders containing 115 pounds of gas when full, this equates to ± 1 percent of the sum of 115 pounds and approximately 120 pounds tare, or slightly more than ± 2 pounds. EPA concluded this change will lower the burden on reporters without significant compromise to data quality.

Comment: EPA received comment regarding the administrative burden of the proposed method to determine emissions downstream of the flowmeter measuring the mass of SF_6 (or PFC) being transferred from the storage container to the equipment being filled. The commenter asserted that accurately determining emissions downstream of the flowmeter (to subtract from the disbursement total) could require an inordinate administrative burden associated with recording the numerous parameters for individual fill operations. The commenter suggested that the entity be explicitly permitted to apply a statistical calculation to a subset of individual fill operations, such as a midpoint or average loss rates, to use as the loss rates associated with all fill operations. The statistical calculation would be based on the factors outlined in the proposed rule, but the proposed approach would relieve the burden of rerecording the measurements for each individual operation.

Response: EPA recognizes that developing a representative loss factor that can be used for all filling events is more practical than performing measurements for each individual fill operation. EPA agrees with the commenters that direct measurement is unnecessarily burdensome. Consequently, rather than requiring actual measurements as proposed, EPA is allowing reporters to account for variability in the diameters and fittings of hoses supplied by various manufacturers and applied under varying conditions and requiring an emission factor be calculated for each hose and valve, or fitting, combination. For each hose-valve combination, the calculated emission factor must be multiplied by the number of annual fill operations that use that hose-valve arrangement. The calculation must be recalculated annually to account for changes to the specifications of the valves or hoses that may occur throughout the year. In addition, EPA is requiring electrical equipment manufacturers to account for SF_6 or PFC emissions that occur as a result of unexpected events or accidental losses, such as a malfunctioning hose or leak in the flow line, during the filling of equipment or containers for disbursement. If there is a sudden rise in the quantity of SF_6 or PFC gas that is needed to fill a certain make and model to its shipping charge, or nameplate capacity, this may be indicative of a leak in the lines. It is good practice to note unusual changes to the quantities used to fill equipment.

Comment: Several entities provided comment as to whether manufacturers should be required to certify to equipment users the actual quantity of SF_6 or PFCs charged into equipment at the manufacturing facility as well as the actual quantity of SF_6 or PFCs charged into equipment at installation. In general, users of electric power equipment supported both certifying requirements as they would provide more accurate acquisitions inputs needed for the mass-balance method required for estimating emissions from electric power equipment use.

Response: EPA had requested comment on whether manufacturers should be required to certify the actual quantity (mass) of SF_6 or PFCs charged into equipment at installation. EPA concludes that the electrical equipment manufacturer should certify the quantity of gas provided in delivered equipment as it represents two inputs to two mass balance equations—the disbursements input (i.e., sales of SF_6 to other entities, including gas in equipment that is sold) of the mass-balance equation used by manufacturers and the acquisitions input (i.e., gas with or alongside equipment) of the mass-balance equation used by electric power systems. Additionally, EPA concludes that the electrical equipment manufacturer should certify the quantity of gas charged into the equipment at installation as it represents the acquisition input to the electric power systems' mass balance equation. The validity of the mass-balance approach is dependent on precise inputs, consequently, inaccuracies of even two or three percent could lead to unacceptably large inaccuracies in emissions estimates. The final rule includes a requirement for electrical equipment manufacturers to maintain such certifications as records and to express the quantity in pounds of SF_6 or PFC gas. Electrical equipment manufacturers should provide copies of the certifications to electric power systems upon request.

Installation of Electrical Equipment at Electric Power Systems

Comment: EPA received comments from electric power systems and electrical equipment manufacturers regarding whether the manufacturer should be responsible for emissions during installation or whether those emissions should become the customer's responsibility. Equipment manufacturers and electric power systems commented that the reporting requirement should be the responsibility of the electric power system at the point in time when the equipment title is transferred.

Response: EPA recognizes that some equipment, namely gas insulated substations, is typically manufactured by the manufacturer onsite and can take several months to complete assembly, inspection, and final acceptance and commissioning. For these projects, gas accounting is best done by the manufacturer that is assembling the

equipment and handling the gas that will be installed into the equipment. Based on EPA's review of these comments, the final rule specifies that the responsibility of reporting emissions from installation practices is dependent upon the point at which the title is transferred to the electric power transmission or distribution entity. In instances when the title to the equipment has not yet been transferred even though the equipment is at the electric power transmission or distribution facility, the equipment manufacturer must estimate and report emissions from equipment installation using the equipment installation mass balance equation or an engineering calculation. In instances when the title of the equipment has been transferred to the electric power transmission or distribution facility, the electric power transmission or distribution facility must estimate and report emissions during installation by accounting for the amount of gas inside the equipment, upon the date of the title transfer to the electric power transmission or distribution entity, in the mass balance acquisition input. If the title is transferred to the electric power transmission or distribution entity and the installation is conducted by a third party, the electric power transmission or distribution facility would be required to report emissions during installation. The role and responsibility of reporters with respect to use of contractors or third parties is elaborated in more detail in the Response to Comment Document for this subpart.

III. Economic Impacts of the Final Rule

This section of the preamble examines the costs and economic impacts of this rule and the estimated economic impacts of the rule on affected entities, including estimated impacts on small entities. Complete detail of the economic impacts of the rule can be found in the text of the economic impact analysis (EIA) in the docket for this rulemaking (EPA–HQ–OAR–2009–0927).

A number of comments on economic impacts of the rule were received regarding the estimation of compliance costs for subparts covered by the rule. A summary of burden related comments can be found in the preamble for each subpart. Complete responses to significant comments received can be found in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Additional Sources of Fluorinated GHGs (EPA–HQ–OAR–2009–0927).

A. How were compliance costs estimated?

1. Summary of Method Used To Estimate Compliance Costs

EPA used available industry and EPA data to characterize conditions at affected sources. Incremental monitoring, recordkeeping, and reporting activities were then identified for each type of facility and the associated costs were estimated. The annual costs are reported in 2006$. EPA's estimated costs of compliance are discussed below and in greater detail in Section 4 of the economic impact analysis (EIA).

Labor Costs. The vast majority of the reporting costs include the time of managers, technical, and administrative staff in both the private sector and the public sector. Staff hours are estimated for activities, including:

- Monitoring (private): Staff hours to operate and maintain emissions monitoring systems.
- Recordkeeping and Reporting (private): Staff hours to gather and process available data and report it to EPA through electronic systems.
- Assuring and releasing data (public): Staff hours to quality assure, analyze, and release reports.

Staff activities and associated labor costs will potentially vary over time. Thus, cost estimates are developed for start-up and first-time reporting, and subsequent reporting. Wage rates to monetize staff time are obtained from the Bureau of Labor Statistics (BLS).

Equipment Costs. Equipment costs include both the initial purchase price and any facility modification that may be required. Based on expert judgment, the engineering costs analyses annualized capital equipment costs with appropriate lifetime and interest rate assumptions. One-time capital costs are amortized over a 10-year cost recovery period at a rate of 7 percent.

B. What are the costs of the rule?

1. Summary of Costs

The total annualized costs incurred under the fluorinated GHG reporting rule will be approximately $6.8 million in the first year and $7.4 million in subsequent years ($2006). This includes a public sector burden estimate of $384,000 for program implementation and verification activities. Table 12 of this preamble shows the first year and subsequent year costs by subpart. In addition, it presents the cost per ton reported, and the relative share of the total cost represented by each subpart.

TABLE 12—NATIONAL ANNUALIZED MANDATORY REPORTING COSTS ESTIMATES (2008$): SUBPARTS I, L, OO AND SS

Subpart	First year			Subsequent years		
	Millions 2006$	$/ton	Share (percent)	Millions 2006$	$/ton	Share (percent)
Subpart I—Electronics Industry	$2.9	$0.33	38	$5.4	$0.33	76
Subpart L—Fluorinated Gas Production	3.0	0.28	40	0.2	0.02	2
Subpart DD—Electric Transmission and Distribution Equipment Use	0.6	0.19	7	0.6	0.05	8
Subpart QQ—Imports and Exports of Fluorinated GHGs	0.7	0.03	9	0.6	0.02	9
Subpart SS—Electrical Equipment Manufacture and Refurbishment and Manufacturing of Electrical Components	0.02	0.01	0.3	0.02	0.01	0
Private Sector, Total	7.2	.....	95	6.8	.....	95
Public Sector, Total	0.4	.....	5	0.4	.....	5
Total	7.6	.....	100	7.2	.....	100

C. What are the economic impacts of the rule?

1. Summary of Economic Impacts

EPA prepared an economic analysis to evaluate the impacts of this rule on affected industries. To estimate the economic impacts, EPA first conducted a screening assessment, comparing the estimated total annualized compliance costs by industry, where industry is defined in terms of North American Industry Classification System (NAICS) code, with industry average revenues. Average cost-to-sales ratios for establishments in affected NAICS codes are typically less than 2 percent.

These low average cost-to-sales ratios indicate that the rule is unlikely to result in significant changes in firms' production decisions or other behavioral changes, and thus unlikely to result in significant changes in prices or quantities in affected markets. Thus, EPA followed its Guidelines for Preparing Economic Analyses (EPA, 2002, p.124–125) and used the engineering cost estimates to measure the social cost of the rule, rather than modeling market responses and using the resulting measures of social cost. Table 13 of this preamble summarizes cost-to-sales ratios for affected industries.

TABLE 13—ESTIMATED COST-TO-SALES RATIOS FOR AFFECTED ENTITIES

[First Year, 2006$]

2007 NAICS	NAICS description	Sub-part	Average cost per entity ($/entity)	All enterprises (percent)
334413	Semiconductor and Related Device Manufacturing	I (Semis)	$19,980	0.03
334413	Semiconductor and Related Device Manufacturing	I (Non-Semis)	16,046	0.02
334119	Other Computer Peripheral Equipment Manufacturing	I (Non-Semis)	16,046	0.06
325120	Industrial Gas Manufacturing	L	126,523	1.08
221121	Electrical Power Systems	DD	2,213	0.00
326140	Polystyrene Foam Product Manufacturing	QQ	3,364	0.03
326150	Urethane and Other Foam Product (except Polystyrene) Manufacturing.	QQ	3,364	0.03
333415	Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.	QQ	3,364	0.01
335313	Switchgear and Switchboard Apparatus Manufacturing	QQ	3,364	0.02
336391	Motor Vehicle Air-Conditioning Manufacturing	QQ	3,364	0.01
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers.	QQ	3,364	0.05
423620	Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers.	QQ	3,364	0.02
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers.	QQ	3,364	0.05
423730	Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers.	QQ	3,364	0.07
423740	Refrigeration Equipment and Supplies Merchant Wholesalers	QQ	3,364	0.09
443111	Household Appliance Stores	QQ	3,364	0.24
443112	Radio, Television and Other Electronics Stores	QQ	3,364	0.14
422610	Plastics Materials and Basic Forms and Shapes Merchant Wholesalers	QQ	3,364	0.03
33361	Engine, Turbine, and Power Transmission Equipment Manufacturing	SS	2,213	0.00
33531	Electrical Equipment Manufacturing	SS	2,213	0.02

D. What are the impacts of the rule on small businesses?

1. Summary of Impacts on Small Businesses

As required by the RFA and Small Business Regulatory Enforcement Fairness Act (SBREFA), EPA assessed the potential impacts of the rule on small entities (small businesses, governments, and non-profit organizations). (See Section IV.C of this preamble for definitions of small entities.)

EPA conducted a screening assessment comparing compliance costs for affected industry sectors to industry-specific receipts data for establishments owned by small businesses. This ratio constitutes a "sales" test that computes the annualized compliance costs of this rule as a percentage of sales and determines whether the ratio exceeds some level (e.g., 1 percent or 3 percent).

The cost-to-sales ratios were constructed at the establishment level (average reporting program costs per establishment/average establishment receipts) for several business size ranges. This allowed EPA to account for receipt differences between establishments owned by large and small businesses and differences in small business definitions across affected industries. The results of the screening assessment are shown in Table 14 of this preamble.

As shown, the cost-to-sales ratios are typically less than 1 percent for establishments owned by small businesses that EPA considers most likely to be covered by the reporting program (e.g., establishments owned by businesses with 20 or more employees).

TABLE 14—ESTIMATED COST-TO-SALES RATIOS BY INDUSTRY AND ENTERPRISE SIZE (FIRST YEAR, 2006$) [a]

NAICS	NAICS Description	Sub-part	SBA Size standard (effective March 11, 2008)	Average cost per entity ($/entity)	All enterprises (percent)	Owned by Enterprises with:					
						1 to 20 Employees (percent)	20 to 99 Employees (percent)	100 to 499 Employees (percent)	500 to 749 Employees (percent)	750 to 999 Employees (percent)	1,000 to 1,499 Employees (percent)
334413	Semiconductor and Related Device Manufacturing.	I (Semis)	500	$19,980	0.03	1.16	0.22	0.07	0.04	0.01	0.02
334413	Semiconductor and Related Device Manufacturing.	I (Non-Semis).	500	16,046	0.02	0.94	0.18	0.05	0.04	0.01	0.02
334119	Other Computer Peripheral Equipment Manufacturing.	I (Non-Semis).	500	16,046	0.06	0.92	0.14	0.04	0.02	0.04	0.01
325120	Industrial Gas Manufacturing	L	1,000	126,523	1.08	23.19	0.77	3.19	NA	NA	NA
221121	Electrical Power Systems	DD	([c])	2,213	0.00	0.10	0.01	0.01	NA	NA	NA
326140	Polystyrene Foam Product Manufacturing.	QQ	500	3,364	0.03	0.25	0.06	0.04	NA	NA	0.01
326150	Urethane and Other Foam Product (except Polystyrene). Manufacturing	QQ	500	3,364	0.03	0.19	0.05	0.02	0.02	NA	NA
333415	Air-Conditioning and Warm Air Heating Equipment. and Commercial and Industrial Refrigeration. Equipment Manufacturing	QQ	750	3,364	0.01	0.22	0.04	0.01	0.01	0.01	0.01
335313	Switchgear and Switchboard Apparatus Manufacturing.	QQ	750	3,364	0.02	0.24	0.05	0.02	NA	NA	NA
336391	Motor Vehicle Air-Conditioning Manufacturing.	QQ	750	3,364	0.01	0.33	0.07	NA	NA	NA	NA
423610	Electrical Apparatus and Equipment, Wiring Supplies,. and Related Equipment Merchant Wholesalers.	QQ	100	3,364	0.05	0.10	0.03	0.03	0.05	0.03	0.03
423620	Electrical and Electronic Appliance, Television, and. Radio Set Merchant Wholesalers	QQ	100	3,364	0.02	0.07	0.02	0.01	0.00	0.01	0.01
423720	Plumbing and Heating Equipment and Supplies. (Hydronics) Merchant Wholesalers	QQ	100	3,364	0.05	0.10	0.02	0.03	0.06	0.03	0.09
423730	Warm Air Heating and Air-Conditioning Equipment. and Supplies Merchant Wholesalers	QQ	100	3,364	0.07	0.13	0.05	0.06	0.10	0.03	NA
423740	Refrigeration Equipment and Supplies Merchant. Wholesalers	QQ	100	3,364	0.09	0.16	0.05	0.10	0.08	0.04	NA
443111	Household Appliance Stores	QQ	$9 M	3,364	0.24	0.42	0.09	0.07	NA	NA	NA
443112	Radio, Television and Other Electronics Stores.	QQ	$9 M	3,364	0.14	0.53	0.15	0.23	NA	NA	NA
422610	Plastics Materials and Basic Forms and Shapes. Merchant Wholesalers	QQ	100	3,364	0.03	0.09	0.03	0.02	0.01	0.01	0.05
33361	Engine, Turbine, and Power Transmission Equipment Manufacturing.	SS	500–1,000	2,213	0.00	0.17	0.03	0.01	0.01	0.01	0.01
33531	Electrical Equipment Manufacturing	SS	750–1,000	2,213	0.02	0.19	0.04	0.01	0.01	0.00	0.01

[a] The Census Bureau defines an enterprise as a business organization consisting of one or more domestic establishments that were specified under common ownership or control. The enterprise and the establishment are the same for single-establishment firms. Each multi-establishment company forms one enterprise—the enterprise employment and annual payroll are summed from the associated establishments. Enterprise size designations are determined by the summed employment of all associated establishments. Since the SBA's business size definitions (*http://www.sba.gov/size*) apply to an establishment's ultimate parent company, we assume in this analysis that the Census Bureau definition of enterprise is consistent with the concept of ultimate parent company that is typically used for Small Business Regulatory Enforcement Fairness Act (SBREFA) screening analyses.

[b] The 2002 SUSB data uses 1997 NAICS codes. For this industry, the relevant code is NAICS 422610.

[c] <4 Million MWh.

EPA acknowledges that several enterprise categories have ratios that exceed this threshold (e.g., enterprise with one to 20 employees). The Industrial Gas Manufacturing industry (NAICS 325120) has sales test results over 1 percent for all enterprises and for most size categories. The following enterprise categories have sales test results over 1 percent and for entities with less than 20 employees: Industrial Gas Manufacturing (325120) and Semiconductor and Related Device Manufacturing (334413).

EPA took a more detailed look at the categories noted above as having sales test ratios above 1 percent. EPA collected information on the entities likely to be covered by the rule as part of the expert sub-group process.

Industrial Gas Manufacturing (325120). Subpart L covers facilities included in NAICS codes for Industrial Gas Manufacturing (NAICS 325120). Within this subpart, EPA identified 13 ultimate parent company names covered by this action. Using publicly available sources (e.g., Hoovers.com), we collected parent company sales and employment data and found that only one company could be classified as a small entity. Using the cost data for a representative entity (see Section 4 of the EIA), EPA determined the small entity's cost-to-sales ratio is below one percent.

Electronic Computer Manufacturing (334111) and Semiconductor and

Related Device Manufacturing (334413). Data on the number of electronics facilities comes from the World Fab Watch and the Flat Panel Display Fabs on Disk datasets. The census data categories cover more establishments than just those facilities covered in the rule. Subpart I covers facilities included in NAICS codes for Semiconductor and Related Device Manufacturing (334413) and Other Computer Peripheral Equipment Manufacturing (334119). The World Fab Watch dataset includes 216 facilities (94 of which exceed the 25,000 ton threshold), while the sum of the two NAICS codes include 1,903 establishments. Covered facilities with emissions greater than 25,000 $mtCO_2e$ per year are unlikely to be included in the 1 to 20 employee size category. Emissions are roughly proportional to production, and establishments with 1 to 20 employees total only 1.6 percent of total receipts, while the threshold excludes 6 percent of industry emissions from the least-emitting facilities.

Although this rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless took several steps to reduce the impact of this rule on small entities. The first and most important step is the establishment of reporting thresholds. As described in Sections II.D through II.H of this preamble, these thresholds exclude hundreds of small entities from the reporting requirements. In addition, EPA is allowing semiconductor manufacturing facilities whose emissions exceed the reporting threshold but whose capacity is equal to or less than 10,500 m^2 of substrate to use default emission factors for their etch processes rather than measuring those factors. Moreover, EPA is requiring annual reporting instead of more frequent reporting.

In addition to the public hearing that EPA held, EPA has an open door policy, similar to the outreach conducted during the development of the proposed and final Part 98. Details of these meetings are available in the docket (EPA–HQ–OAR–2009–0927).

E. What are the benefits of the rule for society?

1. Benefits of the Rule for Society

EPA examined the potential benefits of the Fluorinated GHG Reporting Rule. EPA's previous analysis of the GHG reporting rule discussed the benefits of a reporting system with respect to policy making relevance, transparency issues, and market efficiency. Instead of a quantitative analysis of the benefits, EPA conducted a systematic literature review of existing studies including government, consulting, and scholarly reports.

A mandatory reporting system will benefit the public by increased transparency of facility emissions data. Transparent, public data on emissions allows for accountability of polluters to the public stakeholders who bear the cost of the pollution. Citizens, community groups, and labor unions have made use of data from Pollutant Release and Transfer Registers to negotiate directly with polluters to lower emissions, circumventing greater government regulation. Publicly available emissions data also will allow individuals to alter their consumption habits based on the GHG emissions of producers.

The greatest benefit of mandatory reporting of industry GHG emissions to government will be realized in developing future GHG policies.

Benefits to industry of GHG emissions monitoring include the value of having independent, verifiable data to present to the public to demonstrate appropriate environmental stewardship, and a better understanding of their emission levels and sources to identify opportunities to reduce emissions. Such monitoring allows for inclusion of standardized GHG data into environmental management systems, providing the necessary information to achieve and disseminate their environmental achievements.

Standardization will also be a benefit to industry: Once facilities invest in the institutional knowledge and systems to report emissions, the cost of monitoring should fall and the accuracy of the accounting should improve. A standardized reporting program will also allow for facilities to benchmark themselves against similar facilities to understand better their relative standing within their industry.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

EPA prepared an analysis of the potential costs associated with this action. This analysis is contained in the Economic Impact Analysis (EIA), *Economic Impact Analysis for the Mandatory Reporting of Greenhouse Gas Emissions F-Gases Subparts I, L, DD, QQ, and SS* (EPA–HQ–OAR–2009–0927). A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here. In this report, EPA has identified the regulatory options considered, their costs, the emissions that will likely be reported under each option, and explained the selection of the option chosen for the rule. Overall, EPA has concluded that the costs of the F-Gases Rule are outweighed by the potential benefits of more comprehensive information about GHG emissions. The total annualized cost of the rule will be approximately $7.6 million (in 2006$) during the first year of the program and $7.2 million in subsequent years (including $0.4 million of programmatic costs to the Agency).

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2373.02.

EPA has identified the following goals of the mandatory GHG reporting system:

- Obtain data that is of sufficient quality that it can be used to analyze and inform the development of a range of future climate change policies and potential regulations.
- Balance the rule's coverage to maximize the amount of emissions reported while excluding small emitters.
- Create reporting requirements that are, to the extent possible and appropriate, consistent with existing GHG reporting programs in order to reduce reporting burden for all parties involved.

The information from fluorinated GHG facilities will allow EPA to make well-informed decisions about whether and how to use the CAA to regulate these facilities and encourage voluntary reductions. Because EPA does not yet know the specific policies that will be adopted, the data reported through the mandatory reporting system should be of sufficient quality to inform policy and program development. Also, consistent with the Appropriations Act, the reporting rule covers a broad range of sectors of the economy.

This information collection is mandatory and will be carried out under CAA section 114. Information identified and marked as Confidential Business Information (CBI) will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. However, emission information collected under CAA section 114 generally cannot be claimed as CBI and will be made public.[48]

The projected cost and hour respondent burden in the ICR, averaged over the first three years after promulgation, is $6.87 million and 76,701 hours per year. The estimated average burden per response is 183.93 hours; the frequency of response is annual for all respondents that must comply with the rule's reporting requirements; and the estimated average number of likely respondents per year is 417. The cost burden to respondents resulting from the collection of information includes the total capital and start-up cost annualized over the equipment's expected useful life (averaging $2.70 million per year), a total operation and maintenance component (averaging $9.5 thousand per year), and a labor cost component (averaging $4.15 million per year). Burden is defined at 5 CFR Part 1320.3(b).

These cost numbers differ from those shown elsewhere in the EIA because ICR costs represent the average cost over the first three years of the rule, but costs are reported elsewhere in the EIA for the first year of the rule. Also, the total cost estimate of the rule in the EIA includes the cost to the Agency to administer the program. The ICR differentiates between respondent burden and cost to the Agency, estimated to be $384,000.

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 OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in the final rule.

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the Fluorinated GHG Reporting Rule on small entities, small entity is defined as a small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; according to these size standards, criteria for determining if ultimate parent companies owning affected facilities are categorized as small vary by NAICS. Table 15 of this preamble presents small business criteria for affected NAICS.

TABLE 15—SMALL BUSINESS CRITERIA FOR AFFECTED NAICS

2007 NAICS	NAICS Description	Subpart	SBA Size standard (effective August 22, 2008)
334413	Semiconductor and Related Device Manufacturing	I	500
334119	Other Computer Peripheral Equipment Manufacturing	I	1,000
325120	Industrial Gas Manufacturing	L	1,000
221121	Electrical Power Systems	DD	([1])
326140	Polystyrene Foam Product Manufacturing	QQ	500
326150	Urethane and Other Foam Product (except Polystyrene) Manufacturing	QQ	500
333415	Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.	QQ	750
335313	Switchgear and Switchboard Apparatus Manufacturing	QQ	750
336391	Motor Vehicle Air-Conditioning Manufacturing	QQ	750
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers.	QQ	100
423620	Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers	QQ	100
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	QQ	100
423730	Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers	QQ	100
423740	Refrigeration Equipment and Supplies Merchant Wholesalers	QQ	100
443111	Household Appliance Stores	QQ	$9 M
443112	Radio, Television and Other Electronics Stores	QQ	$9 M
422610	Plastics Materials and Basic Forms and Shapes Merchant Wholesalers	QQ	100
33361	Engine, Turbine, and Power Transmission Equipment Manufacturing	SS	500–1,000
33531	Electrical Equipment Manufacturing	SS	750–1,000

[1] 4 Million MWh.

EPA assessed the potential impacts of this rule on small entities using a sales test, defined as the ratio of total annualized compliance costs to firm sales. Details are provided in Section 5.3 of the EIA. These sales tests compare the average establishment's total annualized mandatory reporting costs to the average establishment receipts for enterprises within several employment categories.[49] The average entity costs used to compute the sales test are the same across all of these enterprise size categories. As a result, the sales test will overstate the cost-to-sales ratio for

[48] Although CBI determinations are usually made on a case-by-case basis, EPA has issued guidance in an earlier **Federal Register** notice on what constitutes emission data that cannot be considered CBI (956 FR 7042–7043, February 21, 1991). As discussed in Section II.B of this preamble, EPA has initiated a separate notice and comment process to make CBI determinations for the data collected under this rule. See 75 FR 39094.

[49] For the one to 20 employee category, we exclude SUSB data for enterprises with zero employees. These enterprises did not operate the entire year.

establishments owned by small businesses, because the reporting costs are likely lower than average entity estimates provided by the engineering cost analysis.

The results of the screening analysis show that for most NAICS, the costs are estimated to be less than 1 percent of sales in all firm size categories. For two NAICS, however, some size categories (especially those with 1–20 employees) show costs exceeding 1 percent of sales. These sectors are Industrial Gas Manufacturing (NAICS 325120) and Semiconductor and Related Device Manufacturing (NAICS 334413). A more careful examination of impacts on small firms in these NAICS codes was conducted.

Analysis of firms in NAICS 334413 shows that firms with fewer than 20 employees produce less than 2 percent of output; firms below the 25,000 Mt CO_2e threshold release approximately 6 percent of emissions. Because emissions and production levels are highly correlated, firms fewer than 20 employees are generally not expected to be affected by the final rule; if they are, their costs are likely to be lower than the overall average costs used in the screening analysis. Thus, EPA does not expect the final rule to impose significant costs to a substantial number of small entities in NAICS 334413.

Subpart L covers facilities included in NAICS codes for Industrial Gas Manufacturing (NAICS 325120). Within this subpart, EPA identified 13 ultimate parent company names covered by the final rule. Using publicly available sources (such as Hoovers.com), EPA collected parent company sales and employment data and found that only one company could be classified as a small entity. Using the cost data for a representative entity (see Section 4 of the EIA), EPA determined the small entity's cost-to-sales ratio is below 1 percent.

After considering the economic impacts of this action on small entities, I therefore certify that this rule will not have a significant economic impact on a substantial number of small entities.

Although this rule will not have a significant economic impact on a substantial number of small entities, the Agency nonetheless tried to reduce the impact of this rule on small entities, including seeking input from a wide range of private- and public-sector stakeholders. When developing the rule, the Agency took special steps to ensure that the burdens imposed on small entities were minimal. The Agency conducted several meetings with industry trade associations to discuss regulatory options and the corresponding burden on industry, such as recordkeeping and reporting. The Agency investigated alternative thresholds and analyzed the marginal costs associated with requiring smaller entities with lower emissions to report.

Through comprehensive outreach activities after proposal of the rule, EPA held meetings and/or conference calls with representatives of the primary audience groups. After proposal, EPA posted a general fact sheet for the rule, information sheets for every source category, and an FAQ document. We continued to meet with stakeholders and entered documentation of all meetings into the docket. One public hearing was held on April 12, 2010, which included three speakers from industry and one non-governmental environmental group. In addition, 20 outreach meetings were held. We considered public comments in developing the final rule.

During rule implementation, EPA will maintain an "open door" policy for stakeholders to ask questions about rule or provide suggestions to EPA about the types of compliance assistance that would be useful to small businesses. EPA intends to develop a range of compliance assistance tools and materials and conduct extensive outreach for the final rule.

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for final rules with "federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Overall, EPA estimates that the total annualized costs of this rule are approximately $7.6 million in the first year, and $7.2 million per year in subsequent years. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Facilities subject to the rule include electronics manufacturers, fluorinated gas producers, electric power systems, electrical equipment manufacturers and refurbishers, as well as importers and exporters of pre-charged equipment and closed-cell foams. None of the facilities currently known to undertake these activities are owned by small government.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This regulation applies to electronics manufacturing, fluorinated gas production, electrical equipment use, electrical equipment manufacture or refurbishment, as well as importers and exporters of pre-charged equipment and closed-cell foams. Few State or local government facilities will be affected. This regulation also does not limit the power of States or localities to collect GHG data and/or regulate GHG emissions. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (59 FR 22951, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications."

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This regulation applies to facilities that manufacture electronic devices, produce fluorinated gases, use electrical equipment in electric power systems, import or export fluorinated GHGs inside pre-charged equipment and closed-cell foams, or manufacture electrical equipment. The only facilities among these that might be owned by Tribal governments are facilities that use electrical equipment in electric power systems. EPA contacted the National Rural Electric Cooperative Association (NRECA) and asked whether any electric power systems owned or operated by Tribal governments were likely to exceed the threshold for reporting emissions from electrical equipment use. NRECA stated

that they did not expect any Tribally-owned or operated electric power systems would trip the threshold. (There are a small number of distribution cooperatives owned by tribes but no transmission or generation.) Thus, Executive Order 13175 does not apply to this action.

Although Executive Order 13175 does not apply to this rule, EPA sought opportunities to provide information to Tribal governments and representatives during development of the MRR rule. In consultation with EPA's American Indian Environment Office, EPA's outreach plan included tribes. During the proposal phase, EPA staff provided information to tribes through conference calls with multiple Indian working groups and organizations at EPA that interact with tribes and through individual calls with two Tribal board members of TCR. In addition, EPA prepared a short article on the GHG reporting rule that appeared on the front page of a Tribal newsletter—*Tribal Air News*—that was distributed to EPA/OAQPS's network of Tribal organizations. EPA gave a presentation on various climate efforts, including Part 98, at the National Tribal Conference on Environmental Management in June, 2008. In addition, EPA had copies of a short information sheet distributed at a meeting of the National Tribal Caucus. EPA participated in a conference call with Tribal air coordinators in April 2009 and prepared a guidance sheet for Tribal governments on the proposal. It was posted on the MRR Web site and published in the Tribal Air Newsletter. For a complete list of Tribal contacts, see the "Summary of EPA Outreach Activities for Developing the Greenhouse Gas Reporting Rule," in the Docket for the initial proposed Part 98 (April, 2009) (EPA–HQ–OAR–2008–0508–055).

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects. This rule relates to monitoring, reporting and recordkeeping at facilities that manufacture, sell, use, import, or export fluorinated GHG related products and does not impact energy supply, distribution or use. Therefore, we conclude that this rule is not likely to have any adverse effects on energy supply, distribution, or use.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule involves technical standards. EPA will use voluntary consensus standards from at least three different voluntary consensus standards bodies, including the following: ASTM, ASME, and International SEMATECH Manufacturing Initiative. These voluntary consensus standards will help facilities monitor, report, and keep records of GHG emissions. No new test methods were developed for this rule. Instead, from existing rules for source categories and voluntary greenhouse gas programs, EPA identified existing means of monitoring, reporting, and keeping records of greenhouse gas emissions. The existing methods (voluntary consensus standards) include a broad range of measurement techniques, such as methods to measure gas or liquid flow and methods to identify the contents of vented or exhausted streams. The test methods are incorporated by reference into the rule and are available as specified in 40 CFR 98.7.

By incorporating voluntary consensus standards into this rule, EPA is both meeting the requirements of the NTTAA and presenting multiple options and flexibility in complying with this rule.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rule does not affect the level of protection provided to human health or the environment because it is a rule addressing information collection and reporting procedures.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the U.S. prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective December 31, 2010.

List of Subjects in 40 CFR Part 98

Environmental protection, Administrative practice and procedure, Greenhouse gases, Incorporation by reference, Suppliers, Reporting and recordkeeping requirements.

Dated: November 8, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 98—[AMENDED]

■ 1. The authority citation for part 98 continues to read as follows:

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

Subpart A—[Amended]

■ 2. Section 98.3 is amended as follows:

■ a. By adding paragraph (c)(4)(vi).

■ b. By revising paragraphs(c)(5)(i) and (c)(5)(ii).

§ 98.3 What are the general monitoring, reporting, and recordkeeping and verification requirements of this part?

* * * * *

(c) * * *

(4) * * *

(vi) When applying paragraph (c)(4)(i) of this section to fluorinated GHGs, calculate and report CO_2e for only those fluorinated GHGs listed in Table A–1 of this subpart.

(5) * * *

(i) Total quantity of GHG aggregated for all GHG from all applicable supply categories in Table A–5 of this subpart and expressed in metric tons of CO_2e calculated using Equation A–1 of this subpart.

(ii) Quantity of each GHG from each applicable supply category in Table A–5 of this subpart, expressed in metric tons of each GHG. For fluorinated GHG, report emissions of all fluorinated GHG, including those not listed in Table A–1 of this subpart.

* * * * *

■ 3. Section 98.6 is amended by revising the definition of "Destruction efficiency" to read as follows:

§ 98.6 Definitions.

* * * * *

Destruction efficiency means the efficiency with which a destruction device reduces the mass of a greenhouse gas fed into the device. Destruction efficiency, or flaring destruction efficiency, refers to the fraction of the gas that leaves the flare partially or fully oxidized. The destruction efficiency is expressed in Equation A–2 of this section:

$$DE = 1 - \frac{tGHG_{iOUT}}{tGHG_{iIN}} \quad \text{(Eq. A-2)}$$

Where:

DE = Destruction Efficiency

$tGHG_{iIN}$ = The mass of GHG i fed into the destruction device

$tGHG_{iOUT}$ = The mass of GHG i exhausted from the destruction device

* * * * *

■ 4. Section 98.7 is amended as follows:

■ a. By revising paragraphs (d)(1) through (d)(8) and paragraph (e)(30).

■ b. By adding paragraph (e)(46) and (e)(47).

■ c. By adding paragraphs (m)(3) through (m)(7).

■ d. By adding paragraph (n).

§ 98.7 What standardized methods are incorporated by reference into this part?

* * * * *

(d) * * *

(1) ASME MFC–3M–2004 Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi, incorporation by reference (IBR) approved for § 98.34(b), § 98.124(m)(1), § 98.244(b), § 98.254(c), § 98.324(e), § 98.344(c), § 98.354(d), § 98.354(h), and § 98.364(e).

(2) ASME MFC–4M–1986 (Reaffirmed 1997) Measurement of Gas Flow by Turbine Meters, IBR approved for § 98.34(b), § 98.124(m)(2), § 98.244(b), § 98.254(c), § 98.324(e), § 98.344(c), § 98.354(h), and § 98.364(e).

(3) ASME MFC–5M–1985 (Reaffirmed 1994) Measurement of Liquid Flow in Closed Conduits Using Transit-Time Ultrasonic Flowmeters, IBR approved for § 98.34(b), § 98.124(m)(3), § 98.244(b), and § 98.354(d).

(4) ASME MFC–6M–1998 Measurement of Fluid Flow in Pipes Using Vortex Flowmeters, IBR approved for § 98.34(b), § 98.124(m)(4), § 98.244(b), § 98.254(c), § 98.324(e), § 98.344(c), § 98.354(h), and § 98.364(e).

(5) ASME MFC–7M–1987 (Reaffirmed 1992) Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles, IBR approved for § 98.34(b), § 98.124(m)(5), § 98.244(b), § 98.254(c), § 98.324(e), § 98.344(c), § 98.354(h), and § 98.364(e).

(6) ASME MFC–9M–1988 (Reaffirmed 2001) Measurement of Liquid Flow in Closed Conduits by Weighing Method, IBR approved for § 98.34(b), § 98.124(m)(6), and § 98.244(b).

(7) ASME MFC–11M–2006 Measurement of Fluid Flow by Means of Coriolis Mass Flowmeters, IBR approved for § 98.124(m)(7), § 98.244(b), § 98.254(c), § 98.324(e), § 98.344(c), and § 98.354(h).

(8) ASME MFC–14M–2003 Measurement of Fluid Flow Using Small Bore Precision Orifice Meters, IBR approved for § 98.124(m)(8), § 98.244(b), § 98.254(c), § 98.324(e), § 98.344(c), § 98.354(h), and § 98.364(e).

* * * * *

(e) * * *

* * * * *

(30) ASTM D6348–03 Standard Test Method for Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform Infrared (FTIR) Spectroscopy (ASTM D6348), IBR approved for § 98.54(b), § 98.124(e)(2), and § 98.224(b).

* * * * *

(46) ASTM D2879–97 (Reapproved 2007) Standard Test Method for Vapor Pressure-Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope (ASTM D2879), approved May 1, 2007, IBR approved for § 98.128.

(47) ASTM D7359–08 Standard Test Method for Total Fluorine, Chlorine and Sulfur in Aromatic Hydrocarbons and Their Mixtures by Oxidative Pyrohydrolytic Combustion followed by Ion Chromatography Detection (Combustion Ion Chromatography-CIC) (ASTM D7359), approved October 15, 2008, IBR approved for § 98.124(e)(2).

* * * * *

(m) * * *

(3) Protocol for Measuring Destruction or Removal Efficiency (DRE) of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing, Version 1, EPA–430–R–10–003, March 2010 (EPA 430–R–10–003), *http://www.epa.gov/semiconductor-pfc/documents/dre_protocol.pdf*, IBR approved for § 98.94(f)(4)(i), § 98.94(g)(3), § 98.97(d)(4), § 98.98, and § 98.124(e)(2).

(4) Emissions Inventory Improvement Program, Volume II: Chapter 16, Methods for Estimating Air Emissions from Chemical Manufacturing Facilities, August 2007, Final, *http://www.epa.gov/ttnchie1/eiip/techreport/volume02/index.html*, IBR approved for § 98.123(c)(1)(i)(A).

(5) Protocol for Equipment Leak Emission Estimates, EPA–453/R–95–017, November 1995 (EPA–453/R–95–017), *http://www.epa.gov/ttnchie1/efdocs/equiplks.pdf*, IBR approved for § 98.123(d)(1)(i), § 98.123(d)(1)(ii), § 98.123(d)(1)(iii), and § 98.124(f)(2).

(6) Tracer Gas Protocol for the Determination of Volumetric Flow Rate Through the Ring Pipe of the Xact Multi-Metals Monitoring System, also known as Other Test Method 24 (Tracer Gas Protocol), Eli Lilly and Company Tippecanoe Laboratories, September 2006, *http://www.epa.gov/ttn/emc/prelim/otm24.pdf*, IBR approved for § 98.124(e)(1)(ii).

(7) Approved Alternative Method 012: An Alternate Procedure for Stack Gas Volumetric Flow Rate Determination (Tracer Gas) (ALT–012), U.S. Environmental Protection Agency Emission Measurement Center, May 23, 1994, *http://www.epa.gov/ttn/emc/approalt/alt-012.pdf*, IBR approved for § 98.124(e)(1)(ii).

* * * * *

(n) The following material is available from the International SEMATECH Manufacturing Initiative, 2706 Montopolis Drive, Austin, Texas 78741, (512) 356–3500, *http://ismi.sematech.org*.

(1) Guideline for Environmental Characterization of Semiconductor Process Equipment, International SEMATECH Manufacturing Initiative Technology Transfer #06124825A–ENG, December 22, 2006 (International SEMATECH #06124825A–ENG), IBR approved for § 98.94(d), § 98.94(d)(1), § 98.94(e), § 98.94(e)(1), § 98.94(g)(1), § 98.96(f)(4), and § 98.97(b)(1).

(2) Guidelines for Environmental Characterization of Semiconductor Equipment, International SEMATECH Technology Transfer #01104197A–XFR, December 4, 2001 (International SEMATECH #01104197A–XFR), IBR approved for § 98.94(d), § 98.94(d)(1), § 98.94(e), § 98.94(e)(1), § 98.94(g)(2), § 98.96(f)(4), and § 98.97(b)(1).

* * * * *

■ 5. Table A–3 to subpart A is amended by adding entries for "Electrical Transmission and Distribution Equipment Use" and "Electrical Transmission Distribution Equipment Manufacture or Refurbishment" to read as follows:

TABLE A–3 TO SUBPART A—SOURCE CATEGORY LIST FOR § 98.2(a)(1)

Source Categories [a] Applicable in 2010 and Future Years
* * * * * * *
Additional Source Categories [a] Applicable in 2011 and Future Years
* * * * * * *
Electrical transmission and distribution equipment use (subpart DD).
Electrical transmission and distribution equipment manufacture or refurbishment (subpart SS).

[a] Source categories are defined in each applicable subpart.

■ 6. Table A–4 to subpart A is amended by adding entries for "Electronics manufacturing" and "Fluorinated gas production" to read as follows:

TABLE A–4 TO SUBPART A—SOURCE CATEGORY LIST FOR § 98.2(a)(2)

Source Categories [a] Applicable in 2010 and Future Years
* * * * * * *
Additional Source Categories [a] Applicable in 2011 and Future Years
* * * * * * *
Electronics manufacturing (subpart I)
Fluorinated gas production (subpart L)

[a] Source categories are defined in each applicable subpart.

■ 7. Table A–5 to subpart A is amended by adding entries for "Importers and exporters of fluorinated greenhouse gases contained in pre-charged equipment or closed-cell foams" to read as follows:

TABLE A–5 TO SUBPART A—SUPPLIER CATEGORY LIST FOR § 98.2(a)(4)

Supplier Categories [a] Applicable in 2010 and Future Years
* * * * * * *
Additional Supplier Categories [a] Applicable in 2011 and Future Years
* * * * * * *
Importers and exporters of fluorinated greenhouse gases contained in pre-charged equipment or closed-cell foams (subpart QQ):
(A) Importers of an annual quantity of fluorinated greenhouse gases contained in pre-charged equipment or closed-cell foams that is equivalent to 25,000 metric tons CO_2e or more.
(B) Exporters of an annual quantity of fluorinated greenhouse gases contained in pre-charged equipment or closed-cell foams that is equivalent to 25,000 metric tons CO_2e or more.

[a] Suppliers are defined in each applicable subpart.

■ 8. Add subpart I to read as follows:

Subpart I—Electronics Manufacturing

Sec.
98.90 Definition of the source category.
98.91 Reporting threshold.
98.92 GHGs to report.
98.93 Calculating GHG emissions.
98.94 Monitoring and QA/QC requirements.
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Subpart I—Electronics Manufacturing

§ 98.90 Definition of the source category.

(a) The electronics manufacturing source category consists of any of the production processes listed in paragraphs (a)(1) through (a)(5) of this section that use fluorinated GHGs or N_2O. Facilities that may use these processes include, but are not limited to, facilities that manufacture micro-electro-mechanical systems (MEMS), liquid crystal displays (LCDs), photovoltaic cells (PV), and semiconductors (including light-emitting diodes (LEDs)).

(1) Any electronics production process in which the etching process uses plasma-generated fluorine atoms and other reactive fluorine-containing fragments, that chemically react with exposed thin-films (e.g., dielectric, metals) or substrate (e.g., silicon) to selectively remove portions of material.

(2) Any electronics production process in which chambers used for depositing thin films are cleaned periodically using plasma-generated fluorine atoms and other reactive fluorine-containing fragments.

(3) Any electronics production process in which wafers are cleaned using plasma generated fluorine atoms or other reactive fluorine-containing fragments to remove residual material from wafer surfaces, including the wafer edge.

(4) Any electronics production process in which the chemical vapor deposition (CVD) process or other manufacturing processes use N_2O.

(5) Any electronics manufacturing production process in which fluorinated GHGs are used as heat transfer fluids to cool process equipment, to control temperature during device testing, to clean substrate surfaces and other parts, and for soldering (e.g., vapor phase reflow).

§ 98.91 Reporting threshold.

(a) You must report GHG emissions under this subpart if electronics manufacturing production processes, as defined in § 98.90, are performed at your facility and your facility meets the requirements of either § 98.2(a)(1) or (a)(2). To calculate total annual GHG emissions for comparison to the 25,000 metric ton CO_2e per year emission threshold in § 98.2(a)(2), follow the requirements of § 98.2(b), with one exception. Rather than using the calculation methodologies in § 98.93 to calculate emissions from electronics manufacturing production processes, calculate emissions of each fluorinated GHG from electronics manufacturing production processes by using paragraphs (a)(1), (a)(2), or (a)(3) of this section, as appropriate, and then sum the emissions of each fluorinated GHG by using paragraph (a)(4) of this section.

(1) If you manufacture semiconductors or MEMS you must calculate annual production process emissions of each input gas i for threshold applicability purposes using the default emission factors shown in Table I–1 to this subpart and Equation I–1 of this subpart.

$$E_i = S * EF_i * GWP_i * 0.001 \quad \text{(Eq. I-1)}$$

Where:

E_i = Annual production process emissions of input gas i for threshold applicability purposes (metric tons CO_2e).

S = 100 percent of annual manufacturing capacity of a facility as calculated using Equation I–5 of this subpart (m^2).

EF_i = Emission factor for input gas i (kg/m^2).

GWP_i = Gas-appropriate GWP as provided in Table A–1 to subpart A of this part.

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

(2) If you manufacture LCDs, you must calculate annual production process emissions of each input gas i for threshold applicability purposes using the default emission factors shown in Table I–1 to this subpart and Equation I–2 of this subpart.

$$E_i = S * EF_i * GWP_i * 0.000001 \quad \text{(Eq. I-2)}$$

Where:

E_i = Annual production process emissions of input gas i for threshold applicability purposes (metric tons Co_2e).

S = 100 percent of annual manufacturing capacity of a facility as calculated using Equation I–5 of this subpart (m^2).

EF_i = Emission factor for input gas i (g/m^2).

GWP_i = Gas-appropriate GWP as provided in Table A–1 to subpart A of this part.

0.000001 = Conversion factor from g to metric tons.

i = Input gas.

(3) If you manufacture PVs, you must calculate annual production process emissions of each input gas i for threshold applicability purposes using gas-appropriate GWP values shown in Table A–1 to subpart A of this part and Equation I–3 of this subpart.

$$E_i = C_i * GWP_i * 0.001 \quad \text{(Eq. I-3)}$$

Where:

E_i = Annual production process emissions of input gas i for threshold applicability purposes (metric tons Co_2e).

C_i = Annual fluorinated GHG (input gas i) purchases or consumption (kg). Only gases used in PV manufacturing that have listed GWP values in Table A–1 to subpart A of this part must be considered for threshold applicability purposes.

GWP_i = Gas-appropriate GWP as provided in Table A–1 to subpart A of this part.

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

(4) You must calculate total annual production process emissions for threshold applicability purposes using Equation I–4 of this subpart.

$$E_T = \delta * \sum_i E_i \quad \text{(Eq. I-4)}$$

Where:

E_T = Annual production process emissions of all fluorinated GHGs for threshold applicability purposes (metric tons Co_2e).

δ = Factor accounting for heat transfer fluid emissions, estimated as 10 percent of total annual production process emissions at a semiconductor facility. Set equal to 1.1 when Equation I–4 of this subpart is used to calculate total annual production process emissions from semiconductor manufacturing. Set equal to 1 when Equation I–4 of this subpart is used to calculate total annual production process emissions from MEMS, LCD, or PV manufacturing.

E_i = Annual production process emissions of input gas i for threshold applicability purposes (metric tons Co_2e), as calculated in Equations I–1, I–2 or I–3 of this subpart.

i = Input gas.

(b) You must calculate annual manufacturing capacity of a facility using Equation I–5 of this subpart.

$$S = \sum_x^{12} W_x \quad \text{(Eq. I-5)}$$

Where:

S = 100 percent of annual manufacturing capacity of a facility (m^2).

W_x = Maximum designed substrate starts of a facility in month x (m^2 per month).

x = Month.

§ 98.92 GHGs to report.

(a) You must report emissions of fluorinated GHGs (as defined in § 98.6) and N_2O. The fluorinated GHGs that are emitted from electronics manufacturing production processes include, but are not limited to, those listed in Table I–2 to this subpart. You must individually report, as appropriate:

(1) Fluorinated GHGs emitted from plasma etching.

(2) Fluorinated GHGs emitted from chamber cleaning.

(3) Fluorinated GHGs emitted from wafer cleaning.

(4) N_2O emitted from chemical vapor deposition and other electronics manufacturing processes.

(5) Fluorinated GHGs emitted from heat transfer fluid use.

(6) All fluorinated GHGs and N_2O consumed, including gases used in manufacturing processes other than those listed in paragraphs (a)(1) through (a)(5) of this section.

(b) CO_2, CH_4, and N_2O combustion emissions from each stationary combustion unit. You must calculate and report these emissions under subpart C of this part (General Stationary Fuel Combustion Sources) by following the requirements of subpart C of this part.

§ 98.93 Calculating GHG emissions.

(a) You must calculate total annual facility-level emissions of each fluorinated GHG used in electronics manufacturing production processes at your facility, for each process type, using Equations I–6 and I–7 of this subpart according to the procedures in paragraphs (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), or (a)(6) of this section, as appropriate. Facilities to which the procedures in paragraphs (a)(1) of this section or (a)(2) of this section apply may elect to use the procedures in paragraph (a)(3) as an alternative. If your facility uses less than 50 kg of a fluorinated GHG in one reporting year, you may calculate emissions as equal to your facility's annual consumption for that specific gas as calculated in Equation I–11 of this subpart. Where your facility is required to perform calculations using default emission factors for gas utilization and by-product formation rates according to the procedures in paragraphs (a)(1) or (a)(2) of this section, and default values are not available for a particular input gas and process type or sub-type combination in Tables I–3, I–4, I–5, I–6, or I–7, you must follow the procedures in paragraph (a)(6) of this section.

$$ProcesstypeE_i = \sum_{j=1}^{N} E_{ij} \quad \text{(Eq. I-6)}$$

Where:

$ProcesstypeE_i$ = Annual emissions of input gas i from the processes type (metric tons).

E_{ij} = Annual emissions of input gas i from recipe, process sub-type, or process type j as calculated in Equation I–8 of this subpart (metric tons).

N = The total number of recipes or process sub-types j that depends on the electronics manufacturing facility and emission calculation methodology. If E_{ij} is calculated for a process type j in Equation I–8 of this subpart, N = 1.

i = Input gas.

j = Recipe, process sub-type, or process type.

$$ProcesstypeBE_k = \sum_{j=1}^{N} \sum_i BE_{ijk} \quad \text{(Eq. I-7)}$$

Where:

$ProcesstypeBE_k$ = Annual emissions of by-product gas k from the processes type (metric tons).

BE_{ijk} = Annual emissions of by-product gas k formed from input gas i used for recipe, process sub-type, or process type j as calculated in Equation I–9 of this subpart (metric tons).

N = The total number of recipes or process sub-types j that depends on the electronics manufacturing facility and emission calculation methodology. If BE_{kij} is calculated for a process type j in Equation I–9 of this subpart, N = 1.

i = Input gas.

j = Recipe, process sub-type, or process type.

k = By-product gas.

(1) If you manufacture MEMS, LCDs, or PVs, you must, except as provided in § 98.93(a)(3), calculate annual facility-level emissions of each fluorinated GHG used for the plasma etching and chamber cleaning process types using default utilization and by-product formation rates as shown in Table I–5, I–6, or I–7 of this subpart, as appropriate, and by using Equations I–8 and I–9 of this subpart.

(2) If you manufacture semiconductors on wafers measuring 300 mm or less in diameter, except as provided in § 98.93(a)(3), you must adhere to the procedures in paragraphs (a)(2)(i) or (a)(2)(ii) of this section.

(i) If your facility has an annual manufacturing capacity, as calculated using Equation I–5 of this subpart, of less than or equal to 10,500 m^2 of substrate, you must adhere to the procedures in paragraphs (a)(i)(A) through (a)(i)(C) of this section.

(A) You must calculate annual facility-level emissions of each fluorinated GHG used for the plasma etching process type using default utilization and by-product formation rates as shown in Table I–3 or I–4 of this subpart, and by using Equations I–8 and I–9 of this subpart.

(B) You must calculate annual facility-level emissions of each fluorinated GHG used for each of the process sub-types associated with the chamber cleaning process type, including in-situ plasma chamber clean, remote plasma chamber clean, and in-situ thermal chamber clean, using default utilization and by-product formation rates as shown in Table I–3 or I–4 of this subpart, and by using Equations I–8 and I–9 of this subpart.

(C) You must calculate annual facility-level emissions of each fluorinated GHG used for the wafer cleaning process type using default utilization and by-product formation rates as shown in Table I–3 or I–4 of this subpart and by using Equations I–8 and I–9 of this subpart.

(ii) If your facility has an annual manufacturing capacity of greater than 10,500 m^2 of substrate, as calculated using Equation I–5 of this subpart, you must adhere to the procedures in paragraphs (a)(ii)(A) through (a)(ii)(C) of this section.

(A) You must calculate annual facility-level emissions of each fluorinated GHG used for the plasma etching process type using recipe-specific utilization and by-product formation rates determined as specified in § 98.94(d), and by using Equations I–8 and I–9 of this subpart. You must develop recipe-specific utilization and by-product formation rates for each individual recipe or set of similar recipes as defined in § 98.98. Recipe-specific utilization and by-product formation rates must be developed each reporting year only for recipes which are not similar to any recipe used in a previous reporting year, as defined in § 98.98.

(B) You must calculate annual facility-level emissions of each fluorinated GHG used for each of the process sub-types associated with the chamber cleaning process type, including in-situ plasma chamber clean, remote plasma chamber clean, and in-situ thermal chamber clean, using default utilization and by-product formation rates as shown in Table I–3 or I–4 to this subpart, and by using Equations I–8 and I–9 of this subpart.

(C) You must calculate annual facility-level emissions of each fluorinated GHG used for the wafer cleaning process type using default utilization and by-product formation rates as shown in Table I–3 or I–4 to this subpart, and by using Equations I–8 and I–9 of this subpart.

(3) If you do not adhere to procedures as specified in paragraphs (a)(1) and (a)(2) of this section, you must calculate annual facility-level emissions of each fluorinated GHG for all fluorinated GHG-emitting production processes using recipe-specific utilization and by-product formation rates determined as specified in § 98.94(d) and by using Equations I–8 and I–9 of this subpart. You must develop recipe-specific utilization and by-product formation rates for each individual recipe or set of similar recipes as defined in § 98.98. Recipe-specific utilization and by-product formation rates must be developed each reporting year only for recipes which are not similar to any recipe used in a previous reporting year, as defined in § 98.98.

(4) If you manufacture semiconductors on wafers measuring greater than 300 mm in diameter, you must calculate annual facility-level emissions of each fluorinated GHG used for all fluorinated GHG emitting production processes using recipe-specific utilization and by-product formation rates as specified in § 98.94(d), and by using Equations I–8 and I–9 of this subpart. You must develop recipe-specific utilization and by-product formation rates for each individual recipe or set of similar recipes as defined in § 98.98. Recipe-specific utilization and by-product formation rates must be developed each reporting year only for recipes that are not similar to any recipe used in a previous reporting year, as defined in § 98.98.

(5) To be included in a set of similar recipes for the purposes of this subpart, a recipe must be similar to the recipe in the set for which recipe-specific utilization and by-product formation rates have been measured.

(6) Where your facility is required to perform calculations using default emission factors for gas utilization and by-product formation rates according to the procedures in paragraphs (a)(1) or (a)(2) of this section, and default values are not available for a particular input gas and process type or sub-type combination in Tables I–3, I–4, I–5, I–6, or I–7, you must follow the procedures in either paragraph (a)(6)(i) or (a)(6)(ii) of this section and use Equations I–8 and I–9 of this subpart.

(i) You must use utilization and by-product formation rates of 0.

(ii) You must develop recipe-specific utilization and by-product formation rates determined as specified in § 98.94(d) for each individual recipe or set of similar recipes as defined in § 98.98. Recipe-specific utilization and by-product formation rates must be developed each reporting year only for recipes that are not similar to any recipe used in a previous reporting year, as defined in § 98.98.

$$E_{ij} = C_{ij} * (1 - U_{ij}) * (1 - a_{ij} * d_{ij}) * 0.001 \qquad \text{(Eq. I-8)}$$

Where:

E_{ij} = Annual emissions of input gas i from recipe, process sub-type, or process type j (metric tons).

C_{ij} = Amount of input gas i consumed for recipe, process sub-type, or process type j, as calculated in Equation I–13 of this subpart (kg).

U_{ij} = Process utilization rate for input gas i for recipe, process sub-type, or process type j (expressed as a decimal fraction).

a_{ij} = Fraction of input gas i used in recipe, process sub-type, or process type j with abatement systems (expressed as a decimal fraction).

d_{ij} = Fraction of input gas i destroyed or removed in abatement systems connected to process tools where recipe, process sub-type, or process type j is used, as calculated in Equation I–14 of

this subpart (expressed as a decimal fraction).

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

j = Recipe, process sub-type, or process type.

$$BE_{ijk} = B_{ijk} * C_{ij} * (1 - a_{ij} * d_{jk}) * 0.001 \quad \text{(Eq. I-9)}$$

Where:

BE_{ijk} = Annual emissions of by-product gas k formed from input gas i from recipe, process sub-type, or process type j (metric tons).

B_{ijk} = By-product formation rate of gas k created as a by-product per amount of input gas i (kg) consumed by recipe, process sub-type, or process type j (kg).

C_{ij} = Amount of input gas i consumed for recipe, process sub-type, or process type j, as calculated in Equation I–13 of this subpart (kg)).

a_{ij} = Fraction of input gas i used for recipe, process sub-type, or process type j with abatement systems (expressed as a decimal fraction).

d_{jk} = Fraction of by-product gas k destroyed or removed in abatement systems connected to process tools where recipe, process sub-type, or process type j is used, as calculated in Equation I–14 of this subpart (expressed as a decimal fraction).

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

j = Recipe, process sub-type, or process type.

k = By-product gas.

(b) You must calculate annual facility-level N_2O emissions from each chemical vapor deposition process and other electronics manufacturing production processes using Equation I–10 of this subpart and the methods in paragraphs (b)(1) and (b)(2) of this section. If your facility uses less than 50 kg of N_2O in one reporting year, you may calculate emissions as equal to your facility's annual consumption for N_2O as calculated in Equation I–11 of this subpart.

(1) You must use a factor for N_2O utilization for chemical vapor deposition processes pursuant to either paragraph (b)(1)(i) or (b)(1)(ii) of this section.

(i) You must develop a facility-specific N_2O utilization factor averaged over all N_2O-using chemical vapor deposition processes determined as specified in § 98.94(e).

(ii) If you do not use a facility-specific N_2O utilization factor for chemical vapor deposition processes, you must use the default utilization factor as shown in Table I–8 to this subpart for N_2O from chemical vapor deposition processes.

(2) You must use a factor for N_2O utilization for other manufacturing processes pursuant to either paragraph (b)(2)(i) or (b)(2)(ii) of this section.

(i) You must develop a facility-specific N_2O utilization factor averaged over all N_2O-using electronics manufacturing production processes other than chemical vapor deposition processes determined as specified in § 98.94(e).

(ii) If you do not use a facility-specific N_2O utilization factor for manufacturing production processes other than chemical vapor deposition, you must use the default utilization factor in as shown in Table I–8 to this subpart for N_2O from manufacturing production processes other than chemical vapor deposition.

$$E(N_2O)_j = C_{N_2O,j} * (1 - U_{N_2O,j}) * (1 - a_{N_2O,j} * d_{N_2O,j}) * 0.001 \quad \text{(Eq. I-10)}$$

Where:

$E(N_2O)_j$ = Annual emissions of N_2O for N_2O-using process j (metric tons).

$C_{N2O,j}$ = Amount of N_2O consumed for N_2O-using process j, as calculated in Equation I–13 of this subpart and apportioned to N_2O process j (kg).

$U_{N2O,j}$ = Process utilization factor for N_2O-using process j (expressed as a decimal fraction).

$a_{N2O,j}$ = Fraction of N_2O used in N_2O-using process j with abatement systems (expressed as a decimal fraction).

$d_{N2O,j}$ = Fraction of N_2O for N_2O-using process j destroyed or removed in abatement systems connected to process tools where process j is used, as calculated in Equation I–14 of this subpart (expressed as a decimal fraction).

0.001 = Conversion factor from kg to metric tons.

j = Type of N_2O-using process, either chemical vapor deposition or other N_2O-using manufacturing processes.

(c) You must calculate total annual input gas i consumption for each fluorinated GHG and N_2O using Equation I–11 of this subpart. Pursuant to § 98.92(a)(6), for all fluorinated GHGs and N_2O used at your facility for which you do not calculate emissions using Equations I–6, I–7, I–8, I–9, and I–10 of this subpart, calculate consumption of these fluorinated GHGs and N_2O using Equation I–11 of this subpart.

$$C_i = (I_{Bi} - I_{Ei} + A_i - D_i) \quad \text{(Eq. I-11)}$$

Where:

C_i = Annual consumption of input gas i (kg per year).

I_{Bi} = Inventory of input gas i stored in containers at the beginning of the reporting year, including heels (kg). For containers in service at the beginning of a reporting year, account for the quantity in these containers as if they were full.

I_{Ei} = Inventory of input gas i stored in containers at the end of the reporting year, including heels (kg). For containers in service at the end of a reporting year, account for the quantity in these containers as if they were full.

A_i = Acquisitions of input gas i during the year through purchases or other transactions, including heels in containers returned to the electronics manufacturing facility (kg).

D_i = Disbursements of input gas i through sales or other transactions during the year, including heels in containers returned by the electronics manufacturing facility to the chemical supplier, as calculated using Equation I–12 of this subpart (kg).

i = Input gas.

(d) You must calculate disbursements of input gas i using facility-wide gas-specific heel factors, as determined in § 98.94(b), and by using Equation I–12 of this subpart.

$$D_i = \sum_{l=1}^{M} \left(h_{il} * N_{il} * F_{il} \right) + X_i \quad \text{(Eq. I-12)}$$

Where:

D_i = Disbursements of input gas i through sales or other transactions during the reporting year, including heels in containers returned by the electronics manufacturing facility to the gas distributor (kg).

h_{il} = Facility-wide gas-specific heel factor for input gas i and container size and type l (expressed as a decimal fraction), as determined in § 98.94(b). If your facility uses less than 50 kg of a fluorinated GHG or N_2O in one reporting year, you may assume that any h_{il} for that fluorinated GHG or N_2O is equal to zero.

N_{il} = Number of containers of size and type l returned to the gas distributor containing the standard heel of input gas i.

F_{il} = Full capacity of containers of size and type l containing input gas i (kg).

X_i = Disbursements under exceptional circumstances of input gas i through sales or other transactions during the year (kg). These include returns of containers whose contents have been weighed due to an exceptional circumstance as specified in § 98.94(b)(4).

i = Input gas.

l = Size and type of gas container.

M = The total number of different sized container types. If only one size and container type is used for an input gas i, M=1.

(e) You must calculate the amount of input gas i consumed for each individual recipe (including those in a set of similar recipes) process sub-type, or process type j, using Equation I–13 of this subpart.

$$C_{ij} = f_{ij} * C_i \quad \text{(Eq. I-13)}$$

Where:

$C_{i,j}$ = The annual amount of input gas i consumed for recipe, process sub-type, or process type j (kg).

$f_{i,j}$ = Recipe-specific, process sub-type-specific, or process type-specific input gas i apportioning factor (expressed as a decimal fraction), as determined in accordance with § 98.94(c).

C_i = Annual consumption of input gas i as calculated using Equation I–11 of this subpart (kg).

i = Input gas.

j = Recipe, process sub-type, or process type.

(f) If you report controlled emissions pursuant to § 98.94(f), you must calculate the fraction of input gas i destroyed in abatement systems for each individual recipe (including those in a set of similar recipes) process sub-type, or process type j by using Equation I–14 of this subpart.

$$d_{i,j} = \frac{\sum_p C_{ijp} * d_{ijp} * u_p}{\sum_p C_{ijp}} \quad \text{(Eq. I-14)}$$

Where:

d_{ij} = Fraction of input gas i destroyed or removed in abatement systems connected to process tools where recipe, process sub-type, or process type j is used (expressed as a decimal fraction).

C_{ijp} = The amount of input gas i consumed for recipe, process sub-type, or process type j fed into abatement system p (kg).

d_{ijp} = Destruction or removal efficiency for input gas i in abatement system p connected to process tools where recipe, process sub-type, or process type j is used (expressed as a decimal fraction). This is zero unless the facility adheres to requirements in § 98.94(f).

u_p = The uptime of abatement system p as calculated in Equation I–15 of this subpart (expressed as a decimal fraction).

i = Input gas.

j = Recipe, process sub-type, or process type.

p = Abatement system.

(g) If you report controlled emissions pursuant to § 98.94(f), you must calculate the uptime by using Equation I–15 of this subpart.

$$u_p = \frac{t_p}{T_p} \quad \text{(Eq. I-15)}$$

Where:

u_p = The uptime of abatement system p (expressed as a decimal fraction).

t_p = The total time in which abatement system p is in an operational mode when fluorinated GHGs or N_2O are flowing through production process tool(s) connected to abatement system p (hours).

T_p = Total time in which fluorinated GHGs or N_2O are flowing through production process tool(s) connected to abatement system p (hours).

p = Abatement system.

(h) If you use fluorinated heat transfer fluids, you must report the annual emissions of fluorinated GHG heat transfer fluids using the mass balance approach described in Equation I–16 of this subpart.

$$EH_i = density_i * (I_{iB} + P_i - N_i + R_i - I_{iE} - D_i) * 0.001 \quad \text{(Eq. I-16)}$$

Where:

EH_i = Emissions of fluorinated GHG heat transfer fluid i, (metric tons/year).

$Density_i$ = Density of fluorinated heat transfer fluid i (kg/l).

I_{iB} = Inventory of fluorinated heat transfer fluid i in containers other than equipment at the beginning of the reporting year (in stock or storage) (l). The inventory at the beginning of the reporting year must be the same as the inventory at the end of the previous reporting year.

P_i = Acquisitions of fluorinated heat transfer fluid i during the reporting year (l), including amounts purchased from chemical suppliers, amounts purchased from equipment suppliers with or inside of equipment, and amounts returned to the facility after off-site recycling.

N_i = Total nameplate capacity (full and proper charge) of equipment that uses fluorinated heat transfer fluid i and that

is newly installed during the reporting year (l).

R_i = Total nameplate capacity (full and proper charge) of equipment that uses fluorinated heat transfer fluid i and that is removed from service during the reporting year (l).

I_{iE} = Inventory of fluorinated heat transfer fluid i in containers other than equipment at the end of the reporting year (in stock or storage)(l).

D_i = Disbursements of fluorinated heat transfer fluid i during the reporting year, including amounts returned to chemical suppliers, sold with or inside of equipment, and sent off-site for verifiable recycling or destruction (l). Disbursements should include only amounts that are properly stored and transported so as to prevent emissions in transit.

0.001 = Conversion factor from kg to metric tons.

i = Heat transfer fluid.

§ 98.94 Monitoring and QA/QC requirements.

(a) For calendar year 2011 monitoring, you may follow the provisions in paragraphs (a)(1) through (a)(3) of this section for best available monitoring methods.

(1) *Best available monitoring methods.* From January 1, 2011 through June 30, 2011, owners or operators may use best available monitoring methods for any parameter that cannot reasonably be measured according to the monitoring and QA/QC requirements of this subpart. The owner or operator must use the calculation methodologies and equations in § 98.93, but may use the best available monitoring method for any parameter for which it is not reasonably feasible to acquire, install, or operate a required piece of monitoring equipment in a facility, or to procure necessary measurement services by January 1, 2011. Starting no later than July 1, 2011, the owner or operator must discontinue using best available monitoring methods and begin following all applicable monitoring and QA/QC requirements of this part, except as provided in paragraphs (a)(2), (a)(3), or (a)(4) of this section. Best available monitoring methods means any of the following methods specified in this paragraph:

(i) Monitoring methods currently used by the facility that do not meet the specifications of this subpart.

(ii) Supplier data.

(iii) Engineering calculations.

(iv) Other company records.

(2) *Requests for extension of the use of best available monitoring methods in 2011 for parameters other than recipe-specific utilization and by-product formation rates for the plasma etching process type.* With respect to any provision of this subpart except § 98.93(a)(2)(ii)(A), the owner or operator may submit a request to the Administrator under this paragraph (a)(2) to use one or more best available monitoring methods to estimate emissions that occur between July 1, 2011 and December 31, 2011.

(i) *Timing of request.* The extension request must be submitted to EPA no later than February 28, 2011.

(ii) *Content of request.* Requests must contain the following information:

(A) A list of specific items of monitoring instrumentation and measuring services for which the request is being made and the locations where each piece of monitoring instrumentation will be installed and where each measurement service will be provided.

(B) Identification of the specific rule requirements for which the instrumentation or measurement service is needed.

(C) A description of the reasons why the needed equipment could not be obtained, installed, or operated or why the needed measurement service could not be provided before July 1, 2011.

(D) If the reason for the extension is that the equipment cannot be purchased, delivered, or installed before July 1, 2011, include supporting documentation such as the date the monitoring equipment was ordered, investigation of alternative suppliers, and the dates by which alternative vendors promised delivery or installation, backorder notices or unexpected delays, descriptions of actions taken to expedite delivery or installation, and the current expected date of delivery or installation.

(E) If the reason for the extension is that service providers were unable to provide necessary measurement services, include supporting documentation demonstrating that these services could not be acquired before July 1, 2011. This documentation must include written correspondence to and from at least three service providers stating that they will not be available to provide the necessary services before July 1, 2011.

(F) A detailed description of the specific best available monitoring methods that the facility will use in place of the required methods.

(G) A description of the specific actions the owner or operator will take to comply with monitoring requirements by January 1, 2012.

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that by July 1, 2011, it is not reasonably feasible to acquire, install, or operate the required piece of monitoring equipment, or procure necessary measurement services to comply with the requirements of this subpart. As a condition for allowing the use of best available monitoring methods through December 31, 2011, facilities must recalculate and resubmit their 2011 estimated emissions using the requirements of this subpart. Where a facility is allowed to use best available monitoring methods for apportioning gas consumption under § 98.94(c), it is not required to verify its 2011 engineering model with its recalculated report. The facility's recalculated emissions must be reported with its report for the 2012 reporting year (to be submitted in 2013) unless the facility receives an additional extension under paragraph (a)(4) of this section.

(3) Requests for extension of the use of best available monitoring methods in 2011 for recipe-specific utilization and by-product formation rates for the plasma etching process type under § 98.93(a)(2)(ii)(A). The owner or operator may submit a request to the Administrator under this paragraph (a)(3) to use one or more best available monitoring methods to estimate emissions that occur between July 1, 2011 and December 31, 2011 for recipe-specific utilization and by-product formation rates for the etching process type under § 98.93(a)(2)(ii)(A).

(i) *Timing of request.* The extension request must be submitted to EPA no later than June 30, 2011.

(ii) *Content of request.* Requests must contain the following information:

(A) The information outlined in paragraphs (a)(2)(ii)(A) through (a)(2)(ii)(F) of this section, substituting December 31, 2011 for July 1, 2011.

(B) A description of the specific actions the owner or operator will take to comply with monitoring requirements by January 1, 2012.

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that by December 31, 2011 it is not reasonably feasible to acquire, install, or operate the required piece of monitoring equipment or procure necessary measurement services to comply with the requirements of this subpart. As a condition for allowing the use of best available monitoring methods through December 31, 2011, facilities must recalculate and resubmit their 2011 estimated emissions using the requirements of this subpart. The facility's recalculated emissions must be reported with its report for the 2012 reporting year (to be submitted in 2013) unless the facility receives an additional

extension under paragraph (a)(4) of this section.

(4) *Requests for extension of the use of best available monitoring methods beyond 2011.* EPA does not anticipate approving the use of best available monitoring methods beyond December 31, 2011; however, EPA reserves the right to approve any such requests submitted for unique and extreme circumstances, which include safety, technical infeasibility, or inconsistency with other local, State or Federal regulations.

(i) *Timing of request.* The extension request must be submitted to EPA no later than June 30, 2011.

(ii) *Content of request.* Requests must contain the following information:

(A) A list of parameters for which the owner or operator is seeking use of best available monitoring methods beyond 2011.

(B) A description of the specific rule requirements that the owner or operator cannot meet, including a detailed explanation as to why the requirements can not be met.

(C) Detailed description of the unique circumstances necessitating an extension, including specific data collection issues that do not meet safety regulations, technical infeasibility, or specific laws or regulations that conflict with data collection.

(D) A detailed explanation and supporting documentation of how and when the owner or operator will receive the required data and/or services to comply with the reporting requirements of this subpart in the future.

(E) A detailed description of the specific best available monitoring methods that the facility will use in place of the required methods.

(F) The Administrator reserves the right to require that the owner or operator provide additional documentation.

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that by December 31, 2011 (or in the case of facilities that are required to calculate and report emissions in accordance with § 98.93(a)(2)(ii)(A), December 31, 2012), it is not reasonably feasible to acquire, install, or operate the required piece of monitoring equipment according to the requirements of this subpart. As a condition for allowing the use of best available monitoring methods through December 31, 2012, facilities must recalculate and resubmit their 2012 estimated emissions using the requirements of this subpart. Where a facility is allowed to use best available monitoring methods for apportioning gas consumption under § 98.94(c), it is not required to verify its 2012 engineering model with its recalculated report. The facility's recalculated emissions must be reported with its report for the 2013 reporting year (to be submitted in 2014).

(b) For purposes of Equation I–12 of this subpart, you must estimate facility-wide gas-specific heel factors for each container type for each gas used, except for fluorinated GHGs or N_2O which your facility uses in quantities less than 50 kg in one reporting year, according to the procedures in paragraphs (b)(1) through (b)(5) of this section.

(1) Base your facility-wide gas-specific heel factors on the trigger point for change out of a container for each container size and type for each gas used. Facility-wide gas-specific heel factors must be expressed as the ratio of the trigger point for change out, in terms of mass, to the initial mass in the container, as determined by paragraphs (b)(2) and (b)(3) of this section.

(2) The trigger points for change out you use to calculate facility-wide gas-specific heel factors in § 98.94(b)(1) must be determined by monitoring the mass or the pressure of your containers. If you monitor the pressure, convert the pressure to mass using the ideal gas law, as displayed in Equation I–17 of this subpart, with the appropriate Z value selected based upon the properties of the gas.

$$pV = ZnRT \quad \text{(Eq. I-17)}$$

Where:

p = Absolute pressure of the gas (Pa).
V = Volume of the gas (m^3).
Z = Compressibility factor.
n = Amount of substance of the gas (moles).
R = Gas constant (8.314 Joule/Kelvin mole).
T = Absolute temperature (K).

(3) The initial mass you use to calculate a facility-wide gas-specific heel factor in § 98.94(b)(1) may be based on the weight of the gas provided to you in gas supplier documents; however, you remain responsible for the accuracy of these masses and weights under this subpart.

(4) If a container is changed in an exceptional circumstance, you must weigh that container or measure the pressure of that container with a pressure gauge, in place of using a heel factor to determine the residual weight of gas. An exceptional circumstance is a change out point that differs by more than 20 percent from the trigger point for change out used to calculate your facility-wide gas-specific heel factor for that gas and container type. When using mass-based trigger points for change out, you must determine if an exceptional circumstance has occurred based on the net weight of gas in the container, excluding the tare weight of the container.

(5) You must re-calculate a facility-wide gas-specific heel factor if you use a trigger point for change out for a gas and container type that differs by more than 5 percent from the previously used trigger point for change out for that gas and container type.

(c) You must develop apportioning factors for fluorinated GHG and N_2O consumption to use in Equation I–13 of this subpart for each input gas i, as appropriate, using a facility-specific engineering model that is documented in your site GHG Monitoring Plan as required under § 98.3(g)(5). This model must be based on a quantifiable metric, such as wafer passes or wafer starts. To verify your model, you must demonstrate its precision and accuracy by adhering to the requirements in paragraphs (c)(1) and (c)(2) of this section.

(1) You must demonstrate that the fluorinated GHG and N_2O apportioning factors are developed using calculations that are repeatable, as defined in § 98.98.

(2) You must demonstrate the accuracy of your facility-specific model by comparing the actual amount of input gas i consumed and the modeled amount of input gas i consumed for the plasma etching and chamber cleaning process types, as follows:

(i) You must analyze at least a 30-day period of operation during which the capacity utilization equals or exceeds 60 percent of its design capacity. In the event your facility operates below 60 percent of its design capacity during the reporting year, you must use the period during which the facility experiences its highest 30-day average utilization for model verification.

(ii) You must compare the actual gas consumed of input gas i to the modeled gas consumed of input gas i for one fluorinated GHG reported under this subpart under the plasma etching process type and the chamber cleaning

process type. You must certify that the fluorinated GHGs selected for comparison correspond to the largest quantities, on a mass basis, of fluorinated GHGs used at your facility during the reporting year for the plasma etching process type and the chamber cleaning process type.

(iii) You must demonstrate that the comparison performed for the largest quantity of gas, on a mass basis, consumed under the plasma etching process type in paragraph (c)(2)(ii) of this section, does not result in a difference between the actual and modeled gas consumption that exceeds five percent relative to actual gas consumption, reported to one significant figure using standard rounding conventions.

(d) If you use factors for fluorinated GHG process utilization and by-product formation rates other than the defaults provided in Tables I–3, I–4, I–5, I–6, and I–7 to this subpart, you must use utilization and by-product formation rates that are developed with measurements made using the International SEMATECH #06124825A–ENG (incorporated by reference, see § 98.7). You may use recipe-specific utilization and by-product formation rates that were measured using the International SEMATECH #01104197A–XFR (incorporated by reference, see § 98.7) provided the measurements were made prior to January 1, 2007. You may use recipe-specific utilization and by-product formation rates measured by a third party, such as a manufacturing equipment supplier, if the conditions in paragraphs (d)(1) and (d)(2) of this section are met.

(1) The third party has measured recipe-specific utilization and by-product formation rates using the International SEMATECH #06124825A–ENG (incorporated by reference, see § 98.7,) or the International SEMATECH #01104197A–XFR (incorporated by reference, see § 98.7) provided the measurements were made prior to January 1, 2007.

(2) Measurements made by a third party to develop recipe-specific utilization and by-product formation rates must have been made for recipes that are similar recipes to those used at your facility, as defined in § 98.98.

(e) If you use N_2O utilization factors other than the defaults provided in Table I–8 to this subpart, you must use factors developed with measurements made using the International SEMATECH #06124825A–ENG (incorporated by reference, see § 98.7). You may use measurements made using the International SEMATECH #01104197A–XFR (incorporated by reference, see § 98.7) provided the measurements were made prior to January 1, 2007. You may use N_2O utilization factors measured by a third party, such as a manufacturing equipment supplier, if the conditions in paragraphs (e)(1) and (e)(2) of this section are met.

(1) The third party has measured N_2O utilization factors using the International SEMATECH #06124825A–ENG (incorporated by reference, see § 98.7,) or the International SEMATECH #01104197A–XFR (incorporated by reference, see § 98.7) provided the measurements were made prior to January 1, 2007.

(2) The conditions under which the measurements were made are representative of your facility's N_2O emitting production processes.

(f) If your facility employs abatement systems and you wish to reflect emission reductions due to these systems in calculations in § 98.93, you must adhere to the procedures in paragraphs (f)(1) and (f)(2) of this section. If you use the default destruction or removal efficiency of 60 percent, you must adhere to procedures in paragraph (f)(3) of this section. If you use either a properly measured destruction or removal efficiency as defined in § 98.98, or a class average of properly measured destruction or removal efficiencies during a reporting year, you must adhere to procedures in paragraph (f)(4) of this section.

(1) You must certify and document that the abatement systems are properly installed, operated, and maintained according to manufacturers' specifications by adhering to the procedures in paragraphs (1)(i) and (1)(ii) of this section.

(i) You must certify and document proper installation by verifying your systems were installed in accordance with the manufacturers' specifications.

(ii) You must certify and document your systems are operated and maintained in accordance with the manufacturers' specifications.

(2) You must calculate and report the uptime of abatement systems using Equation I–15 of this subpart.

(3) To report emissions using the default destruction or removal efficiency of 60 percent, you must certify and document that the abatement systems at your facility are specifically designed for fluorinated GHG and N_2O abatement.

(4) If you do not use the default destruction or removal efficiency value to calculate and report controlled emissions, you must use either a properly measured destruction or removal efficiency, or a class average of properly measured destruction or removal efficiencies, determined in accordance with procedures in paragraphs (f)(4)(i) through (f)(4)(v) of this section.

(i) A properly measured destruction or removal efficiency value must be determined in accordance with EPA 430–R–10–003 (incorporated by reference, see § 98.7).

(ii) You must annually select and properly measure the destruction or removal efficiency for a random sample of abatement systems to include in a random sampling abatement system testing program (RSASTP) in accordance with procedures in paragraphs (f)(4)(ii)(A) and (f)(4)(ii)(B) of this section.

(A) Each reporting year for each abatement system class a random sample of three or 20 percent of installed abatement systems, whichever is greater, must be tested. If 20 percent of the total number of abatement systems in each class does not equate to a whole number, the number of systems to be tested must be determined by rounding up to the nearest integer.

(B) You must select the random sample each reporting year for the RSASTP without repetition of previously-measured systems in the sample, until all systems in each class are properly measured in a 5-year period.

(iii) If you have measured the destruction or removal efficiency of a particular abatement system during the previous 2-year period, you must calculate emissions from that system using the most recently measured destruction or removal efficiency for that particular system.

(iv) If the destruction or removal efficiency of an individual abatement system has not been properly measured during the previous 2-year period, you may use a simple average of the properly measured destruction or removal efficiencies for systems of that class, in accordance with the RSASTP. Your facility must maintain or exceed the RSASTP schedule if you wish to apply class average destruction or removal efficiency factors to abatement systems that have not yet been properly measured.

(v) If your facility uses redundant abatement systems, you may account for the total abatement system uptime calculated for a specific exhaust stream during the reporting year.

(g) You must adhere to the QA/QC procedures of this paragraph when calculating fluorinated GHG and N_2O emissions from electronics manufacturing production processes:

(1) Follow the QA/QC procedures in the International SEMATECH #06124825A–ENG (incorporated by reference, see § 98.7) when measuring and calculating facility-specific, recipe-specific fluorinated GHG and N_2O utilization and by-product formation rates.

(2) Where you use facility-specific, recipe-specific fluorinated GHG and N_2O utilization and by-product formation rates measured prior to January 1, 2007, verify that the QA/QC procedures in the International SEMATECH #01104197A–XFR (incorporated by reference, see § 98.7) were followed during measurement and calculation of the factors.

(3) Follow the QA/QC procedures in accordance with those in EPA 430–R–10–003 (incorporated by reference, see § 98.7) when calculating abatement systems destruction or removal efficiencies.

(4) Demonstrate that as part of normal facility operations the inventory of gas stored in containers at the beginning of the reporting year is the same as the inventory of gas stored in containers at the end of the previous reporting year.

(h) You must adhere to the QA/QC procedures of this paragraph (h) when calculating annual gas consumption for each fluorinated GHG and N_2O used at your facility and fluorinated GHG emissions from heat transfer fluid use.

(1) Review all inputs to Equations I–11 and I–16 of this subpart to ensure that all inputs and outputs are accounted for.

(2) Do not enter negative inputs into the mass balance Equations I–11 and I–16 of this subpart and ensure that no negative emissions are calculated.

(3) Ensure that the inventory at the beginning of one reporting year is identical to the inventory reported at the end of the previous reporting year.

(4) Ensure that the total quantity of gas i in containers in service at the end of a reporting year is accounted for as if the in-service containers were full for Equation I–11 of this subpart. Ensure also that the same quantity is accounted for in the inventory of input gas i stored in containers at the beginning of the subsequent reporting year.

(i) All flowmeters, weigh scales, pressure gauges, and thermometers used to measure quantities that are monitored under this section or used in calculations under § 98.93 must have an accuracy and precision of one percent of full scale or better.

§ 98.95 Procedures for estimating missing data.

(a) Except as provided in paragraph (b) of this section, a complete record of all measured parameters used in the fluorinated GHG and N_2O emissions calculations in § 98.93 and § 98.94 is required.

(b) If you use heat transfer fluids at your facility and are missing data for one or more of the parameters in Equation I–16 of this subpart, you must estimate heat transfer fluid emissions using the arithmetic average of the emission rates for the reporting year immediately preceding the period of missing data and the months immediately following the period of missing data. Alternatively, you may estimate missing information using records from the heat transfer fluid supplier. You must document the method used and values used for all missing data values.

§ 98.96 Data reporting requirements.

In addition to the information required by § 98.3(c), you must include in each annual report the following information for each electronics manufacturing facility:

(a) Annual manufacturing capacity of your facility as determined in Equation I–5 of this subpart.

(b) For facilities that manufacture semiconductors, the diameter of wafers manufactured at your facility (mm).

(c) Annual emissions of:

(1) Each fluorinated GHG emitted from each process type for which your facility is required to calculate emissions as calculated in Equations I–6 and I–7 of this subpart.

(2) Each fluorinated GHG emitted from each individual recipe (including those in a set of similar recipes), or process sub-type as calculated in Equations I–8 and I–9 of this subpart, as applicable.

(3) N_2O emitted from each chemical vapor deposition process and from other N_2O-using manufacturing processes as calculated in Equation I–10 of this subpart.

(4) Each heat transfer fluid emitted as calculated in Equation 1–16 of this subpart.

(d) The method of emissions calculation used in § 98.93.

(e) Annual production in terms of substrate surface area (e.g., silicon, PV-cell, glass).

(f) When you use factors for fluorinated GHG process utilization and by-product formation rates other than the defaults provided in Tables I–3, I–4, I–5, I–6, and I–7 to this subpart and/or N_2O utilization factors other than the defaults provided in Table I–8 to this subpart, you must report the following, as applicable:

(1) The recipe-specific utilization and by-product formation rates for each individual recipe (or set of similar recipes) and/or facility-specific N_2O utilization factors.

(2) For recipe-specific utilization and by-product formation rates, the film or substrate that was etched/cleaned and the feature type that was etched, as applicable.

(3) Certification that the recipes included in a set of similar recipes are similar, as defined in § 98.98.

(4) Certification that the measurements for all reported recipe-specific utilization and by-product formation rates and/or facility-specific N_2O utilization factors were made using the International SEMATECH #06124825A–ENG (incorporated by reference, see § 98.7), or the International SEMATECH #01104197A–XFR (incorporated by reference, see § 98.7) if measurements were made prior to January 1, 2007.

(5) Source of the recipe-specific utilization and by-product formation rates and/or facility-specific-N_2O utilization factors.

(6) Certification that the conditions under which the measurements were made for facility-specific N_2O utilization factors are representative of your facility's N_2O emitting production processes.

(g) Annual gas consumption for each fluorinated GHG and N_2O as calculated in Equation I–11 of this subpart, including where your facility used less than 50 kg of a particular fluorinated GHG or N_2O during the reporting year. For all fluorinated GHGs and N_2O used at your facility for which you have not calculated emissions using Equations I–6, I–7, I–8, I–9, and I–10 of this subpart, the chemical name of the GHG used, the annual consumption of the gas, and a brief description of its use.

(h) All inputs used to calculate gas consumption in Equation I–11 of this subpart, for each fluorinated GHG and N_2O used.

(i) Disbursements for each fluorinated GHG and N_2O during the reporting year, as calculated using Equation I–12 of this subpart.

(j) All inputs used to calculate disbursements for each fluorinated GHG and N_2O used in Equation I–12 of this subpart, including all facility-wide gas-specific heel factors used for each fluorinated GHG and N_2O. If your facility used less than 50 kg of a particular fluorinated GHG during the reporting year, facility-wide gas-specific heel factors do not need to be reported for those gases.

(k) Annual amount of each fluorinated GHG consumed for each recipe, process sub-type, or process type, as appropriate, and the annual amount of

N_2O consumed for each chemical vapor deposition and other electronics manufacturing production processes, as calculated using Equation I–13 of this subpart.

(l) All apportioning factors used to apportion fluorinated GHG and N_2O consumption.

(m) For the facility-specific apportioning model used to apportion fluorinated GHG and N_2O consumption under § 98.94(c), the following information to determine it is verified in accordance with procedures in § 98.94(c)(1) and (2):

(i) Identification of the quantifiable metric used in your facility-specific engineering model to apportion gas consumption.

(ii) The start and end dates selected under § 98.94(c)(2)(i).

(iii) Certification that the gases you selected under § 98.94(c)(2)(ii) correspond to the largest quantities consumed on a mass basis, at your facility in the reporting year for the plasma etching process type and the chamber cleaning process type.

(iv) The result of the calculation comparing the actual and modeled gas consumption under § 98.94(c)(2)(iii).

(n) Fraction of each fluorinated GHG or N_2O fed into a recipe, process sub-type, or process type that is fed into tools connected to abatement systems.

(o) Fraction of each fluorinated GHG or N_2O destroyed or removed in abatement systems connected to process tools where recipe, process sub-type, or process type j is used, as well as all inputs and calculations used to determine the inputs for Equation I–14 of this subpart.

(p) Inventory and description of all abatement systems through which fluorinated GHGs or N_2O flow at your facility, including the number of devices of each manufacturer, model numbers, manufacturer claimed fluorinated GHG and N_2O destruction or removal efficiencies, if any, and records of destruction or removal efficiency measurements over their in-use lives. The inventory of abatement systems must describe the tools with model numbers and the recipe(s), process sub-type, or process type for which these systems treat exhaust.

(q) For each abatement system through which fluorinated GHGs or N_2O flow at your facility, for which you are reporting controlled emissions, the following:

(1) Certification that each abatement system has been installed, maintained, and operated in accordance with manufacturers' specifications.

(2) All inputs and results of calculations made accounting for the uptime of abatement systems used during the reporting year, in accordance with Equations I–14 and I–15 of this subpart.

(3) The default destruction or removal efficiency value or properly measured destruction or removal efficiencies for each abatement system used in the reporting year.

(4) Where the default destruction or removal efficiency value is used to report controlled emissions, certification that the abatement systems for which emissions are being reported were specifically designed for fluorinated GHG and N_2O abatement. You must support this certification by providing abatement system supplier documentation stating that the system was designed for fluorinated GHG and N_2O abatement.

(5) Where properly measured destruction or removal efficiencies or class averages of destruction or removal efficiencies are used, the following must also be reported:

(i) A description of the class, including the abatement system manufacturer and model number and the fluorinated GHG(s) and N_2O in the effluent stream.

(ii) The total number of systems in that class for the reporting year.

(iii) The total number of systems for which destruction or removal efficiency was properly measured in that class for the reporting year.

(iv) A description of the calculation used to determine the class average, including all inputs to the calculation.

(v) A description of the method used for randomly selecting class members for testing.

(r) For heat transfer fluid emissions, inputs to the heat transfer fluid mass balance equation, Equation I–16 of this subpart, for each fluorinated GHG used.

(s) Where missing data procedures were used to estimate inputs into the heat transfer fluid mass balance equation under § 98.95(b), the number of times missing data procedures were followed in the reporting year, the method used to estimate the missing data, and the estimates of those data.

(t) A brief description of each "best available monitoring method" used according to § 98.94(a), the parameter measured or estimated using the method, and the time period during which the "best available monitoring method" was used.

§ 98.97 Records that must be retained.

In addition to the information required by § 98.3(g), you must retain the following records:

(a) All data used and copies of calculations made as part of estimating gas consumption and emissions, including all spreadsheets.

(b) Documentation for the values used for fluorinated GHG and N_2O utilization and by-product formation rates. If you use facility-specific and recipe-specific utilization and by-product formation rates, the following records must also be retained, as applicable:

(1) Complete documentation and final report for measurements for recipe-specific utilization and by-product formation rates demonstrating that the values were measured using International SEMATECH #06124825A–ENG (incorporated by reference, see § 98.7) or, if the measurements were made prior to January 1, 2007, International SEMATECH #01104197A–XFR (incorporated by reference, see § 98.7).

(2) Documentation that recipe-specific utilization and by-product formation rates developed for your facility are measured for recipes that are similar to those used at your facility, as defined in § 98.98. The documentation must include, at a minimum, recorded to the appropriate number of significant figures, reactor pressure, flow rates, chemical composition, applied RF power, direct current (DC) bias, temperature, flow stabilization time, and duration.

(3) Documentation that your facility's N_2O measurements are representative of the N_2O emitting processes at your facility.

(4) The date and results of the initial and any subsequent tests to determine utilization and by-product formation rates.

(c) Documentation for the facility-specific engineering model used to apportion fluorinated GHG and N_2O consumption. This documentation must be part of your site GHG Monitoring Plan as required under § 98.3(g)(5). At a minimum, you must retain the following:

(1) A clear, detailed description of the facility-specific model, including how it was developed; the quantifiable metric used in the model; all sources of information, equations, and formulas, each with clear definitions of terms and variables; and a clear record of any changes made to the model while it was used to apportion fluorinated GHG and N_2O consumption across individual recipes (including those in a set of similar recipes), process sub-types, and/or process types.

(2) Sample calculations used for developing a recipe-specific, process sub-type-specific, or process type-specific gas apportioning factors (f_{ij}) for the two fluorinated GHGs used at your

facility in the largest quantities, on a mass basis, during the reporting year.

(d) For each abatement system through which fluorinated GHGs or N_2O flow at your facility, for which you are reporting controlled emissions, the following:

(1) Documentation to certify the abatement system is installed, maintained, and operated in accordance with manufacturers' specifications.

(2) Abatement system calibration and maintenance records.

(3) Where the default destruction or removal efficiency value is used, documentation from the abatement system supplier describing the equipment's designed purpose and emission control capabilities for fluorinated GHG and N_2O.

(4) Where properly measured DRE is used to report emissions, dated certification by the technician who made the measurement that the destruction or removal efficiency is calculated in accordance with methods in EPA 430–R–10–003 (incorporated by reference, see § 98.7), complete documentation of the results of any initial and subsequent tests, and the final report as specified in EPA 430–R–10–003 (incorporated by reference, see § 98.7).

(e) Purchase records for gas purchased.

(f) Invoices for gas purchases and sales.

(g) Documents and records used to monitor and calculate abatement system uptime.

(h) GHG Monitoring Plans, as described in § 98.3(g)(5), must be completed by April 1, 2011. You must update your GHG Monitoring Plan to comply with § 98.94(c) consistent with the requirements in § 98.3(g)(5)(iii).

§ 98.98 Definitions.

Except as provided in this section, all of the terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part. If a conflict exists between a definition provided in this subpart and a definition provided in subpart A, the definition in this subpart takes precedence for the reporting requirements in this subpart.

Abatement system means a device or equipment that destroys or removes fluorinated GHGs and N_2O in waste streams from one or more electronics manufacturing production processes.

Actual gas consumption means the quantity of gas used during wafer/substrate processing over some period based on a measured change in gas container weight or gas container pressure or on a measured volume of gas.

By-product formation means the creation of fluorinated GHGs during electronics manufacturing production processes or the creation of fluorinated GHGs by an abatement system. By-product formation is the ratio of the mass of the by-product formed to the mass flow of the input gas, where, for multi-fluorinated-GHG recipes, the denominator corresponds to the fluorinated GHG with the largest mass flow.

Chamber cleaning is a process type that consists of the process sub-types defined in paragraphs (1) through (3) of this definition.

(1) In situ plasma process sub-type consists of the cleaning of thin-film production chambers, after processing substrates, with a fluorinated GHG cleaning reagent that is dissociated into its cleaning constituents by a plasma generated inside the chamber where the film is produced.

(2) Remote plasma process sub-type consists of the cleaning of thin-film production chambers, after processing substrates, with a fluorinated GHG cleaning reagent dissociated by a remotely located plasma source.

(3) In situ thermal process sub-type consists of the cleaning of thin-film production chambers, after processing substrates, with a fluorinated GHG cleaning reagent that is thermally dissociated into its cleaning constituents inside the chamber where thin films are produced.

Class means a category of abatement systems grouped by manufacturer model number(s) and by the gas that the system abates, including N_2O and carbon tetrafluoride (CF_4) direct emissions and by-product formation, and all other fluorinated GHG direct emissions and by-product formation. Classes may also include any other abatement systems for which the reporting facility wishes to report controlled emissions provided that class is identified.

Controlled emissions means the quantity of emissions that are released to the atmosphere after application of an emission control device (*e.g.,* abatement system).

Destruction or removal efficiency (DRE) means the efficiency of an abatement system to destroy or remove fluorinated GHGs, N_2O, or both. The destruction or removal efficiency is equal to one minus the ratio of the mass of all relevant GHGs exiting the abatement system to the mass of GHG entering the abatement system. When GHGs are formed in an abatement system, destruction or removal efficiency is expressed as one minus the ratio of amounts of exiting GHGs to the amounts entering the system in units of CO_2-equivalents (CO_2e).

Gas utilization means the fraction of input N_2O or fluorinated GHG converted to other substances during the etching, deposition, and/or wafer and chamber cleaning processes. Gas utilization is expressed as a rate or factor for specific electronics manufacturing recipes, process sub-types, or process types.

Heat transfer fluids are fluorinated GHGs used for temperature control, device testing, and soldering in certain types of electronic manufacturing production processes. Heat transfer fluids used in the electronics sector include perfluoropolyethers, perfluoroalkanes, perfluoroethers, tertiary perfluoroamines, and perfluorocyclic ethers. Electronics manufacturers may also use these same fluorinated chemicals to clean substrate surfaces and other parts.

Heel means the amount of gas that remains in a gas container after it is discharged or off-loaded; heel may vary by container type.

Individual recipe means a specific combination of gases, under specific conditions of reactor temperature, pressure, flow, radio frequency (RF) power and duration, used repeatedly to fabricate a specific feature on a specific film or substrate.

Maximum designed substrate starts means the maximum quantity of substrates, expressed as surface area, that could be started each month during a reporting year if the facility were fully equipped as defined in the facility design specifications and if the equipment were fully utilized. It denotes 100 percent of annual manufacturing capacity of a facility.

Modeled gas consumed means the quantity of gas used during wafer/substrate processing over some period based on a verified facility-specific engineering model used to apportion gas consumption.

Nameplate capacity means the full and proper charge of chemical specified by the equipment manufacturer to achieve the equipment's specified performance. The nameplate capacity is typically indicated on the equipment's nameplate; it is not necessarily the actual charge, which may be influenced by leakage and other emissions.

Operational mode means the time in which an abatement system is being operated within the range of parameters as specified in the operations manual provided by the system manufacturer.

Plasma etching is a process type that consists of any production process using fluorinated GHG reagents to selectively

remove materials from a substrate during electronics manufacturing. The materials removed may include SiO_2, SiO_x-based or fully organic-based thin-film material, SiN, SiON, Si_3N_4, SiC, SiCO, SiCN, etc. (represented by the general chemical formula, $Si_wO_xN_yX_z$ where w, x, y and z are zero or integers and X may be some other element such as carbon), substrate, or metal films (such as aluminum or tungsten).

Process sub-type is a set of similar manufacturing steps, more closely related within a broad process type. For example, the chamber cleaning process type includes in-situ plasma chamber cleaning, remote plasma chamber cleaning, and in-situ thermal chamber cleaning sub-types.

Process types are broad groups of manufacturing steps used at a facility associated with substrate (*e.g.,* wafer) processing during device manufacture for which fluorinated GHG emissions and fluorinated GHG usages are calculated and reported. The process types are Plasma etching, Chamber cleaning, and Wafer cleaning.

Properly measured destruction or removal efficiency means destruction or removal efficiencies measured in accordance with EPA 430–R–10–003 (incorporated by reference, see § 98.7).

The Random Sampling Abatement System Testing Program (RSASTP) means the required frequency for measuring the destruction or removal efficiencies of abatement systems in order to apply properly measured destruction or removal efficiencies to report controlled emissions.

Redundant abatement systems means a system that is specifically designed, installed and operated for the purpose of destroying fluorinated GHGs and N_2O gases. A redundant abatement system is used as a backup to the main fluorinated GHGs and N_2O abatement system during those times when the main system is not functioning or operating in accordance with design and operating specifications.

Repeatable means that the variables used in the formulas for the facility's engineering model for gas apportioning factors are based on observable and measurable quantities that govern gas consumption rather than engineering judgment about those quantities or gas consumption.

Similar, with respect to recipes, means those recipes that are composed of the same set of chemicals and have the same flow stabilization times and where the documented differences, considered separately, in reactor pressure, individual gas flow rates, and applied radio frequency (RF) power are less than or equal to plus or minus 10 percent. For purposes of comparing and documenting recipes that are similar, facilities may use either the best known method provided by an equipment manufacturer or the process of record, for which emission factors for either have been measured.

Trigger point for change out means the residual weight or pressure of a gas container type that a facility uses to change out that gas container.

Uptime means the ratio of the total time during which the abatement system is in an operational mode with fluorinated GHGs or N_2O flowing through production process tool(s) connected to that abatement system, to the total time during which fluorinated GHGs or N_2O are flowing through production process tool(s) connected to that abatement system.

Wafer cleaning is a process type that consists of any production process using fluorinated GHG reagents to clean wafers at any step during production.

Wafer passes is a count of the number of times a wafer substrate is processed in a specific process recipe, sub-type, or type. The total number of wafer passes over a reporting year is the number of wafer passes per tool multiplied by the number of operational process tools in use during the reporting year.

Wafer starts means the number of fresh wafers that are introduced into the fabrication sequence each month. It includes test wafers, which means wafers that are exposed to all of the conditions of process characterization, including but not limited to actual etch conditions or actual film deposition conditions.

TABLE I–1 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS FOR THRESHOLD APPLICABILITY DETERMINATION

Product type	Emission factors EF_i					
	CF_4	C_2F_6	CHF_3	C_3F_8	NF_3	SF_6
Semiconductors (kg/m²)	0.90	1.00	0.04	0.05	0.04	0.20
LCD (g/m²)	0.50	NA	NA	NA	0.90	4.00
MEMS (kg/m²)	NA	NA	NA	NA	NA	1.02

Notes: NA denotes not applicable based on currently available information.

TABLE I–2 TO SUBPART I OF PART 98—EXAMPLES OF FLUORINATED GHGS USED BY THE ELECTRONICS INDUSTRY

Product type	Fluorinated GHGs used during manufacture
Electronics	CF_4, C_2F_6, C_3F_8, c-C_4F_8, c-C_4F_8O, C_4F_6, C_5F_8, CHF_3, CH_2F_2, NF_3, SF_6, and HTFs (CF_3-(O–CF(CF_3)-CF_2)$_n$-(O–CF_2)$_m$-O–CF_3, C_nF_{2n+2}, C_nF_{2n+1}(O)C_mF_{2m+1}, $C_nF_{2n}O$, $(C_nF_{2n+1})_{3N}$).

TABLE I–3 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 150MM AND 200 MM WAFER SIZES

Process type/Sub-type	Process gas i										
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
Plasma Etching											
$1–U_i$	0.69	0.56	0.38	0.093	NA	0.25	0.038	0.20	0.14	NA	NA
BCF_4	NA	0.23	0.026	0.021	NA	0.19	0.0040	NA	0.13	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	0.084	NA	NA	0.12	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

TABLE I–3 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 150MM AND 200 MM WAFER SIZES—Continued

Process type/Sub-type	Process gas i										
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
Chamber Cleaning											
In situ plasma cleaning:											
$1–U_i$	0.92	0.55	NA	NA	0.40	0.10	0.18	NA	NA	NA	0.14
BCF_4	NA	0.19	NA	NA	0.20	0.11	0.011	NA	NA	NA	0.13
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.030
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Remote plasma cleaning:											
$1–U_i$	NA	NA	NA	NA	NA	NA	0.018	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	0.0047	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
In situ thermal cleaning:											
$1–U_i$	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Wafer Cleaning											
$1–U_i$	0.77	NA	NA	0.24	NA	NA	0.23	0.20	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.

TABLE I–4 TO SUBPART I OF PART 98–DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 300 MM WAFER SIZE

Process type/sub-type	Process gas i										
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
Plasma Etching											
$1–U_i$	0.80	0.80	0.48	0.14	NA	0.29	0.32	0.37	0.09	NA	NA
BCF_4	NA	NA	0.0018	0.0011	NA	0.079	NA	NA	0.27	NA	NA
BC_2F_6	NA	NA	0.0011	NA	NA	0.12	NA	NA	0.29	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Chamber Cleaning											
In situ plasma cleaning:											
$1–U_i$	NA	NA	NA	NA	NA	NA	0.23	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	0.0046	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Remote Plasma Cleaning:											
$1–U_i$	NA	NA	NA	NA	0.063	NA	0.018	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	0.040	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
In Situ Thermal Cleaning:											
$1–U_i$	NA	NA	NA	NA	NA	NA	0.28	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	0.010	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Wafer Cleaning											
$1–U_i$	0.77	NA	NA	0.24	NA	NA	0.23	0.20	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.

TABLE I–5 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR MEMS MANUFACTURING

Process type factors	Process gas i											
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 Remote	NF_3	SF_6	C_4F_{6a}	C_5F_{8a}	$C_4F_8O_a$
Etch $1–U_i$	0.7	[1] 0.4	[1] 0.4	[1] 0.06	NA	[1] 0.2	NA	0.2	0.2	0.1	0.2	NA
Etch BCF_4	NA	[1] 0.4	[1] 0.07	[1] 0.08	NA	0.2	NA	NA	NA	[1] 0.3	0.2	NA
Etch BC_2F_6	NA	NA	NA	NA	NA	0.2	NA	NA	NA	[1] 0.2	0.2	NA
CVD $1–U_i$	0.9	0.6	NA	NA	0.4	0.1	0.02	0.2	NA	NA	0.1	0.1
CVD BCF_4	NA	0.1	NA	NA	0.1	0.1	[2] 0.02	[2] 0.1	NA	NA	0.1	0.1
CVD BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.4

Notes: NA denotes not applicable based on currently available information.
[1] Estimate includes multi-gas etch processes.
[2] Estimate reflects presence of low-k, carbide and multi-gas etch processes that may contain a C-containing fluorinated GHG additive.

TABLE I–6 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR LCD MANUFACTURING

Process type factors	Process Gas i								
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 Remote	NF_3	SF_6
Etch $1–U_i$	0.6	NA	0.2	NA	NA	0.1	NA	NA	0.3
Etch BCF_4	NA	NA	0.07	NA	NA	0.009	NA	NA	NA
Etch $BCHF_3$	NA	NA	NA	NA	NA	0.02	NA	NA	NA
Etch BC_2F_6	NA	NA	0.05	NA	NA	NA	NA	NA	NA
CVD $1–U_i$	NA	NA	NA	NA	NA	NA	0.03	0.3	0.9

Notes: NA denotes not applicable based on currently available information.

TABLE I–7 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR PV MANUFACTURING

Process type factors	Process Gas i								
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_3F_8	c-C_4F_8	NF_3 Remote	NF_3	SF_6
Etch $1–U_i$	0.7	0.4	0.4	NA	NA	0.2	NA	NA	0.4
Etch BCF_4	NA	0.2	NA	NA	NA	0.1	NA	NA	NA
Etch BC_2F_6	NA	NA	NA	NA	NA	0.1	NA	NA	NA
CVD $1–U_i$	NA	0.6	NA	NA	0.1	0.1	NA	0.3	0.4
CVD BCF_4	NA	0.2	NA	NA	0.2	0.1	NA	NA	NA

Notes: NA denotes not applicable based on currently available information.

TABLE I–8 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{N2O\ j}$) FOR N_2O UTILIZATION ($U_{N2O\ j}$)

Process type factors	N_2O
CVD $1–U_i$	0.8
Other Manufacturing Process $1–U_i$	1.0

■ 9. Add subpart L to read as follows:

Subpart L—Fluorinated Gas Production

Sec.

98.120 Definition of the source category.
98.121 Reporting threshold.
98.122 GHGs to report.
98.123 Calculating GHG emissions.
98.124 Monitoring and QA/QC requirements.
98.125 Procedures for estimating missing data.
98.126 Data reporting requirements.
98.127 Records that must be retained.
98.128 Definitions.

Subpart L—Fluorinated Gas Production

§ 98.120 Definition of the source category.

(a) The fluorinated gas production source category consists of processes that produce a fluorinated gas from any raw material or feedstock chemical, except for processes that generate HFC–23 during the production of HCFC–22.

(b) To produce a fluorinated gas means to manufacture a fluorinated gas from any raw material or feedstock chemical. Producing a fluorinated gas includes producing a fluorinated GHG as defined at § 98.410(b). Producing a fluorinated gas also includes the manufacture of a chlorofluorocarbon (CFC) or hydrochlorofluorocarbon (HCFC) from any raw material or feedstock chemical, including manufacture of a CFC or HCFC as an isolated intermediate for use in a process that will result in the transformation of the CFC or HCFC either at or outside of the production facility. Producing a fluorinated gas does not include the reuse or recycling of a fluorinated gas, the creation of HFC–23 during the production of HCFC–22, the creation of intermediates that are created and transformed in a single process with no storage of the intermediates, or the creation of fluorinated GHGs that are released or destroyed at the production facility

before the production measurement in § 98.414(a).

§ 98.121 Reporting threshold.

You must report GHG emissions under this subpart if your facility contains a fluorinated gas production process that generates or emits fluorinated GHG and the facility meets the requirements of either § 98.2(a)(1) or (a)(2). To calculate GHG emissions for comparison to the 25,000 metric ton CO_2e per year emission threshold in § 98.2(a)(2), calculate process emissions from fluorinated gas production using uncontrolled GHG emissions.

§ 98.122 GHGs to report.

(a) You must report CO_2, CH_4, and N_2O combustion emissions from each stationary combustion unit. You must calculate and report these emissions under subpart C of this part (General Stationary Fuel Combustion Sources) by following the requirements of subpart C.

(b) You must report under subpart O of this part (HCFC–22 Production and HFC–23 Destruction) the emissions of HFC–23 from HCFC–22 production processes and HFC–23 destruction processes. Do not report the generation and emissions of HFC–23 from HCFC–22 production under this subpart.

(c) You must report the total mass of each fluorinated GHG emitted from:

(1) Each fluorinated gas production process and all fluorinated gas production processes combined.

(2) Each fluorinated gas transformation process that is not part of a fluorinated gas production process and all such fluorinated gas transformation processes combined, except report separately fluorinated GHG emissions from transformation processes where a fluorinated GHG reactant is produced at another facility.

(3) Each fluorinated gas destruction process that is not part of a fluorinated gas production process or a fluorinated gas transformation process and all such fluorinated gas destruction processes combined.

(4) Venting of residual fluorinated GHGs from containers returned from the field.

§ 98.123 Calculating GHG emissions.

For fluorinated gas production and transformation processes, you must calculate the fluorinated GHG emissions from each process using either the mass balance method specified in paragraph (b) of this section or the emission factor or emission calculation factor method specified in paragraphs (c), (d), and (e) of this section, as appropriate. For destruction processes that destroy fluorinated GHGs that were previously "produced" as defined at § 98.410(b), you must calculate emissions using the procedures in paragraph (f) of this section. For venting of residual gas from containers (e.g., cylinder heels), you must calculate emissions using the procedures in paragraph (g) of this section.

(a) *Default GWP value.* In paragraphs (b)(1) and (c)(1) of this section and in § 98.124(b)(8) and (c)(2), use a GWP of 2,000 for fluorinated GHGs that do not have GWPs listed in Table A–1 to subpart A of this part, except as provided in paragraph § 98.123(c)(1)(vi). Do not report CO_2e emissions under § 98.3(c)(4) for fluorinated GHGs that do not have GWPs listed in Table A–1 to subpart A of this part.

(b) *Mass balance method.* Before using the mass balance approach to estimate your fluorinated GHG emissions from a process, you must ensure that the process and the equipment and methods used to measure it meet either the error limits described in this paragraph and calculated under paragraph (b)(1) of this section or the requirements specified in paragraph § 98.124(b)(8). If you choose to calculate the error limits, you must estimate the absolute and relative errors associated with using the mass balance approach on that process using Equations L–1 through L–4 of this section in conjunction with Equations L–5 through L–10 of this section. You may use the mass-balance approach to estimate emissions from the process if this calculation results in an absolute error of less than or equal to 3,000 metric tons CO_2e per year or a relative error of less than or equal to 30 percent of the estimated CO_2e fluorinated GHG emissions. If you do not meet either of the error limits or the requirements of paragraph § 98.124(b)(8), you must use the emission factor approach detailed in paragraphs (c), (d), and (e) of this section to estimate emissions from the process.

(1) *Error calculation.* To perform the calculation, you must first calculate the absolute and relative errors associated with the quantities calculated using either Equations L–7 through L–10 of this section or Equation L–17 of this section. Alternatively, you may estimate these errors based on the variability of previous process measurements (e.g., the variability of measurements of stream concentrations), provided these measurements are representative of the current process and current measurement devices and techniques. Once errors have been calculated for the quantities in these equations, those errors must be used to calculate the errors in Equations L–6 and L–5 of this section. You may ignore the errors associated with Equations L–11, L–12, and L–13 of this section.

(i) Where the measured quantity is a mass, the error in the mass must be equated to the accuracy or precision (whichever is larger) of the flowmeter, scale, or combination of volumetric and density measurements at the flow rate or mass measured.

(ii) Where the measured quantity is a concentration of a stream component, the error of the concentration must be equated to the accuracy or precision (whichever is larger) with which you estimate the mean concentration of that stream component, accounting for the variability of the process, the frequency of the measurements, and the accuracy or precision (whichever is larger) of the analytical technique used to measure the concentration at the concentration measured. If the variability of process measurements is used to estimate the error, this variability shall be assumed to account both for the variability of the process and the precision of the analytical technique. Use standard statistical techniques such as the student's t distribution to estimate the error of the mean of the concentration measurements as a function of process variability and frequency of measurement.

(iii) Equation L–1 of this section provides the general formula for calculating the absolute errors of sums and differences where the sum, S, is the summation of variables measured, a, b, c, etc. (e.g., S = a + b + c):

$$e_{SA} = [(a*e_a)^2 + (b*e_b)^2 + (c*e_c)^2]^{1/2} \quad \text{(Eq. L-1)}$$

Where:

e_{SA} = Absolute error of the sum, expressed as one half of a 95 percent confidence interval.

e_a = Relative error of a, expressed as one half of a 95 percent confidence interval.

e_b = Relative error of b, expressed as one half of a 95 percent confidence interval.

e_c = Relative error of c, expressed as one half of a 95 percent confidence interval.

(iv) Equation L–2 of this section provides the general formula for calculating the relative errors of sums and differences:

$$e_{SR} = \frac{e_{sA}}{(a+b+c)} \quad \text{(Eq. L-2)}$$

Where:

e_{SR} = Relative error of the sum, expressed as one half of a 95 percent confidence interval.

e_{SA} = Absolute error of the sum, expressed as one half of a 95 percent confidence interval.

a+b+c = Sum of the variables measured.

(v) Equation L–3 of this section provides the general formula for calculating the absolute errors of products (e.g., flow rates of GHGs calculated as the product of the flow rate of the stream and the concentration of the GHG in the stream), where the product, P, is the result of multiplying the variables measured, a, b, c, etc. (e.g., P = a*b*c):

$$e_{PA} = (a*b*c)(e_a^2 + e_b^2 + e_c^2)^{1/2} \quad \text{(Eq. L-3)}$$

Where:

e_{PA} = Absolute error of the product, expressed as one half of a 95 percent confidence interval.

e_a = Relative error of a, expressed as one half of a 95 percent confidence interval.

e_b = Relative error of b, expressed as one half of a 95 percent confidence interval.

e_c = Relative error of c, expressed as one half of a 95 percent confidence interval.

(vi) Equation L–4 of this section provides the general formula for calculating the relative errors of products:

$$e_{PR} = \frac{e_{PA}}{(a*b*c)} \quad \text{(Eq. L-4)}$$

Where:

e_{PR} = Relative error of the product, expressed as one half of a 95 percent confidence interval.

e_{PA} = Absolute error of the product, expressed as one half of a 95 percent confidence interval.

a*b*c = Product of the variables measured.

(vii) Calculate the absolute error of the emissions estimate in terms of CO_2e by performing a preliminary estimate of the annual CO_2e emissions of the process using the method in paragraph (b)(1)(viii) of this section. Multiply this result by the relative error calculated for the mass of fluorine emitted from the process in Equation L–6 of this section.

(viii) To estimate the annual CO_2e emissions of the process for use in the error estimate, apply the methods set forth in paragraphs (b)(2) through (b)(7) and (b)(9) through (b)(16) of this section to representative process measurements. If these process measurements represent less than one year of typical process activity, adjust the estimated emissions to account for one year of typical process activity. To estimate the terms FER_d, FEP, and FEB_k for use in the error estimate for Equations L–11, L–12, and L–13 of this section, you must either use emission testing, monitoring of emitted streams, and/or engineering calculations or assessments, or in the alternative assume that all fluorine is emitted in the form of the fluorinated GHG that has the highest GWP among the fluorinated GHGs that occur in more than trace concentrations in the process. To convert the fluorinated GHG emissions to CO_2e, use Equation A–1 of § 98.2. For fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A of this part, use a default GWP of 2,000.

(2) The total mass of each fluorinated GHG emitted annually from each fluorinated gas production and each fluorinated GHG transformation process must be estimated by using Equation L–5 of this section.

$$E_{FGHGf} = \sum_{p=1}^{n} (E_{Rp-FGHGf} + E_{Pp-FGHGf} + E_{Bp-FGHGf}) \quad \text{(Eq. L-5)}$$

Where:

E_{FGHGf} = Total mass of each fluorinated GHG f emitted annually from production or transformation process i (metric tons).

$E_{Rp-FGHGf}$ = Total mass of fluorinated GHG reactant f emitted from production process i over the period p (metric tons, calculated in Equation L–11 of this section).

$E_{Pp-FGHGf}$ = Total mass of the fluorinated GHG product f emitted from production process i over the period p (metric tons, calculated in Equation L–12 of this section).

$E_{Bp-FGHGf}$ = Total mass of fluorinated GHG by-product f emitted from production process i over the period p (metric tons, calculated in Equation L–13 of this section).

n = Number of concentration and flow measurement periods for the year.

(3) The total mass of fluorine emitted from process i over the period p must be estimated at least monthly by calculating the difference between the total mass of fluorine in the reactant(s) (or inputs, for processes that do not involve a chemical reaction) and the total mass of fluorine in the product (or outputs, for processes that do not involve a chemical reaction), accounting for the total mass of fluorine in any destroyed or recaptured streams that contain reactants, products, or by-products (or inputs or outputs). This calculation must be performed using Equation L–6 of this section. An element other than fluorine may be used in the mass-balance equation, provided the element occurs in all of the fluorinated GHGs fed into or generated by the process. In this case, the mass fractions of the element in the reactants, products, and by-products must be calculated as appropriate for that element.

$$E_F = \sum_{1}^{v} (R_d * MFF_{Rd}) - P * MFF_P - F_D \quad \text{(Eq. L-6)}$$

Where:

E_F = Total mass of fluorine emitted from process i over the period p (metric tons).

R_d = Total mass of the fluorine-containing reactant d that is fed into process i over the period p (metric tons).

P = Total mass of the fluorine-containing product produced by process i over the period p (metric tons).

MFF_{Rd} = Mass fraction of fluorine in reactant d, calculated in Equation L–14 of this section.

MFF_P = Mass fraction of fluorine in the product, calculated in Equation L–15 of this section.

F_D = Total mass of fluorine in destroyed or recaptured streams from process i containing fluorine-containing reactants, products, and by-products over the period p, calculated in Equation L–7 of this section.

v = Number of fluorine-containing reactants fed into process i.

(4) The mass of total fluorine in destroyed or recaptured streams containing fluorine-containing reactants, products, and by-products must be estimated at least monthly using Equation L–7 of this section unless you use the alternative approach provided in paragraph (b)(15) of this section.

$$F_D = \sum_{j=1}^{q} P_j * MFF_P + \sum_{k=1}^{u}\left[\left(\sum_{j=1}^{q} B_{kj} + \sum_{l=1}^{x} B_{kl}\right) * MFF_{Bk}\right] + \sum_{d=1}^{v}\left(\sum_{j=1}^{q} R_{dj} * MFF_{Rd}\right) \quad \text{(Eq. L-7)}$$

Where:

F_D = Total mass of fluorine in destroyed or recaptured streams from process i containing fluorine-containing reactants, products, and by-products over the period p.

P_j = Mass of the fluorine-containing product removed from process i in stream j and destroyed over the period p (calculated in Equation L–8 or L–9 of this section).

B_{kj} = Mass of fluorine-containing by-product k removed from process i in stream j and destroyed over the period p (calculated in Equation L–8 or L–9 of this section).

B_{kl} = Mass of fluorine-containing by-product k removed from process i in stream l and recaptured over the period p.

R_{dj} = Mass of fluorine-containing reactant d removed from process i in stream j and destroyed over the period p (calculated in Equation L–8 or L–9 of this section).

MFF_{Rd} = Mass fraction of fluorine in reactant d, calculated in Equation L–14 of this section.

MFF_P = Mass fraction of fluorine in the product, calculated in Equation L–15 of this section.

MFF_{Bk} = Mass fraction of fluorine in by-product k, calculated in Equation L–16 of this section.

q = Number of streams destroyed in process i.

x = Number of streams recaptured in process i.

u = Number of fluorine-containing by-products generated in process i.

v = Number of fluorine-containing reactants fed into process i.

(5) The mass of each fluorinated GHG removed from process i in stream j and destroyed over the period p (i.e., P_j, B_{kj}, or R_{dj}, as applicable) must be estimated by applying the destruction efficiency of the device that has been demonstrated for the fluorinated GHG f to fluorinated GHG f using Equation L–8 of this section:

$$M_{FGHGfj} = DE_{FGHGf} * c_{FGHGfj} * S_j \quad \text{(Eq. L-8)}$$

Where:

M_{FGHGfj} = Mass of fluorinated GHG f removed from process i in stream j and destroyed over the period p. (This may be P_j, B_{kj}, or R_{dj}, as applicable.)

DE_{FGHGf} = Destruction efficiency of the device that has been demonstrated for fluorinated GHG f in stream j (fraction).

C_{FGHGfj} = Concentration (mass fraction) of fluorinated GHG f in stream j removed from process i and fed into the destruction device over the period p. If this concentration is only a trace concentration, $c_{F-GHGfj}$ is equal to zero.

S_j = Mass removed in stream j from process i and fed into the destruction device over the period p (metric tons).

(6) The mass of each fluorine-containing compound that is not a fluorinated GHG and that is removed from process i in stream j and destroyed over the period p (i.e., P_j, B_{kj}, or R_{dj}, as applicable) must be estimated using Equation L–9 of this section.

$$M_{FCgj} = c_{FCgj} * S_j \quad \text{(Eq. L-9)}$$

Where:

M_{FCgj} = Mass of non-GHG fluorine-containing compound g removed from process i in stream j and destroyed over the period p. (This may be P_j, B_{kj}, or R_{dj}, as applicable).

c_{FCgj} = Concentration (mass fraction) of non-GHG fluorine-containing compound g in stream j removed from process i and fed into the destruction device over the period p. If this concentration is only a trace concentration, c_{FCgj} is equal to zero.

S_j = Mass removed in stream j from process i and fed into the destruction device over the period p (metric tons).

(7) The mass of fluorine-containing by-product k removed from process i in stream l and recaptured over the period p must be estimated using Equation L–10 of this section:

$$B_{kl} = c_{Bkl} * S_l \quad \text{(Eq. L-10)}$$

Where:

B_{kl} = Mass of fluorine-containing by-product k removed from process i in stream l and recaptured over the period p (metric tons).

c_{Bkl} = Concentration (mass fraction) of fluorine-containing by-product k in stream l removed from process i and recaptured over the period p. If this concentration is only a trace concentration, c_{Bkl} is equal to zero.

S_l = Mass removed in stream l from process i and recaptured over the period p (metric tons).

(8) To estimate the terms FER_d, FEP, and FEB_k for Equations L–11, L–12, and L–13 of this section, you must assume that the total mass of fluorine emitted, E_F, estimated in Equation L–6 of this section, occurs in the form of the fluorinated GHG that has the highest GWP among the fluorinated GHGs that occur in more than trace concentrations in the process unless you possess emission characterization measurements showing otherwise. These emission characterization measurements must meet the requirements in paragraph (8)(i), (ii), or (iii) of this section, as appropriate. The sum of the terms must equal 1. You must document the data and calculations that are used to speciate individual compounds and to estimate FER_d, FEP, and FEB_k. Exclude from your calculations the fluorine included in F_D. For example, exclude fluorine-containing compounds that are not fluorinated GHGs and that result from the destruction of fluorinated GHGs by any destruction devices (e.g., the mass of HF created by combustion of an HFC). However, include emissions of fluorinated GHGs that survive the destruction process.

(i) If the calculations under paragraph (b)(1)(viii) of this section, or any subsequent measurements and calculations under this subpart, indicate that the process emits 25,000 metric tons CO_2e or more, estimate the emissions from each process vent, considering controls, using the methods in § 98.123(c)(1). You must characterize the emissions of any process vent that emits 25,000 metric tons CO_2e or more as specified in § 98.124(b)(4).

(ii) For other vents, including vents from processes that emit less than 25,000 metric tons CO_2e, you must characterize emissions as specified in § 98.124(b)(5).

(iii) For fluorine emissions that are not accounted for by vent estimates, you must characterize emissions as specified in § 98.124(b)(6).

(9) The total mass of fluorine-containing reactant d emitted must be estimated at least monthly based on the total fluorine emitted and the fraction that consists of fluorine-containing reactants using Equation L–11 of this section. If the fluorine-containing reactant d is a non-GHG, you may assume that FER_d is zero.

$$E_{R-ip} = \frac{FER_d * E_F}{\left(\sum_{d=1}^{v} FER_d * MFF_{Rd} + FEP * MFF_P + \sum_{k=1}^{u} FEB_k * MFF_{Bk}\right)} \quad \text{(Eq. L-11)}$$

Where:

E_{R-ip} = Total mass of fluorine-containing reactant d that is emitted from process i over the period p (metric tons).

FER_d = The fraction of the mass emitted that consists of the fluorine-containing reactant d.

E_F = Total mass of fluorine emissions from process i over the period p (metric tons), calculated in Equation L–6 of this section.

FEP = The fraction of the mass emitted that consists of the fluorine-containing product.

FEB_k = The fraction of the mass emitted that consists of fluorine-containing by-product k.

MFF_{Rd} = Mass fraction of fluorine in reactant d, calculated in Equation L–14 of this section.

MFF_P = Mass fraction of fluorine in the product, calculated in Equation L–15 of this section.

MFF_{Bk} = Mass fraction of fluorine in by-product k, calculation in Equation L–16 of this section.

u = Number of fluorine-containing by-products generated in process i.

v = Number of fluorine-containing reactants fed into process i.

(10) The total mass of fluorine-containing product emitted must be estimated at least monthly based on the total fluorine emitted and the fraction that consists of fluorine-containing products using Equation L–12 of this section. If the fluorine-containing product is a non-GHG, you may assume that FEP is zero.

$$E_{P-ip} = \frac{FEP * E_F}{\left(\sum_{d=1}^{v} FER_d * MFF_{Rd} + FEP * MFF_P + \sum_{k=1}^{u} FEB_k * MFF_{Bk}\right)} \quad \text{(Eq. L-12)}$$

Where:

E_{P-ip} = Total mass of fluorine-containing product emitted from process i over the period p (metric tons).

FEP = The fraction of the mass emitted that consists of the fluorine-containing product.

E_F = Total mass of fluorine emissions from process i over the period p (metric tons), calculated in Equation L–6 of this section.

FER_d = The fraction of the mass emitted that consists of fluorine-containing reactant d.

FEB_k = The fraction of the mass emitted that consists of fluorine-containing by-product k.

MFF_{Rd} = Mass fraction of fluorine in reactant d, calculated in Equation L–14 of this section.

MFF_P = Mass fraction of fluorine in the product, calculated in Equation L–15 of this section.

MFF_{Bk} = Mass fraction of fluorine in by-product k, calculation in Equation L–16 of this section.

u = Number of fluorine-containing by-products generated in process i.

v = Number of fluorine-containing reactants fed into process i.

(11) The total mass of fluorine-containing by-product k emitted must be estimated at least monthly based on the total fluorine emitted and the fraction that consists of fluorine-containing by-products using Equation L–13 of this section. If fluorine-containing by-product k is a non-GHG, you may assume that FEB_k is zero.

$$E_{Bk-ip} = \frac{FEB_k * E_F}{\left(\sum_{1}^{v} FER_d * MFF_{Rd} + FEP * MFF_P + \sum_{k=1}^{u} FEB_k * MFF_{Bk}\right)} \quad \text{(Eq. L-13)}$$

Where:

E_{Bk-ip} = Total mass of fluorine-containing by-product k emitted from process i over the period p (metric tons).

FEB_k = The fraction of the mass emitted that consists of fluorine-containing by-product k.

FER_d = The fraction of the mass emitted that consists of fluorine-containing reactant d.

FEP = The fraction of the mass emitted that consists of the fluorine-containing product.

E_F = Total mass of fluorine emissions from process i over the period p (metric tons), calculated in Equation L–6 of this section.

MFF_{Rd} = Mass fraction of fluorine in reactant d, calculated in Equation L–14 of this section.

MFF_P = Mass fraction of fluorine in the product, calculated in Equation L–15 of this section.

MFF_{Bk} = Mass fraction of fluorine in by-product k, calculation in Equation L–16 of this section.

u = Number of fluorine-containing by-products generated in process i.

v = Number of fluorine-containing reactants fed into process i.

(12) The mass fraction of fluorine in reactant d must be estimated using Equation L–14 of this section:

$$MFF_{Rd} = MF_{Rd} * \frac{AW_F}{MW_{Rd}} \quad \text{(Eq. L-14)}$$

Where:

MFF_{Rd} = Mass fraction of fluorine in reactant d (fraction).

MF_{Rd} = Moles fluorine per mole of reactant d.

AW_F = Atomic weight of fluorine.

MW_{Rd} = Molecular weight of reactant d.

(13) The mass fraction of fluorine in the product must be estimated using Equation L–15 of this section:

$$MFF_P = MF_P * \frac{AW_F}{MW_P} \quad \text{(Eq. L-15)}$$

Where:

MFF_P = Mass fraction of fluorine in the product (fraction).

MF_P = Moles fluorine per mole of product.

AW_F = Atomic weight of fluorine.

MW_P = Molecular weight of the product produced.

(14) The mass fraction of fluorine in by-product k must be estimated using Equation L–16 of this section:

$$MFF_{Bk} = MF_{Bk} * \frac{AW_F}{MW_{Bk}} \quad \text{(Eq. L-16)}$$

Where:

MFF_{Bk} = Mass fraction of fluorine in the product (fraction).

MF_{Bk} = Moles fluorine per mole of by-product k.

AW_F = Atomic weight of fluorine.

MW_{Bk} = Molecular weight of by-product k.

(15) *Alternative for determining the mass of fluorine destroyed or recaptured.* As an alternative to using Equation L–7 of this section as provided in paragraph (b)(4) of this section, you may estimate at least monthly the total mass of fluorine in destroyed or recaptured streams containing fluorine-containing compounds (including all fluorine-containing reactants, products, and byproducts) using Equation L–17 of this section.

$$F_D = \sum_{j=1}^{q} DE_{avgj} * c_{TFj} * S_j + \sum_{l=1}^{x} c_{TFl} * S_l \quad \text{(Eq. L-17)}$$

Where:

F_D = Total mass of fluorine in destroyed or recaptured streams from process i containing fluorine-containing reactants, products, and by-products over the period p.

DE_{avgj} = Weighted average destruction efficiency of the destruction device for the fluorine-containing compounds identified in destroyed stream j under § 98.124(b)(4)(ii) and (5)(ii) (calculated in Equation L–18 of this section)(fraction).

c_{TFj} = Concentration (mass fraction) of total fluorine in stream j removed from process i and fed into the destruction device over the period p. If this concentration is only a trace concentration, c_{TFj} is equal to zero.

S_j = Mass removed in stream j from process i and fed into the destruction device over the period p (metric tons).

c_{TFl} = Concentration (mass fraction) of total fluorine in stream l removed from process i and recaptured over the period p. If this concentration is only a trace concentration, c_{Bkl} is equal to zero.

S_l = Mass removed in stream l from process i and recaptured over the period p.

q = Number of streams destroyed in process i.

x = Number of streams recaptured in process i.

(16) *Weighted average destruction efficiency.* For purposes of Equation L–17 of this section, calculate the weighted average destruction efficiency applicable to a destroyed stream using Equation L–18 of this section.

$$DE_{avgj} = \frac{\sum_{f=1}^{w} DE_{FGHGf} * c_{FGHGf} * S_j * MFF_{FGHGf} + \sum_{g=1}^{y} c_{FCg} * S_j * MFF_g}{\sum_{f=1}^{w} c_{FGHGf} * S_j * MFF_{FGHGf} + \sum_{g=1}^{y} c_{FCg} * S_j * MFF_g} \quad \text{(Eq. L-18)}$$

Where:

DE_{avgj} = Weighted average destruction efficiency of the destruction device for the fluorine-containing compounds identified in destroyed stream j under 98.124(b)(4)(ii) or (b)(5)(ii), as appropriate.

DE_{FGHGf} = Destruction efficiency of the device that has been demonstrated for fluorinated GHG f in stream j (fraction).

c_{FGHGfj} = Concentration (mass fraction) of fluorinated GHG f in stream j removed from process i and fed into the destruction device over the period p. If this concentration is only a trace concentration, $c_{F-GHGfj}$ is equal to zero.

c_{FCgj} = Concentration (mass fraction) of non-GHG fluorine-containing compound g in stream j removed from process i and fed into the destruction device over the period p. If this concentration is only a trace concentration, c_{FCgj} is equal to zero.

S_j = Mass removed in stream j from process i and fed into the destruction device over the period p (metric tons).

MFF_{FGHGf} = Mass fraction of fluorine in fluorinated GHG f, calculated in Equation L–14, L–15, or L–16 of this section, as appropriate.

MFF_{FCg} = Mass fraction of fluorine in non-GHG fluorine-containing compound g, calculated in Equation L–14, L–15, or L–16 of this section, as appropriate.

w = Number of fluorinated GHGs in destroyed stream j.

y = Number of non-GHG fluorine-containing compounds in destroyed stream j.

(c) *Emission factor and emission calculation factor methods.* To use the method in this paragraph for batch processes, you must comply with either paragraph (c)(3) of this section (Emission Factor approach) or paragraph (c)(4) of this section (Emission Calculation Factor approach). To use the method in this paragraph for continuous processes, you must first make a preliminary estimate of the emissions from each individual continuous process vent under paragraph (c)(1) of this section. If your continuous process operates under different conditions as part of normal operations, you must also define the different operating scenarios and make a preliminary estimate of the emissions from the vent for each operating scenario. Then, compare the preliminary estimate for each continuous process vent (summed across operating scenarios) to the criteria in paragraph (c)(2) of this section to determine whether the process vent meets the criteria for using the emission factor method described in paragraph (c)(3) of this section or whether the process vent meets the criteria for using the emission calculation factor method described in paragraph (c)(4) of this section. For continuous process vents that meet the criteria for using the emission factor method described in paragraph (c)(3) of this section and that have more than one operating scenario, compare the preliminary estimate for each operating scenario to the criteria in (c)(3)(ii) to determine whether an emission factor must be developed for that operating scenario.

(1) *Preliminary estimate of emissions by process vent.* You must estimate the annual CO_2e emissions of fluorinated GHGs for each process vent within each operating scenario of a continuous process using the approaches specified in paragraph (c)(1)(i) or (c)(1)(ii) of this section, accounting for any destruction as specified in paragraph (c)(1)(iii) of this section. You must determine emissions of fluorinated GHGs by process vent by using measurements, by using calculations based on chemical engineering principles and chemical property data, or by conducting an engineering assessment. You may use previous measurements, calculations, and assessments if they represent current process operating conditions or process operating conditions that would result in higher fluorinated GHG emissions than the current operating conditions and if they were performed in accordance with paragraphs (c)(1)(i), (c)(1)(ii), and (c)(1)(iii) of this section, as applicable. You must document all data, assumptions, and procedures used in the calculations or engineering assessment and keep a record of the emissions determination as required by § 98.127(a).

(i) *Engineering calculations.* For process vent emission calculations, you may use any of paragraphs (c)(1)(i)(A), (c)(1)(i)(B), or (c)(1)(i)(C) of this section.

(A) U.S. Environmental Protection Agency, Emission Inventory Improvement Program, Volume II: Chapter 16, Methods for Estimating Air Emissions from Chemical Manufacturing Facilities, August 2007, Final (incorporated by reference, see § 98.7).

(B) You may determine the fluorinated GHG emissions from any process vent within the process using the procedures specified in § 63.1257(d)(2)(i) and (d)(3)(i)(B) of this chapter, except as specified in paragraphs (c)(1)(i)(B)(*1*) through (c)(1)(i)(B)(*4*) of this section. For the purposes of this subpart, use of the term "HAP" in § 63.1257(d)(2)(i) and (d)(3)(i)(B) of this chapter means "fluorinated GHG".

(*1*) To calculate emissions caused by the heating of a vessel without a process condenser to a temperature lower than the boiling point, you must use the procedures in § 63.1257(d)(2)(i)(C)(*3*) of this chapter.

(*2*) To calculate emissions from depressurization of a vessel without a process condenser, you must use the procedures in § 63.1257(d)(2)(i)(D)(*10*) of this chapter.

(*3*) To calculate emissions from vacuum systems, the terms used in Equation 33 to § 63.1257(d)(2)(i)(E) of this chapter are defined as follows:

(*i*) P_{system} = Absolute pressure of the receiving vessel.

(*ii*) P_i= Partial pressure of the fluorinated GHG determined at the exit temperature and exit pressure conditions of the condenser or at the conditions of the dedicated receiver.

(*iii*) P_j= Partial pressure of condensables (including fluorinated GHG) determined at the exit temperature and exit pressure conditions of the condenser or at the conditions of the dedicated receiver.

(*iv*) $MW_{Fluorinated\ GHG}$= Molecular weight of the fluorinated GHG determined at the exit temperature and exit pressure conditions of the condenser or at the conditions of the dedicated receiver.

(*4*) To calculate emissions when a vessel is equipped with a process condenser or a control condenser, you must use the procedures in § 63.1257(d)(3)(i)(B) of this chapter, except as follows:

(*i*) You must determine the flowrate of gas (or volume of gas), partial pressures of condensables, temperature (T), and fluorinated GHG molecular weight ($MW_{Fluorinated\ GHG}$) at the exit temperature and exit pressure conditions of the condenser or at the conditions of the dedicated receiver.

(*ii*) You must assume that all of the components contained in the condenser exit vent stream are in equilibrium with the same components in the exit condensate stream (except for noncondensables).

(*iii*) You must perform a material balance for each component, if the condensate receiver composition is not known.

(*iv*) For the emissions from gas evolution, the term for time, t, must be used in Equation 12 to § 63.1257(d)(2)(i)(B) of this chapter.

(*v*) Emissions from empty vessel purging must be calculated using Equation 36 to § 63.1257(d)(2)(i)(H) of this chapter and the exit temperature and exit pressure conditions of the condenser or the conditions of the dedicated receiver.

(C) Commercial software products that follow chemical engineering principles (e.g., including the calculation methodologies in paragraphs (c)(1)(i)(A) and (c)(1)(i)(B) of this section).

(ii) *Engineering assessments.* For process vent emissions determinations, you may conduct an engineering assessment to calculate uncontrolled emissions. An engineering assessment includes, but is not limited to, the following:

(A) Previous test results, provided the tests are representative of current operating practices of the process.

(B) Bench-scale or pilot-scale test data representative of the process operating conditions.

(C) Maximum flow rate, fluorinated GHG emission rate, concentration, or other relevant parameters specified or implied within a permit limit applicable to the process vent.

(D) Design analysis based on chemical engineering principles, measureable process parameters, or physical or chemical laws or properties.

(iii) *Impact of destruction for the preliminary estimate.* If the process vent is vented to a destruction device, you may reflect the impact of the destruction device on emissions. In your emissions estimate, account for the following:

(A) The destruction efficiencies of the device that have been demonstrated for the fluorinated GHGs in the vent stream for periods when the process vent is vented to the destruction device.

(B) Any periods when the process vent is not vented to the destruction device.

(iv) *Use of typical recent values.* In the calculations in paragraphs (c)(1)(i), (c)(1)(ii), and (c)(1)(iii) of this section, the values used for the expected process activity and for the expected fraction of that activity whose emissions will be vented to the properly functioning destruction device must be based on either typical recent values for the process or values that would overestimate emissions from the process, unless there is a compelling reason to adopt a different value (e.g., installation of a destruction device for a previously uncontrolled process). If there is such a reason, it must be documented in the GHG Monitoring Plan.

(v) *GWPs.* To convert the fluorinated GHG emissions to CO_2e, use Equation A–1 of § 98.2. For fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A of this part, use a default GWP of 2,000 unless you submit a request to use other GWPs for those fluorinated GHGs in that process under paragraph (c)(1)(vi) of this section and we approve that request.

(vi) *Request to use a GWP other than 2,000 for fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A of this part.* If your process vent emits one or more fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A of this part, that are emitted in quantities that, with a default GWP of 2,000, result in total calculated annual emissions equal to or greater than 10,000 metric tons CO_2e for the vent, and that you believe have GWPs that would result in total calculated annual emissions less than 10,000 metric tons CO_2e for the vent, you may submit a request to use provisional GWPs for these fluorinated GHGs for purposes of the calculations in paragraph (c)(1) of this section. The request must be submitted by February 28, 2011 for a completeness determination and review by EPA.

(A) *Contents of the request.* You must include the following information in the request for each fluorinated GHG that does not have a GWP listed in Table A–1 to subpart A of this part and that constitutes more than one percent by mass of the stream emitted from the vent:

(*1*) The identity of the fluorinated GHG, including its chemical formula and, if available, CAS number.

(*2*) The estimated GWP of the fluorinated GHG.

(*3*) The data and analysis that supports your estimate of the GWP of the fluorinated GHG, including:

(*i*) Data and analysis related to the low-pressure gas phase infrared absorption spectrum of the fluorinated GHG.

(*ii*) Data and analysis related to the estimated atmospheric lifetime of the fluorinated GHG (reaction mechanisms and rates, including e.g., photolysis and reaction with atmospheric components such as OH, O_3, CO, and water).

(*iii*) The radiative transfer analysis that integrates the lifetime and infrared absorption spectrum data to calculate the GWP.

(*iv*) Any published or unpublished studies of the GWP of the gas.

(*4*) The engineering calculations or assessments and underlying data that demonstrate that the process vent is calculated to emit less than 10,000 metric tons CO_2e of this and other fluorinated GHGs only when the proposed provisional GWPs, not the default GWP of 2,000, are used for fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A of this part.

(B) *Review and completeness determination by EPA.* If EPA makes a preliminary determination that the request is complete, that it substantiates each of the provisional GWPs, and that it demonstrates that the process vent is calculated to emit less than 10,000 metric tons CO_2e of this and other fluorinated GHGs only when the provisional GWPs, not the default GWP of 2,000, are used for fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A of this part, then EPA will publish a notice including the data and analysis submitted under paragraphs (c)(1)(vi)(A)(1) through (c)(1)(vi)(A)(3) of this section. If, after review of public comment on the notice, EPA finalizes its preliminary determination, then EPA will permit the facility to use the provisional GWPs for the calculations in paragraph (c)(1) of this section unless and until EPA determines that one or more of the provisional GWPs is in error and provides reasonable notice to the facility.

(2) *Method selection for continuous process vents.*

(i) If the calculations under paragraph (c)(1) of this section, as well as any subsequent measurements and calculations under this subpart, indicate that the continuous process vent has fluorinated GHG emissions of less than 10,000 metric ton CO_2e per year, summed across all operating scenarios, then you may comply with either paragraph (c)(3) of this section (Emission Factor approach) or paragraph (c)(4) of this section (Emission Calculation Factor approach).

(ii) If the continuous process vent does not meet the criteria in paragraph (c)(2)(i) of this section, then you must comply with the emission factor method specified in paragraph (c)(3) (Emission Factor approach) of this section.

(A) You must conduct emission testing for process-vent-specific emission factor development before the destruction device unless the calculations you performed under paragraph (c)(1)(iii) of this section indicate that the uncontrolled fluorinated GHG emissions that occur during periods when the process vent is not vented to the properly functioning destruction device are less than 10,000 metric tons CO_2e per year. In this case, you may conduct emission testing after the destruction device to develop a process-vent-specific emission factor. If you do so, you must develop and apply an emission calculation factor under paragraph (c)(4) to estimate emissions during any periods when the process vent is not vented to the properly functioning destruction device.

(B) Regardless of the level of uncontrolled emissions, the emission testing for process-vent-specific emission factor development may be conducted on the outlet side of a wet scrubber in place for acid gas reduction, if one is in place, as long as there is no appreciable reduction in the fluorinated GHG.

(3) *Process-vent-specific emission factor method.* For each process vent, conduct an emission test and measure fluorinated GHG emissions from the process and measure the process activity, such as the feed rate, production rate, or other process activity rate, during the test as described in this paragraph (c)(3). Conduct the emission test according to the procedures in § 98.124. All emissions test data and procedures used in developing emission factors must be documented according to § 98.127. If more than one operating scenario applies to the process that contains the subject process vent, you must comply with either paragraph (3)(i) or paragraph (3)(ii) of this section.

(i) Conduct a separate emissions test for operation under each operating scenario.

(ii) Conduct an emissions test for the operating scenario that is expected to have the largest emissions in terms of CO_2e (considering both activity levels and emission calculation factors) on an annual basis. Also conduct an emissions test for each additional operating scenario that is estimated to emit 10,000 metric tons CO_2e or more annually from the vent and whose emission calculation factor differs by 15 percent or more from the emission calculation factor of the operating scenario that is expected to have the largest emissions (or of another operating scenario for which emission testing is performed), unless the difference between the operating scenarios is solely due to the application of a destruction device to emissions under one of the operating scenarios. For any other operating scenarios, adjust the process-vent specific emission factor developed for the operating scenario that is expected to have the largest emissions (or for another operating scenario for which emission testing is performed) using the approach in paragraph (c)(3)(viii) of this section.

(iii) You must measure the process activity, such as the process feed rate, process production rate, or other process activity rate, as applicable, during the emission test and calculate the rate for the test period, in kg (or another appropriate metric) per hour.

(iv) For continuous processes, you must calculate the hourly emission rate of each fluorinated GHG using Equation L–19 of this section and determine the hourly emission rate of each fluorinated GHG per process vent (and per operating scenario, as applicable) for the test run.

$$E_{ContPV} = \frac{C_{PV}}{10^6} * MW * Q_{PV} * \frac{1}{SV} * \frac{1}{10^3} * \frac{60}{1} \qquad \text{(Eq. L-19)}$$

Where:

E_{ContPV} = Mass of fluorinated GHG f emitted from process vent v from process i, operating scenario j, during the emission test during test run r (kg/hr).

C_{PV} = Concentration of fluorinated GHG f during test run r of the emission test (ppmv).

MW = Molecular weight of fluorinated GHG f (g/g-mole).

Q_{PV} = Flow rate of the process vent stream during test run r of the emission test (m^3/min).

SV = Standard molar volume of gas (0.0240 m^3/g-mole at 68 °F and 1 atm).

$1/10^3$ = Conversion factor (1 kilogram/1,000 grams).

60/1 = Conversion factor (60 minutes/1 hour).

(v) You must calculate a site-specific, process-vent-specific emission factor for each fluorinated GHG for each process vent and each operating scenario, in kg of fluorinated GHG per process activity rate (e.g., kg of feed or production), as applicable, using Equation L–20 of this section. For continuous processes, divide the hourly fluorinated GHG emission rate during the test by the hourly process activity rate during the test runs.

$$EF_{PV} = \frac{\sum_{1}^{r}\left(\frac{E_{PV}}{Activity_{EmissionTest}}\right)}{r} \qquad \text{(Eq. L-20)}$$

Where:

EF_{PV} = Emission factor for fluorinated GHG f emitted from process vent v during process i, operating scenario j (e.g., kg emitted/kg activity).

E_{PV} = Mass of fluorinated GHG f emitted from process vent v from process i, operating scenario j, during the emission test during test run r, for either continuous or batch (kg emitted/hr for continuous, kg emitted/batch for batch).

$Activity_{EmissionTest}$ = Process feed, process production, or other process activity rate for process i, operating scenario j, during the emission test during test run r (e.g., kg product/hr).

r = Number of test runs performed during the emission test.

(vi) If you conducted emissions testing after the destruction device, you must calculate the emissions of each fluorinated GHG for the process vent (and operating scenario, as applicable) using Equation L–21 of this section. You must also develop a process-vent-specific emission calculation factor based on paragraph (c)(4) of this section for the periods when the process vent is not venting to the destruction device.

$$E_{PV} = EF_{PV-C} * Activity_C + ECF_{PV-U} * Activity_U \qquad \text{(Eq. L-21)}$$

Where:

E_{PV} = Mass of fluorinated GHG f emitted from process vent v from process i, operating scenario j, for the year (kg).

EF_{PV-C} = Emission factor for fluorinated GHG f emitted from process vent v during process i, operating scenario j, based on testing after the destruction device (kg emitted/activity) (e.g., kg emitted/kg product).

$Activity_C$ = Total process feed, process production, or other process activity for process i, operating scenario j, during the year for which emissions are vented to the properly functioning destruction device (i.e., controlled).

ECF_{PV-U} = Emission calculation factor for fluorinated GHG f emitted from process vent v during process i, operating scenario j during periods when the process vent is not vented to the properly functioning destruction device (kg emitted/activity) (e.g., kg emitted/kg product).

$Activity_U$ = Total process feed, process production, or other process activity during the year for which the process vent is not vented to the properly functioning destruction device (e.g., kg product).

(vii) If you conducted emissions testing before the destruction device, apply the destruction efficiencies of the device that have been demonstrated for the fluorinated GHGs in the vent stream to the fluorinated GHG emissions for the process vent (and operating scenario, as applicable), using Equation L–22 of this section. You may apply the destruction efficiency only to the portion of the process activity during which emissions

are vented to the properly functioning destruction device (i.e., controlled).

$$E_{PV} = EF_{PV-U} * \left(Activity_U + Activity_C * (1 - DE)\right) \quad \text{(Eq. L-22)}$$

Where:

E_{PV} = Mass of fluorinated GHG f emitted from process vent v from process i, operating scenario j, for the year, considering destruction efficiency (kg).

EF_{PV-U} = Emission factor (uncontrolled) for fluorinated GHG f emitted from process vent v during process i, operating scenario j (kg emitted/kg product).

$Activity_U$ = Total process feed, process production, or other process activity for process i, operating scenario j, during the year for which the process vent is not vented to the properly functioning destruction device (e.g., kg product).

$Activity_C$ = Total process feed, process production, or other process activity for process i, operating scenario j, during the year for which the process vent is vented to the properly functioning destruction device (e.g., kg product).

DE = Demonstrated destruction efficiency of the destruction device (weight fraction).

(viii) *Adjusted process-vent-specific emission factors for other operating scenarios.* For process vents from processes with multiple operating scenarios, use Equation L–23 of this section to develop an adjusted process-vent-specific emission factor for each operating scenario from which the vent is estimated to emit less than 10,000 metric tons CO_2e annually or whose emission calculation factor differs by less than 15 percent from the emission calculation factor of the operating scenario that is expected to have the largest emissions (or of another operating scenario for which emission testing is performed).

$$EF_{PVadj} = \frac{ECF_{UT}}{ECF_T} * EF_{PV} \quad \text{(Eq. L-23)}$$

Where:

EF_{PVadj} = Adjusted process-vent-specific emission factor for an untested operating scenario.

ECF_{UT} = Emission calculation factor for the untested operating scenario developed under paragraph (c)(4) of this section.

ECF_T = Emission calculation for the tested operating scenario developed under paragraph (c)(4) of this section.

EF_{PV} = Process vent specific emission factor for the tested operating scenario.

(ix) Sum the emissions of each fluorinated GHG from all process vents in each operating scenario and all operating scenarios in the process for the year to estimate the total process vent emissions of each fluorinated GHG from the process, using Equation L–24 of this section.

$$E_{Pfi} = \sum_{1}^{o} \sum_{1}^{v} E_{PV} \quad \text{(Eq. L-24)}$$

Where:

E_{Pfi} = Mass of fluorinated GHG f emitted from process vents for process i for the year (kg).

E_{PV} = Mass of fluorinated GHG f emitted from process vent v from process i, operating scenario j, for the year, considering destruction efficiency (kg).

v = Number of process vents in process i, operating scenario j.

o = Number of operating scenarios for process i.

(4) *Process-vent-specific emission calculation factor method.* For each process vent within an operating scenario, determine fluorinated GHG emissions by calculations and determine the process activity rate, such as the feed rate, production rate, or other process activity rate, associated with the emission rate.

(i) You must calculate uncontrolled emissions of fluorinated GHG by individual process vent, E_{PV}, by using measurements, by using calculations based on chemical engineering principles and chemical property data, or by conducting an engineering assessment. Use the procedures in paragraphs (c)(1)(i) or (ii) of this section, except paragraph (c)(1)(ii)(C) of this section. The procedures in paragraphs (c)(1)(i) and (ii) of this section may be applied either to batch process vents or to continuous process vents. The uncontrolled emissions must be based on a typical batch or production rate under a defined operating scenario. The process activity rate associated with the uncontrolled emissions must be determined. The methods, data, and assumptions used to estimate emissions for each operating scenario must be selected to yield a best estimate (expected value) of emissions rather than an over- or underestimate of emissions for that operating scenario. All data, assumptions, and procedures used in the calculations or engineering assessment must be documented according to § 98.127.

(ii) You must calculate a site-specific, process-vent-specific emission calculation factor for each process vent, each operating scenario, and each fluorinated GHG, in kg of fluorinated GHG per activity rate (e.g., kg of feed or production) as applicable, using Equation L–25 of this section.

$$ECF_{PV} = \frac{E_{PV}}{Activity_{\mathrm{Re}\,presentative}} \quad \text{(Eq. L-25)}$$

Where:

ECF_{PV} = Emission calculation factor for fluorinated GHG f emitted from process vent v during process i, operating scenario j, (e.g., kg emitted/kg product).

E_{PV} = Average mass of fluorinated GHG f emitted, based on calculations, from process vent v from process i, operating scenario j, during the period or batch for which emissions were calculated, for either continuous or batch (kg emitted/hr for continuous, kg emitted/batch for batch).

$Activity_{Representative}$ = Process feed, process production, or other process activity rate corresponding to average mass of emissions based on calculations (e.g., kg product/hr for continuous, kg product/batch for batch).

(iii) You must calculate emissions of each fluorinated GHG for the process vent (and operating scenario, as applicable) for the year by multiplying

the process-vent-specific emission calculation factor by the total process activity, as applicable, for the year, using Equation L–26 of this section.

$$E_{PV} = ECF_{PV} * Activity \quad \text{(Eq. L-26)}$$

Where:

E_{PV} = Mass of fluorinated GHG f emitted from process vent v from process i, operating scenario j, for the year (kg).

ECF_{PV} = Emission calculation factor for fluorinated GHG f emitted from process vent v during process i, operating scenario j, (kg emitted/activity) (e.g., kg emitted/kg product).

Activity = Process feed, process production, or other process activity for process i, operating scenario j, during the year.

(iv) If the process vent is vented to a destruction device, apply the demonstrated destruction efficiency of the device to the fluorinated GHG emissions for the process vent (and operating scenario, as applicable), using Equation L–27 of this section. Apply the destruction efficiency only to the portion of the process activity that is vented to the properly functioning destruction device (i.e., controlled).

$$E_{PV} = ECF_{PV} * \left(Activity_U + Activity_C * (1 - DE)\right) \quad \text{(Eq. L-27)}$$

Where:

E_{PV} = Mass of fluorinated GHG f emitted from process vent v from process i, operating scenario j, for the year considering destruction efficiency (kg).

ECF_{PV} = Emission calculation factor for fluorinated GHG f emitted from process vent v during process i, operating scenario j, (e.g., kg emitted/kg product).

$Activity_U$ = Total process feed, process production, or other process activity for process i, operating scenario j, during the year for which the process vent is not vented to the properly functioning destruction device (e.g., kg product).

$Activity_C$ = Total process feed, process production, or other process activity for process i, operating scenario j, during the year for which the process vent is vented to the properly functioning destruction device (e.g., kg product).

DE = Demonstrated destruction efficiency of the destruction device (weight fraction).

(v) Sum the emissions of each fluorinated GHG from all process vents in each operating scenario and all operating scenarios in the process for the year to estimate the total process vent emissions of each fluorinated GHG from the process, using Equation L–28 of this section.

$$E_{Pfi} = \sum_{1}^{o} \sum_{1}^{v} E_{PV} \quad \text{(Eq. L-28)}$$

Where:

E_{Pfi} = Mass of fluorinated GHG f emitted from process vents for process i for the year (kg).

E_{PV} = Mass of fluorinated GHG f emitted from process vent v from process i, operating scenario j, for the year, considering destruction efficiency (kg).

v = Number of process vents in process i, operating scenario j.

o = Number of operating scenarios in process i.

(d) *Calculate fluorinated GHG emissions for equipment leaks (EL).* If you comply with paragraph (c) of this section, you must calculate the fluorinated GHG emissions from pieces of equipment associated with processes covered under this subpart and in fluorinated GHG service. If you conduct monitoring of equipment in fluorinated GHG service, monitoring must be conducted for those in light liquid and in gas and vapor service. If you conduct monitoring of equipment in fluorinated GHG service, you may exclude from monitoring each piece of equipment that is difficult-to-monitor, that is unsafe-to-monitor, that is insulated, or that is in heavy liquid service; you may exclude from monitoring each pump with dual mechanical seals, agitator with dual mechanical seals, pump with no external shaft, agitator with no external shaft; you may exclude from monitoring each pressure relief device in gas and vapor service with upstream rupture disk, each sampling connection system with closed-loop or closed-purge systems, and any pieces of equipment where leaks are routed through a closed vent system to a destruction device. You must estimate emissions using another approach for those pieces of equipment excluded from monitoring. Equipment that is in fluorinated GHG service for less than 300 hr/yr; equipment that is in vacuum service; pressure relief devices that are in light liquid service; and instrumentation systems are exempted from these requirements.

(1) The emissions from equipment leaks must be calculated using any of the procedures in paragraphs (d)(1)(i), (d)(1)(ii), (d)(1)(iii), or (d)(1)(iv) of this section.

(i) *Use of Average Emission Factor Approach in EPA Protocol for Equipment Leak Emission Estimates.* The emissions from equipment leaks may be calculated using the default Average Emission Factor Approach in EPA–453/R–95–017 (incorporated by reference, see § 98.7).

(ii) *Use of Other Approaches in EPA Protocol for Equipment Leak Emission Estimates in conjunction with EPA Method 21 at 40 CFR part 60, appendix A–7.* The emissions from equipment leaks may be calculated using one of the following methods in EPA–453/R–95–017 (incorporated by reference, see § 98.7): The Screening Ranges Approach; the EPA Correlation Approach; or the Unit-Specific Correlation Approach. If you determine that EPA Method 21 at 40 CFR part 60, appendix A–7 is appropriate for monitoring a fluorinated GHG, and if you calibrate your instrument with a compound different from one or more of the fluorinated GHGs or surrogates to be measured, you must develop response factors for each fluorinated GHG or for each surrogate to be measured using EPA Method 21 at 40 CFR part 60, appendix A–7. For each fluorinated GHG or surrogate measured, the response factor must be less than 10. The response factor is the ratio of the known concentration of a fluorinated GHG or surrogate to the observed meter reading when measured using an instrument calibrated with the reference compound.

(iii) *Use of Other Approaches in EPA Protocol for Equipment Leak Emission Estimates in conjunction with site-specific leak monitoring methods.* The emissions from equipment leaks may be calculated using one of the following methods in EPA–453/R–95–017 (incorporated by reference, see § 98.7): The Screening Ranges Approach; the EPA Correlation Approach; or the Unit-Specific Correlation Approach. You may develop a site-specific leak monitoring method appropriate for monitoring fluorinated GHGs or surrogates to use along with these three approaches. The site-specific leak monitoring method

must meet the requirements in § 98.124(f)(1).

(iv) *Use of site-specific leak monitoring methods.* The emissions from equipment leaks may be calculated using a site-specific leak monitoring method. The site-specific leak monitoring method must meet the requirements in § 98.124(f)(1).

(2) You must collect information on the number of each type of equipment; the service of each piece of equipment (gas, light liquid, heavy liquid); the concentration of each fluorinated GHG in the stream; and the time period each piece of equipment was in service. Depending on which approach you follow, you may be required to collect information for equipment on the associated screening data concentrations for greater than or equal to 10,000 ppmv and associated screening data concentrations for less than 10,000 ppmv; associated actual screening data concentrations; or associated screening data and leak rate data (i.e., bagging) used to develop a unit-specific correlation.

(3) Calculate and sum the emissions of each fluorinated GHG in metric tons per year for equipment pieces for each process, E_{ELf}, annually. You must include and estimate emissions for types of equipment that are excluded from monitoring, including difficult-to-monitor, unsafe-to-monitor and insulated pieces of equipment, pieces of equipment in heavy liquid service, pumps with dual mechanical seals, agitators with dual mechanical seals, pumps with no external shaft, agitators with no external shaft, pressure relief devices in gas and vapor service with upstream rupture disk, sampling connection systems with closed-loop or closed purge systems, and pieces of equipment where leaks are routed through a closed vent system to a destruction device.

(e) *Calculate total fluorinated GHG emissions for each process and for production or transformation processes at the facility.*

(i) Estimate annually the total mass of each fluorinated GHG emitted from each process, including emissions from process vents in paragraphs (c)(3) and (c)(4) of this section, as appropriate, and from equipment leaks in paragraph (d), using Equation L–29 of this section.

$$E_i = E_{Pfi} + E_{ELfi} \quad \text{(Eq. L-29)}$$

Where:

E_i = Total mass of each fluorinated GHG f emitted from process i, annual basis (kg/year).

E_{Pfi} = Mass of fluorinated GHG f emitted from all process vents and all operating scenarios in process i, annually (kg/year, calculated in Equation L–24 or L–28 of this section, as appropriate).

E_{ELfi} = Mass of fluorinated GHG f emitted from equipment leaks for pieces of equipment for process i, annually (kg/year, calculated in paragraph (d)(3) of this section).

(ii) Estimate annually the total mass of each fluorinated GHG emitted from each type of production or transformation process at the facility using Equation L–30 of this section. Develop separate totals for fluorinated gas production processes, transformation processes that transform fluorinated gases produced at the facility, and transformation processes that transform fluorinated gases produced at another facility.

$$E = \sum_{i=1}^{z} E_i * 0.001 \quad \text{(Eq. L-30)}$$

Where:

E = Total mass of each fluorinated GHG f emitted from all fluorinated gas production processes, all transformation processes that transform fluorinated gases produced at the facility, or all transformation processes that transform fluorinated gases produced at another facility, as appropriate (metric tons).

E_i = Total mass of each fluorinated GHG f emitted from each production or transformation process, annual basis (kg/year, calculated in Equation L–29 of this section).

0.001 = Conversion factor from kg to metric tons.

z = Total number of fluorinated gas production processes, fluorinated gas transformation processes that transform fluorinated gases produced at the facility, or transformation processes that transform fluorinated gases produced at another facility, as appropriate.

(f) *Calculate fluorinated GHG emissions from destruction of fluorinated GHGs that were previously "produced".* Estimate annually the total mass of fluorinated GHGs emitted from destruction of fluorinated GHGs that were previously "produced" as defined at § 98.410(b) using Equation L–31 of this section:

$$E_D = RE_D * (1 - DE) \quad \text{(Eq. L-31)}$$

Where:

E_D = The mass of fluorinated GHGs emitted annually from destruction of fluorinated GHGs that were previously "produced" as defined at § 98.410(b) (metric tons).

RE_D = The mass of fluorinated GHGs that were previously "produced" as defined at § 98.410(b) and that are fed annually into the destruction device (metric tons).

DE = Destruction efficiency of the destruction device (fraction).

(g) *Emissions from venting of residual fluorinated GHGs in containers.* If you vent residual fluorinated GHGs from containers, you must either measure the residual fluorinated GHGs vented from each container or develop a heel factor for each combination of fluorinated GHG, container size, and container type that you vent. You do not need to estimate de minimis emissions associated with good-faith attempts to recycle or recover residual fluorinated GHGs in or from containers.

(1) *Measuring contents of each container.* If you weigh or otherwise measure the contents of each container before venting the residual fluorinated GHGs, use Equation L–32 of this section to calculate annual emissions of each fluorinated GHG from venting of residual fluorinated GHG from containers. Convert pressures to masses as directed in paragraph (g)(2)(ii) of this section.

$$E_{Cf} = \sum_{1}^{n} H_{Bfj} - \sum_{1}^{n} H_{Efj} \quad \text{(Eq. L-32)}$$

Where:

E_{Cf} = Total mass of each fluorinated GHG f emitted from the facility through venting of residual fluorinated GHG from containers, annual basis (kg/year).

H_{Bfj} = Mass of residual fluorinated GHG f in container j when received by facility.

H_{Efj} = Mass of residual fluorinated GHG f in container j after evacuation by facility. (Facility may equate to zero.)

n = Number of vented containers for each fluorinated GHG f.

(2) *Developing and applying heel factors.* If you use heel factors to

estimate emissions of residual fluorinated GHGs vented from containers, you must annually develop these factors based on representative samples of the containers received by your facility from fluorinated GHG users.

(i) *Sample size.* For each combination of fluorinated GHG, container size, and container type that you vent, select a representative sample of containers that reflects the full range of quantities of residual gas returned in that container size and type. This sample must reflect the full range of the industries and a broad range of the customers that use and return the fluorinated GHG, container size, and container type. The minimum sample size for each combination of fluorinated GHG, container size, and container type must be 30, unless this is greater than the number of containers returned within that combination annually, in which case the contents of every container returned must be measured.

(ii) *Measurement of residual gas.* The residual weight or pressure you use for paragraph (g)(1) of this section must be determined by monitoring the mass or the pressure of your cylinders/containers according to § 98.124(k). If you monitor the pressure, convert the pressure to mass using the ideal gas law, as displayed in Equation L–33 of this section, with an appropriately selected Z value.

$$pV=ZnRT \quad \text{(Eq. L-33)}$$

Where:

p = Absolute pressure of the gas (Pa)
V = Volume of the gas (m^3)
Z = Compressibility factor
n = Amount of substance of the gas (moles)
R = Gas constant (8.314 Joule/Kelvin mole)
T = Absolute temperature (K)

(iii) *Heel factor calculation.* To determine the heel factor h_{fj} for each combination of fluorinated GHG, container size, and container type, use paragraph (g)(1) of this section to calculate the total heel emissions for each sample selected under paragraph (g)(2)(i) of this section. Divide this total by the number of containers in the sample. Divide the result by the full capacity (the mass of the contents of a full container) of that combination of fluorinated GHG, container size, and container type. The heel factor is expressed as a fraction of the full capacity.

(iv) Calculate annual emissions of each fluorinated GHG from venting of residual fluorinated GHG from containers using Equation L–34 of this section.

$$E_{Cf} = \sum_{j=1}^{n} h_{fj} * N_{fj} * F_{fj} \quad \text{(Eq. L-34)}$$

Where:

E_{Cf} = Total mass of each fluorinated GHG f emitted from the facility through venting of residual fluorinated GHG from containers, annual basis (kg/year).
h_{fj} = Facility-wide gas-specific heel factor for fluorinated GHG f (fraction) and container size and type j, as determined in paragraph (g)(2)(iii) of this section.
N_{fj} = Number of containers of size and type j returned to the fluorinated gas production facility.
F_{fj} = Full capacity of containers of size and type j containing fluorinated GHG f (kg).
n = Number of combinations of container sizes and types for fluorinated GHG f.

§ 98.124 Monitoring and QA/QC requirements.

(a) *Initial scoping speciation to identify fluorinated GHGs.* You must conduct an initial scoping speciation to identify all fluorinated GHGs that may be generated from processes that are subject to this subpart and that have at least one process vent with uncontrolled emissions of 1.0 metric ton or more of fluorinated GHGs per year based on the preliminary estimate of emissions in § 98.123(c)(1). You are not required to quantify emissions under this initial scoping speciation. Only fluorinated GHG products and by-products that occur in greater than trace concentrations in at least one stream must be identified under this paragraph.

(1) *Procedure.* To conduct the scoping speciation, select the stream(s) (including process streams or destroyed streams) or process vent(s) that would be expected to individually or collectively contain all of the fluorinated GHG by-products of the process at their maximum concentrations and sample and analyze the contents of these selected streams or process vents. For example, if fluorinated GHG by-products are separated into one low-boiling-point and one high-boiling-point stream, sample and analyze both of these streams. Alternatively, you may sample and analyze streams where fluorinated GHG by-products occur at less than their maximum concentrations, but you must ensure that the sensitivity of the analysis is sufficient to compensate for the expected difference in concentration. For example, if you sample and analyze streams where fluorinated GHG by-products are expected to occur at one half their maximum concentrations elsewhere in the process, you must ensure that the sensitivity of the analysis is sufficient to detect fluorinated GHG by-products that occur at concentrations of 0.05 percent or higher. You do not have to sample and analyze every stream or process vent, i.e., you do not have to sample and analyze a stream or process vent that contains only fluorinated GHGs that are contained in other streams or process vents that are being sampled and analyzed. Sampling and analysis must be conducted according to the procedures in paragraph (e) of this section.

(2) *Previous measurements.* If you have conducted testing of streams (including process streams or destroyed streams) or process vents less than 10 years before December 31, 2010, and the testing meets the requirements in paragraph (a)(1) of this section, you may use the previous testing to satisfy this requirement.

(b) *Mass balance monitoring.* If you determine fluorinated GHG emissions from any process using the mass balance method under § 98.123(b), you must estimate the total mass of each fluorinated GHG emitted from that process at least monthly. Only streams that contain greater than trace concentrations of fluorine-containing reactants, products, or by-products must be monitored under this paragraph. If you use an element other than fluorine in the mass-balance equation pursuant to § 98.123(b)(3), substitute that element for fluorine in the monitoring requirements of this paragraph.

(1) *Mass measurements.* Measure the following masses on a monthly or more frequent basis using flowmeters, weigh scales, or a combination of volumetric and density measurements with accuracies and precisions that allow the facility to meet the error criteria in § 98.123(b)(1):

(i) Total mass of each fluorine-containing product produced. Account for any used fluorine-containing product added into the production process upstream of the output measurement as directed at § 98.413(b) and § 98.414(b). For each product, the mass produced used for the mass-balance calculation must be the same as

the mass produced that is reported under subpart OO of this part, where applicable.

(ii) Total mass of each fluorine-containing reactant fed into the process.

(iii) The mass removed from the process in each stream fed into the destruction device.

(iv) The mass removed from the process in each recaptured stream.

(2) *Concentration measurements for use with § 98.123(b)(4).* If you use § 98.123(b)(4) to estimate the mass of fluorine in destroyed or recaptured streams, measure the following concentrations at least once each calendar month during which the process is operating, on a schedule to ensure that the measurements are representative of the full range of process conditions (e.g., catalyst age). Measure more frequently if this is necessary to meet the error criteria in § 98.123(b)(1). Use equipment and methods (e.g., gas chromatography) that comply with paragraph (e) of this section and that have an accuracy and precision that allow the facility to meet the error criteria in § 98.123(b)(1). Only fluorine-containing reactants, products, and by-products that occur in a stream in greater than trace concentrations must be monitored under this paragraph.

(i) The concentration (mass fraction) of the fluorine-containing product in each stream that is fed into the destruction device.

(ii) The concentration (mass fraction) of each fluorine-containing by-product in each stream that is fed into the destruction device.

(iii) The concentration (mass fraction) of each fluorine-containing reactant in each stream that is fed into the destruction device.

(iv) The concentration (mass fraction) of each fluorine-containing by-product in each stream that is recaptured (c_{Bkl}).

(3) *Concentration measurements for use with § 98.123(b)(15).* If you use § 98.123(b)(15) to estimate the mass of fluorine in destroyed or recaptured streams, measure the concentrations listed in paragraphs (3)(i) and (ii) of this section at least once each calendar month during which the process is operating, on a schedule to ensure that the measurements are representative of the full range of process conditions (e.g., catalyst age). Measure more frequently if this is necessary to meet the error criteria in § 98.123(b)(1). Use equipment and methods (e.g., gas chromatography) that comply with paragraph (e) of this section and that have an accuracy and precision that allow the facility to meet the error criteria in § 98.123(b)(1). Only fluorine-containing reactants, products, and by-products that occur in a stream in greater than trace concentrations must be monitored under this paragraph.

(i) The concentration (mass fraction) of total fluorine in each stream that is fed into the destruction device.

(ii) The concentration (mass fraction) of total fluorine in each stream that is recaptured.

(4) *Emissions characterization: process vents emitting 25,000 metric tons CO_2e or more.* To characterize emissions from any process vent emitting 25,000 metric tons CO_2e or more, comply with paragraphs (b)(4)(i) through (b)(4)(v) of this section, as appropriate. Only fluorine-containing reactants, products, and by-products that occur in a stream in greater than trace concentrations must be monitored under this paragraph.

(i) *Uncontrolled emissions.* If emissions from the process vent are not routed through a destruction device, sample and analyze emissions at the process vent or stack or sample and analyze emitted streams before the process vent. If the process has more than one operating scenario, you must either perform the emission characterization for each operating scenario or perform the emission characterization for the operating scenario that is expected to have the largest emissions and adjust the emission characterization for other scenarios using engineering calculations and assessments as specified in § 98.123(c)(4). To perform the characterization, take three samples under conditions that are representative for the operating scenario. Measure the concentration of each fluorine-containing compound in each sample. Use equipment and methods that comply with paragraph (e) of this section. Calculate the average concentration of each fluorine-containing compound across all three samples.

(ii) *Controlled emissions using § 98.123(b)(15).* If you use § 98.123(b)(15) to estimate the total mass of fluorine in destroyed or recaptured streams, and if the emissions from the process vent are routed through a destruction device, characterize emissions as specified in paragraph (b)(4)(i) of this section before the destruction device. Apply the destruction efficiency demonstrated for each fluorinated GHG in the destroyed stream to that fluorinated GHG. Exclude from the characterization fluorine-containing compounds that are not fluorinated GHGs.

(iii) *Controlled emissions using § 98.123(b)(4).* If you use § 98.123(b)(4) to estimate the mass of fluorine in destroyed or recaptured streams, and if the emissions from the process vent are routed through a destruction device, characterize the process vent's emissions monthly (or more frequently) using the monthly (or more frequent) measurements under paragraphs (b)(1)(iii) and (b)(2)(i) through (b)(2)(iii) of this section. Apply the destruction efficiency demonstrated for each fluorinated GHG in the destroyed stream to that fluorinated GHG. Exclude from the characterization fluorine-containing compounds that are not fluorinated GHGs.

(iv) *Emissions characterization frequency.* You must repeat emission characterizations performed under paragraph (b)(4)(i) and (b)(4)(ii) of this section under paragraph (b)(4)(iv)(A) or (b)(4)(iv)(B) of this section, whichever occurs first:

(A) *10-year revision.* Repeat the emission characterization every 10 years. In the calculations under § 98.123, apply the revised emission characterization to the process activity that occurs after the revision.

(B) *Operating scenario change that affects the emission characterization.* For planned operating scenario changes, you must estimate and compare the emission calculation factors for the changed operating scenario and for the original operating scenario whose process vent specific emission factor was measured. Use the engineering calculations and assessments specified in § 98.123(c)(4). If the share of total fluorine-containing compound emissions represented by any fluorinated GHG changes under the changed operating scenario by 15 percent or more of the total, relative to the previous operating scenario (this includes the cumulative change in the emission calculation factor since the last emissions test), you must repeat the emission characterization. Perform the emission characterization before February 28 of the year that immediately follows the change. In the calculations under § 98.123, apply the revised emission characterization to the process activity that occurs after the operating scenario change.

(v) *Subsequent measurements.* If a process vent with fluorinated GHG emissions less than 25,000 metric tons CO_2e, per § 98.123(c)(2), is later found to have fluorinated GHG emissions of 25,000 metric tons CO_2e or greater, you must perform an emission characterization under this paragraph during the following year.

(5) *Emissions characterization: process vents emitting less than 25,000 metric tons CO_2e.* To characterize

emissions from any process vent emitting less than 25,000 metric tons CO_2e, comply with paragraphs (b)(5)(i) through (b)(5)(iii) of this section, as appropriate. Only fluorine-containing reactants, products, and by-products that occur in a stream in greater than trace concentrations must be monitored under this paragraph.

(i) *Uncontrolled emissions.* If emissions from the process vent are not routed through a destruction device, emission measurements must consist of sampling and analysis of emissions at the process vent or stack, sampling and analysis of emitted streams before the process vent, previous test results, provided the tests are representative of current operating conditions of the process, or bench-scale or pilot-scale test data representative of the process operating conditions.

(ii) *Controlled emissions using § 98.123(b)(15).* If you use § 98.123(b)(15) to estimate the total mass of fluorine in destroyed or recaptured streams, and if the emissions from the process vent are routed through a destruction device, characterize emissions as specified in paragraph (b)(5)(i) of this section before the destruction device. Apply the destruction efficiency demonstrated for each fluorinated GHG in the destroyed stream to that fluorinated GHG. Exclude from the characterization fluorine-containing compounds that are not fluorinated GHGs.

(iii) *Controlled emissions using § 98.123(b)(4).* If you use § 98.123(b)(4) to estimate the mass of fluorine in destroyed or recaptured streams, and if the emissions from the process vent are routed through a destruction device, characterize the process vent's emissions monthly (or more frequently) using the monthly (or more frequent) measurements under paragraphs (b)(1)(iii) and (b)(2)(i) through (b)(2)(iii) of this section. Apply the destruction efficiency demonstrated for each fluorinated GHG in the destroyed stream to that fluorinated GHG. Exclude from the characterization fluorine-containing compounds that are not fluorinated GHGs.

(6) *Emissions characterization: emissions not accounted for by process vent estimates.* Calculate the weighted average emission characterization across the process vents before any destruction devices. Apply the weighted average emission characterization for all the process vents to any fluorine emissions that are not accounted for by process vent estimates.

(7) *Impurities in reactants.* If any fluorine-containing impurity is fed into a process along with a reactant (or other input) in greater than trace concentrations, this impurity shall be monitored under this section and included in the calculations under § 98.123 in the same manner as reactants fed into the process, fed into the destruction device, recaptured, or emitted, except the concentration of the impurity in the mass fed into the process shall be measured, and the mass of the impurity fed into the process shall be calculated as the product of the concentration of the impurity and the mass fed into the process. The mass of the reactant fed into the process may be reduced to account for the mass of the impurity.

(8) *Alternative to error calculation.* As an alternative to calculating the relative and absolute errors associated with the estimate of emissions under § 98.123(b), you may comply with the precision, accuracy, measurement and calculation frequency, and fluorinated GHG throughput requirements of paragraph (b)(8)(i) through (b)(8)(iv) of this section.

(i) *Mass measurements.* Measure the masses specified in paragraph (b)(1) of this section using flowmeters, weigh scales, or a combination of volumetric and density measurements with accuracies and precisions of ±0.2 percent of full scale or better.

(ii) *Concentration measurements.* Measure the concentrations specified in paragraph (b)(2) or paragraph (b)(3) of this section, as applicable, using analytical methods with accuracies and precisions of ±10 percent or better.

(iii) *Measurement and calculation frequency.* Perform the mass measurements specified in paragraph (b)(1) of this section and the concentration measurements specified in paragraph (b)(2) or paragraph (b)(3) of this section, as applicable, at least weekly, and calculate emissions at least weekly.

(iv) *Fluorinated-GHG throughput limit.* You may use the alternative to the error calculation specified in paragraph (b)(8) of this section only if the total annual CO_2-equivalent fluorinated GHG throughput of the process is 500,000 $mtCO_2e$ or less. The total throughput is the sum of the masses of the fluorinated GHG reactants, products, and by-products fed into and generated by the process. To convert these masses to CO_2e, use Equation A–1 of § 98.2. For fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A of this part, use a default GWP of 2,000.

(c) *Emission factor testing.* If you determine fluorinated GHG emissions using the site-specific process-vent-specific emission factor, you must meet the requirements in paragraphs (c)(1) through (c)(8) of this section.

(1) *Process vent testing.* Conduct an emissions test that is based on representative performance of the process or operating scenario(s) of the process, as applicable. Include in the emission test any fluorinated greenhouse gas that occurs in more than trace concentrations in the vent stream or, where a destruction device is used, in the inlet to the destruction device. You may include startup and shutdown events if the testing is sufficiently long or comprehensive to ensure that such events are not overrepresented in the emission factor. Malfunction events must not be included in the testing. If you conduct your emission testing after a destruction device, and if the outlet concentration of a fluorinated GHG that is fed into the device is below the detection limit of the method, you may use a concentration of one-half the detection limit to estimate the emission factor.

(2) *Number of runs.* For continuous processes, sample the process vent for a minimum of 3 runs of 1 hour each. If the RSD of the emission factor calculated based on the first 3 runs is greater than or equal to 0.15 for the emission factor, continue to sample the process vent for an additional 3 runs of 1 hour each. If more than one fluorinated GHG is measured, the RSD must be expressed in terms of total CO_2 equivalents. For fluorinated GHGs whose GWPs are not listed in Table A–1 to subpart A of this part, use a default GWP of 2,000 in the RSD calculation.

(3) *Process activity measurements.* Determine the mass rate of process feed, process production, or other process activity as applicable during the test using flow meters, weigh scales, or other measurement devices or instruments with an accuracy and precision of ±1 percent of full scale or better. These devices may be the same plant instruments or procedures that are used for accounting purposes (such as weigh hoppers, belt weigh feeders, combination of volume measurements and bulk density, etc.) if these devices or procedures meet the requirement. For monitoring ongoing process activity, use flow meters, weigh scales, or other measurement devices or instruments with an accuracy and precision of ±1 percent of full scale or better.

(4) *Sample each process.* If process vents from separate processes are manifolded together to a common vent or to a common destruction device, you must follow paragraph (c)(4)(i), (c)(4)(ii), or (c)(4)(iii) of this section.

(i) You may sample emissions from each process in the ducts before the emissions are combined.

(ii) You may sample in the common duct or at the outlet of the destruction device when only one process is operating.

(iii) You may sample the combined emissions and use engineering calculations and assessments as specified in § 98.123(c)(4) to allocate the emissions to each manifolded process vent, provided the sum of the calculated fluorinated GHG emissions across the individual process vents is within 20 percent of the total fluorinated GHG emissions measured during the manifolded testing.

(5) *Emission test results.* The results of an emission test must include the analysis of samples, number of test runs, the results of the RSD analysis, the analytical method used, determination of emissions, the process activity, and raw data and must identify the process, the operating scenario, the process vents tested, and the fluorinated GHGs that were included in the test (i.e., the fluorinated GHGs that occur in more than trace concentrations in the vent stream or, where a destruction device is used, in the inlet to the destruction device, and any other fluorinated GHGs included in the test). The emissions test report must contain all information and data used to derive the process-vent-specific emission factor, as well as key process conditions during the test. Key process conditions include those that are normally monitored for process control purposes and may include but are not limited to yields, pressures, temperatures, etc. (e.g., of reactor vessels, distillation columns).

(7) *Emissions testing frequency.* You must conduct emissions testing to develop the process-vent-specific emission factor under paragraph (c)(7)(i) or (c)(7)(ii) of this section, whichever occurs first:

(i) *10-year revision.* Conduct an emissions test every 10 years. In the calculations under § 98.123, apply the revised process-vent-specific emission factor to the process activity that occurs after the revision.

(ii) *Operating scenario change that affects the emission factor.* For planned operating scenario changes, you must estimate and compare the emission calculation factors for the changed operating scenario and for the original operating scenario whose process vent specific emission factor was measured. Use the calculation methods in § 98.123(c)(4). If the emission calculation factor for the changed operating scenario is 15 percent or more different from the emission calculation factor for the previous operating scenario (this includes the cumulative change in the emission calculation factor since the last emissions test), you must conduct an emissions test to update the process-vent-specific emission factor, unless the difference between the operating scenarios is solely due to the application of a destruction device to emissions under the changed operating scenario. Conduct the test before February 28 of the year that immediately follows the change. In the calculations under § 98.123, apply the revised process-vent-specific emission factor to the process activity that occurs after the operating scenario change.

(8) *Subsequent measurements.* If a continuous process vent with fluorinated GHG emissions less than 10,000 metric tons CO_2e, per § 98.123(c)(2), is later found to have fluorinated GHG emissions of 10,000 metric tons CO_2e or greater, you must conduct the emissions testing for the process vent during the following year and develop the process-vent-specific emission factor from the emissions testing.

(9) *Previous measurements.* If you have conducted an emissions test less than 10 years before December 31, 2010, and the emissions testing meets the requirements in paragraphs (c)(1) through (c)(8) of this section, you may use the previous emissions testing to develop process-vent-specific emission factors. For purposes of paragraph (c)(7)(i) of this section, the date of the previous emissions test rather than December 31, 2010 shall constitute the beginning of the 10-year re-measurement cycle.

(d) *Emission calculation factor monitoring.* If you determine fluorinated GHG emissions using the site-specific process-vent-specific emission calculation factor, you must meet the requirements in paragraphs (d)(1) through (d)(4) of this section.

(1) *Operating scenario.* Perform the emissions calculation for the process vent based on representative performance of the operating scenario of the process. If more than one operating scenario applies to the process that contains the subject process vent, you must conduct a separate emissions calculation for operation under each operating scenario. For each continuous process vent that contains more than trace concentrations of any fluorinated GHG and for each batch process vent that contains more than trace concentrations of any fluorinated GHG, develop the process-vent-specific emission calculation factor for each operating scenario. For continuous process vents, determine the emissions based on the process activity for the representative performance of the operating scenario. For batch process vents, determine emissions based on the process activity for each typical batch operating scenario.

(2) *Process activity measurements.* Use flow meters, weigh scales, or other measurement devices or instruments with an accuracy and precision of ±1 percent of full scale or better for monitoring ongoing process activity.

(3) *Emission calculation results.* The emission calculation must be documented by identifying the process, the operating scenario, and the process vents. The documentation must contain the information and data used to calculate the process-vent-specific emission calculation factor.

(4) *Operating scenario change that affects the emission calculation factor.* For planned operating scenario changes that are expected to change the process-vent-specific emission calculation factor, you must conduct an emissions calculation to update the process-vent-specific emission calculation factor. In the calculations under § 98.123, apply the revised emission calculation factor to the process activity that occurs after the operating scenario change.

(5) *Previous calculations.* If you have performed an emissions calculation for the process vent and operating scenario less than 10 years before December 31, 2010, and the emissions calculation meets the requirements in paragraphs (d)(1) through (d)(4) of this section and in § 98.123(c)(4)(i) and (c)(4)(ii), you may use the previous calculation to develop the site-specific process-vent-specific emission calculation factor.

(e) *Emission and stream testing, including analytical methods.* Select and document testing and analytical methods as follows:

(1) *Sampling and mass measurement for emission testing.* For emission testing in process vents or at the stack, use methods for sampling, measuring volumetric flow rates, non-fluorinated-GHG gas analysis, and measuring stack gas moisture that have been validated using a scientifically sound validation protocol.

(i) Sample and velocity traverses. Acceptable methods include but are not limited to EPA Method 1 or 1A in Appendix A–1 of 40 CFR part 60.

(ii) Velocity and volumetric flow rates. Acceptable methods include but are not limited to EPA Method 2, 2A, 2B, 2C, 2D, 2F, or 2G in Appendix A–1 of 40 CFR part 60. Alternatives that may be used for determining flow rates include OTM–24 (incorporated by reference, see § 98.7) and ALT–012 (incorporated by reference, see § 98.7).

(iii) Non-fluorinated-GHG gas analysis. Acceptable methods include

but are not limited to EPA Method 3, 3A, or 3B in Appendix A–1 of 40 CFR part 60.

(iv) Stack gas moisture. Acceptable methods include but are not limited to EPA Method 4 in Appendix A–1 of 40 CFR part 60.

(2) *Analytical methods.* Use a quality-assured analytical measurement technology capable of detecting the analyte of interest at the concentration of interest and use a sampling and analytical procedure validated with the analyte of interest at the concentration of interest. Where calibration standards for the analyte are not available, a chemically similar surrogate may be used. Acceptable analytical measurement technologies include but are not limited to gas chromatography (GC) with an appropriate detector, infrared (IR), fourier transform infrared (FTIR), and nuclear magnetic resonance (NMR). Acceptable methods for determining fluorinated GHGs include EPA Method 18 in appendix A–1 of 40 CFR part 60, EPA Method 320 in appendix A of 40 CFR part 63, EPA 430–R–10–003 (incorporated by reference, see § 98.7), ASTM D6348–03 (incorporated by reference, see § 98.7), or other analytical methods validated using EPA Method 301 at 40 CFR part 63, appendix A or some other scientifically sound validation protocol. Acceptable methods for determining total fluorine concentrations for fluorine-containing compounds in streams under paragraph (b)(3) of this section include ASTM D7359–08 (incorporated by reference, see § 98.7), or other analytical methods validated using EPA Method 301 at 40 CFR part 63, appendix A or some other scientifically sound validation protocol. The validation protocol may include analytical technology manufacturer specifications or recommendations.

(3) *Documentation in GHG Monitoring Plan.* Describe the sampling, measurement, and analytical method(s) used under paragraphs (e)(1) and (e)(2) of this section in the GHG Monitoring Plan as required under § 98.3(g)(5). Identify the methods used to obtain the samples and measurements listed under paragraphs (e)(1)(i) through (e)(1)(iv) of this section. At a minimum, include in the description of the analytical method a description of the analytical measurement equipment and procedures, quantitative estimates of the method's accuracy and precision for the analytes of interest at the concentrations of interest, as well as a description of how these accuracies and precisions were estimated, including the validation protocol used.

(f) *Emission monitoring for pieces of equipment.* If you conduct a site-specific leak detection method or monitoring approach for pieces of equipment, follow paragraph (f)(1) or (f)(2) of this section and follow paragraph (f)(3) of this section.

(1) *Site-specific leak monitoring approach.* You may develop a site-specific leak monitoring approach. You must validate the leak monitoring method and describe the method and the validation in the GHG Monitoring Plan. To validate the site-specific method, you may, for example, release a known rate of the fluorinated GHGs or surrogates of interest, or you may compare the results of the site-specific method to those of a method that has been validated for the fluorinated GHGs or surrogates of interest. In the description of the leak detection method and its validation, include a detailed description of the method, including the procedures and equipment used and any sampling strategies. Also include the rationale behind the method, including why the method is expected to result in an unbiased estimate of emissions from equipment leaks. If the method is based on methods that are used to detect or quantify leaks or other emissions in other regulations, standards, or guidelines, identify and describe the regulations, standards, or guidelines and why their methods are applicable to emissions of fluorinated GHGs or surrogates from leaks. Account for possible sources of error in the method, e.g., instrument detection limits, measurement biases, and sampling biases. Describe validation efforts, including but not limited to any comparisons against standard leaks or concentrations, any comparisons against other methods, and their results. If you use the Screening Ranges Approach, the EPA Correlation Approach, or the Unit-Specific Correlation Approach with a monitoring instrument that does not meet all of the specifications in EPA Method 21 at 40 CFR part 60, appendix A–7, then explain how and why the monitoring instrument, as used at your facility, would nevertheless be expected to accurately detect and quantify emissions of fluorinated GHGs or surrogates from process equipment, and describe how you verified its accuracy. For all methods, provide a quantitative estimate of the accuracy and precision of the method.

(2) *EPA Method 21 monitoring.* If you determine that EPA Method 21 at 40 CFR part 60, appendix A–7 is appropriate for monitoring a fluorinated GHG, conduct the screening value concentration measurements using EPA Method 21 at 40 CFR part 60, appendix A–7 to determine the screening range data or the actual screening value data for the Screening Ranges Approach, EPA Correlation Approach, or the Unit-Specific Correlation Approach. For the one-time testing to develop the Unit-Specific Correlation equations in EPA–453/R–95–017 (incorporated by reference, see § 98.7), conduct the screening value concentration measurements using EPA Method 21 at 40 CFR part 60, appendix A–7 and the bagging procedures to measure mass emissions. Concentration measurements of bagged samples must be conducted using gas chromatography following EPA Method 18 analytical procedures or other method according to § 98.124(e). Use methane or other appropriate compound as the calibration gas.

(3) *Frequency of measurement and sampling.* If you estimate emissions based on monitoring of equipment, conduct monitoring at least annually. Sample at least one-third of equipment annually (except for equipment that is unsafe-to-monitor, difficult-to-monitor, insulated, or in heavy liquid service, pumps with dual mechanical seals, agitators with dual mechanical seals, pumps with no external shaft, agitators with no external shaft, pressure relief devices in gas and vapor service with an upstream rupture disk, sampling connection systems with closed-loop or closed purge systems, and pieces of equipment whose leaks are routed through a closed vent system to a destruction device), changing the sample each year such that at the end of three years, all equipment in the process has been monitored. If you estimate emissions based on a sample of the equipment in the process, ensure that the sample is representative of the equipment in the process. If you have multiple processes that have similar types of equipment in similar service, and that produce or transform similar fluorinated GHGs (in terms of chemical composition, molecular weight, and vapor pressure) at similar pressures and concentrations, then you may annually sample all of the equipment in one third of these processes rather than one third of the equipment in each process.

(g) *Destruction device performance testing.* If you vent or otherwise feed fluorinated GHGs into a destruction device and apply the destruction efficiency of the device to one or more fluorinated GHGs in § 98.123, you must conduct emissions testing to determine the destruction efficiency for each fluorinated GHG to which you apply the destruction efficiency. You must either determine the destruction efficiency for the most-difficult-to-destroy fluorinated GHG fed into the device (or a surrogate

that is still more difficult to destroy) and apply that destruction efficiency to all the fluorinated GHGs fed into the device or alternatively determine different destruction efficiencies for different groups of fluorinated GHGs using the most-difficult-to-destroy fluorinated GHG of each group (or a surrogate that is still more difficult to destroy).

(1) *Destruction efficiency testing.* You must sample the inlet and outlet of the destruction device for a minimum of three runs of 1 hour each to determine the destruction efficiency. You must conduct the emissions testing using the methods in paragraph (e) of this section. To determine the destruction efficiency, emission testing must be conducted when operating at high loads reasonably expected to occur (i.e., representative of high total fluorinated GHG load that will be sent to the device) and when destroying the most-difficult-to-destroy fluorinated GHG (or a surrogate that is still more difficult to destroy) that is fed into the device from the processes subject to this subpart or that belongs to the group of fluorinated GHGs for which you wish to establish a DE. If the outlet concentration of a fluorinated GHG that is fed into the device is below the detection limit of the method, you may use a concentration of one-half the detection limit to estimate the destruction efficiency.

(i) If perfluoromethane (CF_4) is vented to the destruction device in any stream in more than trace concentrations, you must test and determine the destruction efficiency achieved specifically for CF_4 to take credit for the CF_4 emissions reduction.

(ii) If sulfur hexafluoride (SF_6) is vented to the destruction device in any stream in more than trace concentrations, you must test and determine the destruction efficiency achieved specifically for SF_6, or alternatively for CF_4 as a surrogate, to take credit for the SF_6 emissions reduction.

(iii) If saturated perfluorocarbons other than CF_4 are vented to the destruction device in any stream in more than trace concentrations, you must test and determine the destruction efficiency achieved for the lowest molecular weight saturated perfluorocarbon vented to the destruction device, or alternatively for a lower molecular weight saturated PFC or SF_6 as a surrogate, to take credit for the PFC emission reduction.

(iv) For all other fluorinated GHGs that are vented to the destruction device in any stream in more than trace concentrations, you must test and determine the destruction efficiency achieved for the most-difficult-to-destroy fluorinated GHG or surrogate vented to the destruction device. Examples of acceptable surrogates include the Class 1 compounds (ranked 1 through 34) in Appendix D, Table D–1 of "Guidance on Setting Permit Conditions and Reporting Trial Burn Results; Volume II of the Hazardous Waste Incineration Guidance Series," January 1989, EPA Publication EPA 625/6–89/019. You can obtain a copy of this publication by contacting the Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 272–0167, *http://www.epa.gov.*

(2) *Destruction efficiency testing frequency.* You must conduct emissions testing to determine the destruction efficiency as provided in paragraphs (g)(2)(i) or (ii) of this section, whichever occurs first:

(i) Conduct an emissions test every 10 years. In the calculations under § 98.123, apply the updated destruction efficiency to the destruction that occurs after the test.

(ii) *Destruction device changes that affect the destruction efficiency.* If you make a change to the destruction device that would be expected to affect the destruction efficiency, you must conduct an emissions test to update the destruction efficiency. Conduct the test before the February 28 of the year that immediately follows the change. In the calculations under § 98.123, apply the updated destruction efficiency to the destruction that occurs after the change to the device.

(3) *Previous testing* .If you have conducted an emissions test within the 10 years prior to December 31, 2010, and the emissions testing meets the requirements in paragraph (g)(1) of this section, you may use the destruction efficiency determined during this previous emissions testing. For purposes of paragraph (g)(2)(i) of this section, the date of the previous emissions test rather than December 31, 2010 shall constitute the beginning of the 10-year re-measurement cycle.

(4) *Hazardous Waste Combustor testing.* If a destruction device used to destroy fluorinated GHG is subject to subpart EEE of part 63 of this chapter or any portion of parts 260–270 of this chapter, you may apply the destruction efficiency specifically determined for CF_4, SF_6, PFCs other than CF_4, and all other fluorinated GHGs under that test if the testing meets the criteria in paragraph (g)(1)(i) through (g)(1)(iv) of this section. If the testing of the destruction efficiency under subpart EEE of part 63 of this chapter was conducted more than 10 years ago, you may use the most recent destruction efficiency test provided that the design, operation, or maintenance of the destruction device has not changed since the last destruction efficiency test in a manner that could affect the ability to achieve the destruction efficiency, and the hazardous waste is fed into the normal flame zone.

(h) *Mass of previously produced fluorinated GHGs fed into destruction device.* You must measure the mass of each fluorinated GHG that is fed into the destruction device in more than trace concentrations and that was previously produced as defined at § 98.410(b). Such fluorinated GHGs include but are not limited to quantities that are shipped to the facility by another facility for destruction and quantities that are returned to the facility for reclamation but are found to be irretrievably contaminated and are therefore destroyed. You must use flowmeters, weigh scales, or a combination of volumetric and density measurements with an accuracy and precision of ±1 percent of full scale or better. If the measured mass includes more than trace concentrations of materials other than the fluorinated GHG being destroyed, you must measure the concentration of the fluorinated GHG being destroyed. You must multiply this concentration (mass fraction) by the mass measurement to obtain the mass of the fluorinated GHG fed into the destruction device.

(i) *Emissions due to malfunctions of destruction device.* In their estimates of the mass of fluorinated GHG destroyed, fluorinated gas production facilities that destroy fluorinated GHGs must account for any temporary reductions in the destruction efficiency that result from any malfunctions of the destruction device, including periods of operation outside of the operating conditions defined in operating permit requirements and/or destruction device manufacturer specifications.

(j) *Emissions due to process startup, shutdown, or malfunctions.* Fluorinated GHG production facilities must account for fluorinated GHG emissions that occur as a result of startups, shutdowns, and malfunctions, either recording fluorinated GHG emissions during these events, or documenting that these events do not result in significant fluorinated GHG emissions. Facilities may use the calculation methods in § 98.123(c)(1) to estimate emissions during startups, shutdowns, and malfunctions.

(k) *Monitoring for venting residual fluorinated GHG in containers.* Measure the residual fluorinated GHG in containers received by the facility either using scales or using pressure and

temperature measurements. You may use pressure and temperature measurements only in cases where no liquid fluorinated GHG is present in the container. Scales must have an accuracy and precision of ±1 percent or better of the filled weight (gas plus tare) of the containers of fluorinated GHGs that are typically weighed on the scale. For example, for scales that are generally used to weigh cylinders that contain 115 pounds of gas when full and that have a tare weight of 115 pounds, this equates to ±1 percent of 230 pounds, or ±2.3 pounds. Pressure gauges and thermometers used to measure quantities that are monitored under this paragraph must have an accuracy and precision of ±1 percent of full scale or better.

(l) Initial scoping speciations, emissions testing, emission factor development, emission calculation factor development, emission characterization development, and destruction efficiency determinations must be completed by February 29, 2012 for processes and operating scenarios that operate between December 31, 2010 and December 31, 2011. For other processes and operating scenarios, initial scoping speciations, emissions testing, emission factor development, emission calculation factor development, emission characterization development, and destruction efficiency determinations must be complete by February 28 of the year following the year in which the process or operating scenario commences or recommences.

(m) Calibrate all flow meters, weigh scales, and combinations of volumetric and density measures using monitoring instruments traceable to the International System of Units (SI) through the National Institute of Standards and Technology (NIST) or other recognized national measurement institute. Recalibrate all flow meters, weigh scales, and combinations of volumetric and density measures at the minimum frequency specified by the manufacturer. Use any of the following applicable flow meter test methods or the calibration procedures specified by the flow meter, weigh-scale, or other volumetric or density measure manufacturer.

(1) ASME MFC–3M–2004 Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi (incorporated by reference, see § 98.7).

(2) ASME MFC–4M–1986 (Reaffirmed 1997) Measurement of Gas Flow by Turbine Meters (incorporated by reference, see § 98.7).

(3) ASME–MFC–5M–1985, (Reaffirmed 1994) Measurement of Liquid Flow in Closed Conduits Using Transit-Time Ultrasonic Flowmeters (incorporated by reference, see § 98.7).

(4) ASME MFC–6M–1998 Measurement of Fluid Flow in Pipes Using Vortex Flowmeters (incorporated by reference, see § 98.7).

(5) ASME MFC–7M–1987 (Reaffirmed 1992) Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles (incorporated by reference, see § 98.7).

(6) ASME MFC–9M–1988 (Reaffirmed 2001) Measurement of Liquid Flow in Closed Conduits by Weighing Method (incorporated by reference, see § 98.7).

(7) ASME MFC–11M–2006 Measurement of Fluid Flow by Means of Coriolis Mass Flowmeters (incorporated by reference, see § 98.7).

(8) ASME MFC–14M–2003 Measurement of Fluid Flow Using Small Bore Precision Orifice Meters (incorporated by reference, see § 98.7).

(n) All analytical equipment used to determine the concentration of fluorinated GHGs, including but not limited to gas chromatographs and associated detectors, infrared (IR), fourier transform infrared (FTIR), and nuclear magnetic resonance (NMR) devices, must be calibrated at a frequency needed to support the type of analysis specified in the GHG Monitoring Plan as required under § 98.124(e)(3) and 93.3(g)(5). Quality assurance samples at the concentrations of concern must be used for the calibration. Such quality assurance samples must consist of or be prepared from certified standards of the analytes of concern where available; if not available, calibration must be performed by a method specified in the GHG Monitoring Plan.

(o) Special provisions for estimating 2011 and subsequent year emissions.

(1) *Best available monitoring methods.* To estimate emissions that occur from January 1, 2011 through June 30, 2011, owners or operators may use best available monitoring methods for any parameter that cannot reasonably be measured according to the monitoring and QA/QC requirements of this subpart. The owner or operator must use the calculation methodologies and equations in § 98.123, but may use the best available monitoring method for any parameter for which it is not reasonably feasible to acquire, install, or operate a required piece of monitoring equipment, to procure measurement services from necessary providers, or to gain physical access to make required measurements in a facility by January 1, 2011. Starting no later than July 1, 2011, the owner or operator must discontinue using best available methods and begin following all applicable monitoring and QA/QC requirements of this part, except as provided in paragraphs (o)(2) through (o)(4) of this section. Best available monitoring methods means any of the following methods specified in this paragraph:

(i) Monitoring methods currently used by the facility that do not meet the specifications of this subpart.

(ii) Supplier data.

(iii) Engineering calculations or assessments.

(iv) Other company records.

(2) *Requests for extension of the use of best available monitoring methods to estimate 2011 emissions: parameters other than scoping speciations, emission factors, and emission characterizations.* The owner or operator may submit a request to the Administrator to use one or more best available monitoring methods for parameters other than scoping speciations, emission factors, or emission characterizations to estimate emissions that occur between July 1, 2011 and December 31, 2011.

(i) *Timing of request.* The extension request must be submitted to EPA no later than February 28, 2011.

(ii) *Content of request.* Requests must contain the following information:

(A) A list of specific items of monitoring equipment and measurement services for which the request is being made and the locations (e.g., processes and vents) where each piece of monitoring equipment will be installed and where each measurement service will be provided.

(B) Identification of the specific rule requirements for which the monitoring equipment or measurement service is needed.

(C) A description of the reasons why the needed equipment could not be obtained, installed, or operated or why the needed measurement service could not be provided before July 1, 2011. The owner or operator must consider all of the data collection and emission calculation options outlined in the rule for a specific emissions source before claiming that a specific safety, technical, logistical, or legal barrier exists.

(D) If the reason for the extension is that the equipment cannot be purchased, delivered, or installed before July 1, 2011, include supporting documentation such as the date the monitoring equipment was ordered, investigation of alternative suppliers, the dates by which alternative vendors promised delivery or installation, backorder notices or unexpected delays, descriptions of actions taken to expedite delivery or installation, and the current expected date of delivery or installation.

(E) If the reason for the extension is that service providers were unable to provide necessary measurement

services, include supporting documentation demonstrating that these services could not be acquired before July 1, 2011. This documentation must include written correspondence to and from at least two service providers stating that they will not be able to provide the necessary services before July 1, 2011.

(F) If the reason for the extension is that the process is operating continuously without process shutdown, include supporting documentation showing that it is not practicable to isolate the process equipment or unit and install the measurement device without a full shutdown or a hot tap, and that there is no opportunity before July 1, 2011 to install the device. Include the date of the three most recent shutdowns for each relevant process equipment or unit, the frequency of shutdowns for each relevant process equipment or unit, and the date of the next planned process equipment or unit shutdown.

(G) If the reason for the extension is that access to process streams, emissions streams, or destroyed streams, as applicable, could not be gained before July 1, 2011 for reasons other than the continuous operation of the process without shutdown, include illustrative documentation such as photographs and engineering diagrams demonstrating that access could not be gained.

(H) A description of the best available monitoring methods that will be used and how their results will be applied (i.e., which calculation method will be used) to develop the emission estimate. Where the proposed best available monitoring method is the use of current monitoring data in the mass-balance approach, include the estimated relative and absolute errors of the mass-balance approach using the current monitoring data.

(I) A description of the specific actions the owner or operator will take to comply with monitoring requirements by January 1, 2012.

(3) *Requests for extension of the use of best available monitoring methods to estimate 2011 emissions: scoping speciations, emission factors, and emission characterizations.* The owner or operator may submit a request to the Administrator to use one or more best available monitoring methods for scoping speciations, emission factors, and emission characterizations to estimate emissions that occur between July 1, 2011 and December 31, 2011.

(i) *Timing of request.* The extension request must be submitted to EPA no later than June 30, 2011.

(ii) *Content of request.* Requests must contain the information outlined in paragraph (o)(2)(ii) of this section, substituting March 1, 2012 for July 1, 2011 and substituting March 1, 2013 for January 1, 2012.

(iii) *Reporting of 2011 emissions using scoping speciations, emission factors, and emission characterizations developed after February 29, 2012.* Facilities that are approved to use best available monitoring methods in 2011 for scoping speciations, emission factors, or emission characterizations for certain processes must submit, by March 31, 2013, revised 2011 emission estimates that reflect the scoping speciations, emission factors, and emission characterizations that are measured for those processes after February 29, 2012. If the operating scenario for 2011 is different from all of the operating scenarios for which emission factors are developed after February 29, 2012, use Equation L–23 at § 98.123(c)(3)(viii) to adjust the emission factor(s) or emission characterizations measured for the post-February 29, 2012 operating scenario(s) to account for the differences.

(4) *Requests for extension of the use of best available monitoring methods to estimate emissions that occur after 2011.* EPA does not anticipate approving the use of best available monitoring methods to estimate emissions that occur beyond December 31, 2011; however, EPA reserves the right to review requests for unique and extreme circumstances which include safety, technical infeasibility, or inconsistency with other local, State or Federal regulations.

(i) *Timing of request.* The extension request must be submitted to EPA no later than June 30, 2011.

(ii) *Content of request.* Requests must contain the following information:

(A) The information outlined in paragraph (o)(2)(ii) of this section. For scoping speciations, emission factors, and emission characterizations, substitute March 1, 2013 for July 1, 2011 and substitute March 1, 2014 for January 1, 2012. For other parameters, substitute January 1, 2012 for July 1, 2011 and substitute January 1, 2013 for January 1, 2012.

(B) A detailed outline of the unique circumstances necessitating an extension, including specific data collection issues that do not meet safety regulations, technical infeasibility or specific laws or regulations that conflict with data collection. The owner or operator must consider all the data collection and emission calculation options outlined in the rule for a specific emissions source before claiming that a specific safety, technical or legal barrier exists.

(C) A detailed explanation and supporting documentation of how and when the owner or operator will receive the required data and/or services to comply with the reporting requirements of this subpart in the future.

(E) The Administrator reserves the right to require that the owner or operator provide additional documentation.

(iii) *Reporting of 2011 and subsequent year emissions using scoping speciations, emission factors, and emission characterizations developed after approval to use best available monitoring methods expires.* Facilities that are approved to use best available monitoring methods in 2011 and subsequent years for scoping speciations, emission factors, or emission characterizations for certain processes must submit, by March 31 of the year that begins one year after their approval to use best available monitoring method(s) expires, revised emission estimates for 2011 and subsequent years that reflect the scoping speciations, emission factors, and emission characterizations that are measured for those processes in 2013 or subsequent years. If the operating scenario for 2011 or subsequent years is different from all of the operating scenarios for which emission factors or emission characterizations are developed in 2013 or subsequent years, use Equation L–23 of § 98.123(c)(3)(viii) to adjust the emission factor(s) or emission characterization(s) measured for the new operating scenario(s) to account for the differences.

(5) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that it is not reasonably feasible to acquire, install, or operate the required piece of monitoring equipment, to procure measurement services from necessary providers, or to gain physical access to make required measurements in a facility according to the requirements of this subpart by the dates specified in paragraphs (o)(2), (3), and (4) of this section for any of the reasons described in paragraph (o)(2)(ii) of this section, or, for requests under paragraph (o)(4) of this section, any of the reasons described in paragraph (o)(4)(ii)(B) of this section.

§ 98.125 Procedures for estimating missing data.

(a) A complete record of all measured parameters used in the GHG emissions calculations in § 98.123 is required. Therefore, whenever a quality-assured value of a required parameter is

unavailable, a substitute data value for the missing parameter must be used in the calculations as specified in the paragraphs (b) and (c) of this section. You must document and keep records of the procedures used for all such estimates.

(b) For each missing value of the fluorinated GHG concentration or fluorine-containing compound concentration, the substitute data value must be the arithmetic average of the quality-assured values of that parameter immediately preceding and immediately following the missing data incident.

(c) For each missing value of the mass produced, fed into the production process, fed into the transformation process, or fed into destruction devices, the substitute value of that parameter must be a secondary mass measurement where such a measurement is available. For example, if the mass produced is usually measured with a flowmeter at the inlet to the day tank and that flowmeter fails to meet an accuracy or precision test, malfunctions, or is rendered inoperable, then the mass produced may be estimated by calculating the change in volume in the day tank and multiplying it by the density of the product. Where a secondary mass measurement is not available, the substitute value of the parameter must be an estimate based on a related parameter. For example, if a flowmeter measuring the mass fed into a destruction device is rendered inoperable, then the mass fed into the destruction device may be estimated using the production rate and the previously observed relationship between the production rate and the mass flow rate into the destruction device.

§ 98.126 Data reporting requirements.

(a) *All facilities.* In addition to the information required by § 98.3(c), you must report the information in paragraphs (a)(2) through (a)(6) of this section.

(1) *Frequency of reporting under paragraph (a) of this section.* The information in paragraphs (a)(2), (5), and (6) of this section must be reported annually. The information in paragraphs (a)(3) and (4) of this section must be reported once by March 31, 2012 for each process and operating scenarios that operates between December 31, 2010 and December 31, 2011. For other processes and operating scenarios, the information in paragraphs (a)(3) and (4) of this section must be reported once by March 31 of the year following the year in which the process or operating scenario commences or recommences.

(2) You must report the total mass in metric tons of each fluorinated GHG emitted from:

(i) Each fluorinated gas production process and all fluorinated gas production processes combined.

(ii) Each fluorinated gas transformation process that is not part of a fluorinated gas production process and all such fluorinated gas transformation processes combined, except report separately fluorinated GHG emissions from transformation processes where a fluorinated GHG reactant is produced at another facility.

(iii) Each fluorinated gas destruction process that is not part of a fluorinated gas production process or a fluorinated gas transformation process and all such fluorinated gas destruction processes combined.

(iv) Venting of residual fluorinated GHGs from containers returned from the field.

(3) The chemical identities of the contents of the stream(s) (including process, emissions, and destroyed streams) analyzed under the initial scoping speciation of fluorinated GHG at § 98.124(a), by process.

(4) The location and function of the stream(s) (including process streams, emissions streams, and destroyed streams) that were analyzed under the initial scoping speciation of fluorinated GHG at § 98.124(a), by process.

(5) The method used to determine the mass emissions of each fluorinated GHG, i.e., mass balance, process-vent-specific emission factor, or process-vent-specific emission calculation factor, for each process and process vent at the facility. For processes for which the process-vent-specific emission factor or process-vent-specific emission calculation factor are used, report the method used to estimate emissions from equipment leaks.

(6) The chemical formula and total mass produced of the fluorinated gas product in metric tons, by chemical and process.

(b) *Reporting for mass balance approach.* For processes whose emissions are determined using the mass-balance approach under § 98.123(b), you must report the information listed in paragraphs (b)(1) through (b)(13) of this section for each process on an annual basis. Identify and separately report fluorinated GHG emissions from transformation processes where the fluorinated GHG reactants are produced at another facility. If you use an element other than fluorine in the mass-balance equation pursuant to § 98.123(b)(3), substitute that element for fluorine in the reporting requirements of this paragraph.

(1) If you calculate the relative and absolute errors under 98.123(b)(1), the absolute and relative errors calculated under paragraph § 98.123(b)(1), as well as the data (including quantities and their accuracies and precisions) used in these calculations.

(2) The balanced chemical equation that describes the reaction used to manufacture the fluorinated GHG product and each fluorinated GHG transformation product.

(3) The mass and chemical formula of each fluorinated GHG reactant emitted from the process in metric tons.

(4) The mass and chemical formula of the fluorinated GHG product emitted from the process in metric tons.

(5) The mass and chemical formula of each fluorinated GHG by-product emitted from the process in metric tons.

(6) The mass and chemical formula of each fluorine-containing reactant that is fed into the process (metric tons).

(7) The mass and chemical formula of each fluorine-containing product produced by the process (metric tons).

(8) If you use § 98.123(b)(4) to estimate the total mass of fluorine in destroyed or recaptured streams, report the following.

(i) The mass and chemical formula of each fluorine-containing product that is removed from the process and fed into the destruction device (metric tons).

(ii) The mass and chemical formula of each fluorine-containing by-product that is removed from the process and fed into the destruction device (metric tons).

(iii) The mass and chemical formula of each fluorine-containing reactant that is removed from the process and fed into the destruction device (metric tons).

(iv) The mass and chemical formula of each fluorine-containing by-product that is removed from the process and recaptured (metric tons).

(v) The demonstrated destruction efficiency of the destruction device for each fluorinated GHG fed into the device from the process in greater than trace concentrations (fraction).

(9) If you use § 98.123(b)(15) to estimate the total mass of fluorine in destroyed or recaptured streams, report the following.

(i) The mass of fluorine in each stream that is fed into the destruction device (metric tons).

(ii) The mass of fluorine that is recaptured (metric tons).

(iii) The weighted average destruction efficiency of the destruction device calculated for each stream under § 98.123(b)(16).

(10) The fraction of the mass emitted that consists of each fluorine-containing reactant.

(11) The fraction of the mass emitted that consists of the fluorine-containing product.

(12) The fraction of the mass emitted that consists of each fluorine-containing by-product.

(13) The method used to estimate the total mass of fluorine in destroyed or recaptured streams (specify § 98.123(b)(4) or (15)).

(c) *Reporting for emission factor and emission calculation factor approach.* For processes whose emissions are determined using the emission factor approach under § 98.123(c)(3) or the emission calculation factor under § 98.123(c)(4), you must report the following for each process. Fluorinated GHG emissions from transformation processes where the fluorinated GHG reactants are produced at another facility must be identified and reported separately from other fluorinated GHG emissions.

(1) The identity and quantity of the process activity used to estimate emissions (e.g., tons of product produced or tons of reactant consumed).

(2) The site-specific, process-vent-specific emission factor(s) or emission calculation factor for each process vent.

(3) The mass of each fluorinated GHG emitted from each process vent (metric tons).

(4) The mass of each fluorinated GHG emitted from equipment leaks (metric tons).

(d) *Reporting for missing data.* Where missing data have been estimated pursuant to § 98.125, you must report the reason the data were missing, the length of time the data were missing, the method used to estimate the missing data, and the estimates of those data.

(e) *Reporting of destruction device excess emissions data.* Each fluorinated gas production facility that destroys fluorinated GHGs must report the excess emissions that result from malfunctions of the destruction device, and these excess emissions would be reflected in the fluorinated GHG estimates in § 98.123(b) and (c). Such excess emissions would occur if the destruction efficiency was reduced due to the malfunction.

(f) *Reporting of destruction device testing.* By March 31, 2012 or by March 31 of the year immediately following the year in which it begins fluorinated GHG destruction, each fluorinated gas production facility that destroys fluorinated GHGs must submit a report containing the information in paragraphs (f)(1) through (f)(4) of this section. This report is one-time unless you make a change to the destruction device that would be expected to affect its destruction efficiencies.

(1) Destruction efficiency (DE) of each destruction device for each fluorinated GHG whose destruction the facility reflects in § 98.123, in accordance with § 98.124(g)(1)(i) through (iv).

(2) Chemical identity of the fluorinated GHG(s) used in the performance test conducted to determine destruction efficiency, including surrogates, and information on why the surrogate is sufficient to demonstrate the destruction efficiency for each fluorinated GHG, consistent with requirements in § 98.124(g)(1), vented to the destruction device.

(3) Date of the most recent destruction device test.

(4) Name of all applicable Federal or State regulations that may apply to the destruction process.

(5) If you make a change to the destruction device that would be expected to affect its destruction efficiencies, submit a revised report that reflects the changes, including the revised destruction efficiencies measured for the device under § 98.124(g)(2)(ii), by March 31 of the year that immediately follows the change.

(g) *Reporting for destruction of previously produced fluorinated GHGs.* Each fluorinated gas production facility that destroys fluorinated GHGs must report, separately from the fluorinated GHG emissions reported under paragraphs (b) or (c) of this section, the following for each previously produced fluorinated GHG destroyed:

(1) The mass of the fluorinated GHG fed into the destruction device.

(2) The mass of the fluorinated GHG emitted from the destruction device.

(h) *Reporting of emissions from venting of residual fluorinated GHGs from containers.* Each fluorinated gas production facility that vents residual fluorinated GHGs from containers must report the following for each fluorinated GHG vented:

(1) The mass of the residual fluorinated GHG vented from each container size and type annually (tons).

(2) If applicable, the heel factor calculated for each container size and type.

(i) *Reporting of fluorinated GHG products of incomplete combustion (PICs) of fluorinated gases.* Each fluorinated gas production facility that destroys fluorinated gases must submit a one-time report by June 30, 2011, that describes any measurements, research, or analysis that it has performed or obtained that relate to the formation of products of incomplete combustion that are fluorinated GHGs during the destruction of fluorinated gases. The report must include the methods and results of any measurement or modeling studies, including the products of incomplete combustion for which the exhaust stream was analyzed, as well as copies of relevant scientific papers, if available, or citations of the papers, if they are not. No new testing is required to fulfill this requirement.

§ 98.127 Records that must be retained.

In addition to the records required by § 98.3(g), you must retain the dated records specified in paragraphs (a) through (j) of this section, as applicable.

(a) *Process information records.*

(1) Identify all products and processes subject to this subpart. Include the unit identification as appropriate.

(2) Monthly and annual records, as applicable, of all analyses and calculations conducted as required under § 98.123, including the data monitored under § 98.124, and all information reported as required and § 98.126.

(b) *Scoping speciation.* Retain records documenting the information reported under § 98.126(a)(3) and (4).

(c) *Mass-balance method.* Retain the following records for each process for which the mass-balance method was used to estimate emissions. If you use an element other than fluorine in the mass-balance equation pursuant to § 98.123(b)(3), substitute that element for fluorine in the recordkeeping requirements of this paragraph.

(1) The data and calculations used to estimate the absolute and relative errors associated with use of the mass-balance approach.

(2) The data and calculations used to estimate the mass of fluorine emitted from the process.

(3) The data and calculations used to determine the fractions of the mass emitted consisting of each reactant (FER_d), product (FEP), and by-product (FEB_k), including the preliminary calculations in § 98.123(b)(8)(i).

(d) *Emission factor and emission calculation factor method.* Retain the following records for each process for which the emission factor or emission calculation factor method was used to estimate emissions.

(1) Identify all continuous process vents with emissions of fluorinated GHGs that are less than 10,000 metric tons CO_2e per year and all continuous process vents with emissions of 10,000 metric tons CO_2e per year or more. Include the data and calculation used to develop the preliminary estimate of emissions for each process vent.

(2) Identify all batch process vents.

(3) For each vent, identify the method used to develop the factor (i.e., emission factor by emissions test or emission calculation factor).

(4) The emissions test data and reports (see § 98.124(c)(5)) and the calculations used to determine the process-vent-specific emission factor, including the actual process-vent-specific emission factor, the average hourly emission rate of each fluorinated GHG from the process vent during the test and the process feed rate, process production rate, or other process activity rate during the test.

(5) The process-vent-specific emission calculation factor and the calculations used to determine the process-vent-specific emission calculation factor.

(6) The annual process production quantity or other process activity information in the appropriate units, along with the dates and time period during which the process was operating and dates and time periods the process vents are vented to the destruction device. As an alternative to date and time periods when process vents are vented to the destruction device, a facility may track dates and time periods that process vents by-pass the destruction device.

(7) Calculations used to determine annual emissions of each fluorinated GHG for each process and the total fluorinated GHG emissions for all processes, i.e., total for facility.

(e) *Destruction efficiency testing.* A fluorinated GHG production facility that destroys fluorinated GHGs and reflects this destruction in § 98.123 must retain the emissions performance testing reports (including revised reports) for each destruction device. The emissions performance testing report must contain all information and data used to derive the destruction efficiency for each fluorinated GHG whose destruction the facility reflects in § 98.123, as well as the key process and device conditions during the test. This information includes the following:

(1) Destruction efficiency (DE) determined for each fluorinated GHG whose destruction the facility reflects in § 98.123, in accordance with § 98.124(g)(1)(i) through (iv).

(2) Chemical identity of the fluorinated GHG(s) used in the performance test conducted to determine destruction efficiency, including surrogates, and information on why the surrogate is sufficient to demonstrate destruction efficiency for each fluorinated GHG, consistent with requirements in § 98.124(g)(1)(i) through (iv), vented to the destruction device.

(3) Mass flow rate of the stream containing the fluorinated GHG(s) or surrogate into the device during the test.

(4) Concentration (mass fraction) of each fluorinated GHG or surrogate in the stream flowing into the device during the test.

(5) Concentration (mass fraction) of each fluorinated GHG or surrogate at the outlet of the destruction device during the test.

(6) Mass flow rate at the outlet of the destruction device during the test.

(7) Test methods and analytical methods used to determine the mass flow rates and fluorinated GHG (or surrogate) concentrations of the streams flowing into and out of the destruction device during the test.

(8) Destruction device conditions that are normally monitored for device control, such as temperature, total mass flow rates into the device, and CO or O_2 levels.

(9) Name of all applicable Federal or State regulations that may apply to the destruction process.

(f) *Equipment leak records.* If you are subject to § 98.123(d) of this subpart, you must maintain information on the number of each type of equipment; the service of each piece of equipment (gas, light liquid, heavy liquid); the concentration of each fluorinated GHG in the stream; each piece of equipment excluded from monitoring requirement; the time period each piece of equipment was in service, and the emission calculations for each fluorinated GHG for all processes. Depending on which equipment leak monitoring approach you follow, you must maintain information for equipment on the associated screening data concentrations for greater than or equal to 10,000 ppmv and associated screening data concentrations for less than 10,000 ppmv; associated actual screening data concentrations; and associated screening data and leak rate data (i.e., bagging) used to develop a unit-specific correlation. If you developed and follow a site-specific leak detection approach, provide the records for monitoring events and the emissions estimation calculations, as appropriate, consistent with the approach for equipment leak emission estimation in your GHG Monitoring Plan.

(g) *Container heel records.* If you vent residual fluorinated GHGs from containers, maintain the following records of the measurements and calculations used to estimate emissions of residual fluorinated GHGs from containers.

(i) If you measure the contents of each container, maintain records of these measurements and the calculations used to estimate emissions of each fluorinated GHG from each container size and type.

(ii) If you develop and apply container heel factors to estimate emissions, maintain records of the measurements and calculations used to develop the heel factor for each fluorinated GHG and each container size and type and of the number of containers of each fluorinated GHG and of each container size and type returned to your facility.

(h) *Missing data records.* Where missing data have been estimated pursuant to § 98.125, you must record the reason the data were missing, the length of time the data were missing, the method used to estimate the missing data, and the estimates of those data.

(i) *All facilities.* Dated records documenting the initial and periodic calibration of all analytical equipment used to determine the concentration of fluorinated GHGs, including but not limited to gas chromatographs, gas chromatography-mass spectrometry (GC/MS), gas chromatograph-electron capture detector (GC/ECD), fourier transform infrared (FTIR), and nuclear magnetic resonance (NMR) devices, and all mass measurement equipment such as weigh scales, flowmeters, and volumetric and density measures used to measure the quantities reported under this subpart, including the industry standards or manufacturer directions used for calibration pursuant to § 98.124(e), (f), (g), (m), and (n).

(j) GHG Monitoring Plans, as described in § 98.3(g)(5), must be completed by April 1, 2011.

§ 98.128 Definitions.

Except as provided in this section, all of the terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part. If a conflict exists between a definition provided in this subpart and a definition provided in subpart A, the definition in this subpart shall take precedence for the reporting requirements in this subpart.

Batch process or *batch operation* means a noncontinuous operation involving intermittent or discontinuous feed into equipment, and, in general, involves the emptying of the equipment after the batch operation ceases and prior to beginning a new operation. Addition of raw material and withdrawal of product do not occur simultaneously in a batch operation.

Batch emission episode means a discrete venting episode associated with a vessel in a process; a vessel may have more than one batch emission episode. For example, a displacement of vapor resulting from the charging of a vessel with a feed material will result in a discrete emission episode that will last through the duration of the charge and will have an average flow rate equal to

the rate of the charge. If the vessel is then heated, there will also be another discrete emission episode resulting from the expulsion of expanded vapor. Other emission episodes also may occur from the same vessel and other vessels in the process, depending on process operations.

By-product means a chemical that is produced coincidentally during the production of another chemical.

Completely destroyed means destroyed with a destruction efficiency of 99.99 percent or greater.

Completely recaptured means 99.99 percent or greater of each fluorinated GHG is removed from a stream.

Continuous process or operation means a process where the inputs and outputs flow continuously throughout the duration of the process. Continuous processes are typically steady state.

Destruction device means any device used to destroy fluorinated GHG.

Destruction process means a process used to destroy fluorinated GHG in a destruction device such as a thermal incinerator or catalytic oxidizer.

Difficult-to-monitor means the equipment piece may not be monitored without elevating the monitoring personnel more than 2 meters (7 feet) above a support surface or it is not accessible in a safe manner when it is in fluorinated GHG service.

Dual mechanical seal pump and *dual mechanical seal agitator* means a pump or agitator equipped with a dual mechanical seal system that includes a barrier fluid system where the barrier fluid is not in light liquid service; each barrier fluid system is equipped with a sensor that will detect failure of the seal system, the barrier fluid system, or both; and meets the following requirements:

(1) Each dual mechanical seal system is operated with the barrier fluid at a pressure that is at all times (except periods of startup, shutdown, or malfunction) greater than the pump or agitator stuffing box pressure; or

(2) Equipped with a barrier fluid degassing reservoir that is routed to a process or fuel gas system or connected by a closed-vent system to a control device; or

(3) Equipped with a closed-loop system that purges the barrier fluid into a process stream.

Equipment (for the purposes of § 98.123(d) and § 98.124(f) only) means each pump, compressor, agitator, pressure relief device, sampling connection system, open-ended valve or line, valve, connector, and instrumentation system in fluorinated GHG service for a process subject to this subpart; and any destruction devices or closed-vent systems to which processes subject to this subpart are vented.

Fluorinated gas means any fluorinated GHG, CFC, or HCFC.

In fluorinated GHG service means that a piece of equipment either contains or contacts a feedstock, by-product, or product that is a liquid or gas and contains at least 5 percent by weight fluorinated GHG.

In gas and vapor service means that a piece of equipment in regulated material service contains a gas or vapor at operating conditions.

In heavy liquid service means that a piece of equipment in regulated material service is not in gas and vapor service or in light liquid service.

In light liquid service means that a piece of equipment in regulated material service contains a liquid that meets the following conditions:

(1) The vapor pressure of one or more of the compounds is greater than 0.3 kilopascals at 20 °C.

(2) The total concentration of the pure compounds constituents having a vapor pressure greater than 0.3 kilopascals at 20 °C is equal to or greater than 20 percent by weight of the total process stream.

(3) The fluid is a liquid at operating conditions.

Note to definition of "in light liquid service": Vapor pressures may be determined by standard reference texts or ASTM D–2879, (incorporated by reference, see § 98.7).

In vacuum service means that equipment is operating at an internal pressure which is at least 5 kilopascals below ambient pressure.

Isolated intermediate means a product of a process that is stored before subsequent processing. An isolated intermediate is usually a product of chemical synthesis. Storage of an isolated intermediate marks the end of a process. Storage occurs at any time the intermediate is placed in equipment used solely for storage.

No external shaft pump and *No external shaft agitator* means any pump or agitator that is designed with no externally actuated shaft penetrating the pump or agitator housing.

Operating scenario means any specific operation of a process and includes the information specified in paragraphs (1) through (5) of this definition for each process. A change or series of changes to any of these elements, except for paragraph (4) of this definition, constitutes a different operating scenario.

(1) A description of the process, the specific process equipment used, and the range of operating conditions for the process.

(2) An identification of related process vents, their associated emissions episodes and durations, and calculations and engineering analyses to show the annual uncontrolled fluorinated GHG emissions from the process vent.

(3) The control or destruction devices used, as applicable, including a description of operating and/or testing conditions for any associated destruction device.

(4) The process vents (including those from other processes) that are simultaneously routed to the control or destruction device(s).

(5) The applicable monitoring requirements and any parametric level that assures destruction or removal for all emissions routed to the control or destruction device.

Process means all equipment that collectively functions to produce a fluorinated gas product, including an isolated intermediate (which is also a fluorinated gas product), or to transform a fluorinated gas product. A process may consist of one or more unit operations. For the purposes of this subpart, process includes any, all, or a combination of reaction, recovery, separation, purification, or other activity, operation, manufacture, or treatment which are used to produce a fluorinated gas product. For a continuous process, cleaning operations conducted may be considered part of the process, at the discretion of the facility. For a batch process, cleaning operations are part of the process. Ancillary activities are not considered a process or part of any process under this subpart. Ancillary activities include boilers and incinerators, chillers and refrigeration systems, and other equipment and activities that are not directly involved (i.e., they operate within a closed system and materials are not combined with process fluids) in the processing of raw materials or the manufacturing of a fluorinated gas product.

Process condenser means a condenser whose primary purpose is to recover material as an integral part of a process. All condensers recovering condensate from a process vent at or above the boiling point or all condensers in line prior to a vacuum source are considered process condensers. Typically, a primary condenser or condensers in series are considered to be integral to the process if they are capable of and normally used for the purpose of recovering chemicals for fuel value (i.e., net positive heating value), use, reuse or for sale for fuel value, use, or reuse.

Process vent (for the purposes of this subpart only) means a vent from a

process vessel or vents from multiple process vessels within a process that are manifolded together into a common header, through which a fluorinated GHG-containing gas stream is, or has the potential to be, released to the atmosphere (or the point of entry into a control device, if any). Examples of process vents include, but are not limited to, vents on condensers used for product recovery, bottoms receivers, surge control vessels, reactors, filters, centrifuges, and process tanks. Process vents do not include vents on storage tanks, wastewater emission sources, or pieces of equipment.

Typical batch means a batch process operated within a range of operating conditions that are documented in an operating scenario. Emissions from a typical batch are based on the operating conditions that result in representative emissions. The typical batch defines the uncontrolled emissions for each emission episode defined under the operating scenario.

Uncontrolled fluorinated GHG emissions means a gas stream containing fluorinated GHG which has exited the process (or process condenser or control condenser, where applicable), but which has not yet been introduced into a destruction device to reduce the mass of fluorinated GHG in the stream. If the emissions from the process are not routed to a destruction device, uncontrolled emissions are those fluorinated GHG emissions released to the atmosphere.

Unsafe-to-monitor means that monitoring personnel would be exposed to an immediate danger as a consequence of monitoring the piece of equipment. Examples of unsafe-to-monitor equipment include, but are not limited to, equipment under extreme pressure or heat.

■ 10. Add subpart DD to read as follows:

Subpart DD—Electrical Transmission and Distribution Equipment Use

Sec.
98.300 Definition of the source category.
98.301 Reporting threshold.
98.302 GHGs to report.
98.303 Calculating GHG emissions.
98.304 Monitoring and QA/QC requirements.
98.305 Procedures for estimating missing data.
98.306 Data reporting requirements.
98.307 Records that must be retained.
98.308 Definitions.

Subpart DD—Electrical Transmission and Distribution Equipment Use

§ 98.300 Definition of the source category.

(a) The electrical transmission and distribution equipment use source category consists of all electric transmission and distribution equipment and servicing inventory insulated with or containing sulfur hexafluoride (SF_6) or perfluorocarbons (PFCs) used within an electric power system. Electric transmission and distribution equipment and servicing inventory includes, but is not limited to:

(1) Gas-insulated substations.

(2) Circuit breakers.

(3) Switchgear, including closed-pressure and hermetically sealed-pressure switchgear and gas-insulated lines containing SF_6 or PFCs.

(4) Gas containers such as pressurized cylinders.

(5) Gas carts.

(6) Electric power transformers.

(7) Other containers of SF_6 or PFC.

§ 98.301 Reporting threshold.

(a) You must report GHG emissions from an electric power system if the total nameplate capacity of SF_6 and PFC containing equipment (excluding hermetically sealed-pressure equipment) located within the facility, when added to the total nameplate capacity of SF_6 and PFC containing equipment (excluding hermetically sealed-pressure equipment) that is not located within the facility but is under common ownership or control, exceeds 17,820 pounds and the facility meets the requirements of § 98.2(a)(1).

(b) A facility other than an electric power system that is subject to this part because of emissions from any other source category listed in Table A–3 or A–4 in subpart A of this part is not required to report emissions under subpart DD of this part unless the total nameplate capacity of SF_6 and PFC containing equipment located within that facility exceeds 17,820 pounds.

§ 98.302 GHGs to report.

You must report total SF_6 and PFC emissions from your facility (including emissions from fugitive equipment leaks, installation, servicing, equipment decommissioning and disposal, and from storage cylinders) resulting from the transmission and distribution servicing inventory and equipment listed in § 98.300(a). For acquisitions of equipment containing or insulated with SF_6 or PFCs, you must report emissions from the equipment after the title to the equipment is transferred to the electric power transmission or distribution entity.

§ 98.303 Calculating GHG emissions.

(a) Calculate the annual SF_6 and PFC emissions using the mass-balance approach in Equation DD–1 of this section:

$$\text{User Emissions} = (\text{Decrease in } SF_6 \text{ Inventory}) + (\text{Acquisitions of } SF_6) - (\text{Disbursements of } SF_6) - (\text{Net Increase in Total Nameplate Capacity of Equipment Operated}) \quad \text{(Eq. DD-1)}$$

Where:

Decrease in SF_6 Inventory = (pounds of SF_6 stored in containers, but not in energized equipment, at the beginning of the year)—(pounds of SF_6 stored in containers, but not in energized equipment, at the end of the year).

Acquisitions of SF_6 = (pounds of SF_6 purchased from chemical producers or distributors in bulk) + (pounds of SF_6 purchased from equipment manufacturers or distributors with or inside equipment, including hermetically sealed-pressure switchgear) + (pounds of SF_6 returned to facility after off-site recycling).

Disbursements of SF_6 = (pounds of SF_6 in bulk and contained in equipment that is sold to other entities) + (pounds of SF_6 returned to suppliers) + (pounds of SF_6 sent off site for recycling) + (pounds of SF_6 sent off-site for destruction).

Net Increase in Total Nameplate Capacity of Equipment Operated = (The Nameplate Capacity of new equipment in pounds, including hermetically sealed-pressure switchgear)—(Nameplate Capacity of retiring equipment in pounds, including hermetically sealed-pressure switchgear). (Note that Nameplate Capacity refers to the full and proper charge of equipment rather than to the actual charge, which may reflect leakage).

(b) Use Equation DD–1 of this section to estimate emissions of PFCs from power transformers, substituting the relevant PFC(s) for SF_6 in the equation.

§ 98.304 Monitoring and QA/QC requirements.

(a) For calendar year 2011 monitoring, you may follow the provisions of § 98.3(d)(1) through (d)(2) for best

available monitoring methods rather than follow the monitoring requirements of this section. For purposes of this subpart, any reference in § 98.3(d)(1) through (d)(2) to 2010 means 2011, to March 31 means June 30, and to April 1 means July 1. Any reference to the effective date in § 98.3(d)(1) through (d)(2) means February 28, 2011.

(b) You must adhere to the following QA/QC methods for reviewing the completeness and accuracy of reporting:

(1) Review inputs to Equation DD–1 of this section to ensure inputs and outputs to the company's system are included.

(2) Do not enter negative inputs and confirm that negative emissions are not calculated. However, the Decrease in SF_6 Inventory and the Net Increase in Total Nameplate Capacity may be calculated as negative numbers.

(3) Ensure that beginning-of-year inventory matches end-of-year inventory from the previous year.

(4) Ensure that in addition to SF_6 purchased from bulk gas distributors, SF_6 purchased from Original Equipment Manufacturers (OEM) and SF_6 returned to the facility from off-site recycling are also accounted for among the total additions.

(c) Ensure the following QA/QC methods are employed throughout the year:

(1) Ensure that cylinders returned to the gas supplier are consistently weighed on a scale that is certified to be accurate and precise to within 2 pounds of the scale's capacity and is periodically recalibrated per the manufacturer's specifications. Either measure residual gas (the amount of gas remaining in returned cylinders) or have the gas supplier measure it. If the gas supplier weighs the residual gas, obtain from the gas supplier a detailed monthly accounting, within +/− 2 pounds, of residual gas amounts in the cylinders returned to the gas supplier.

(2) Ensure that cylinders weighed for the beginning and end of year inventory measurements are weighed on a scale that is certified to be accurate to within 2 pounds of the scale's capacity and is periodically recalibrated per the manufacturer's specifications. All scales used to measure quantities that are to be reported under § 98.306 must be calibrated using calibration procedures specified by the scale manufacturer. Calibration must be performed prior to the first reporting year. After the initial calibration, recalibration must be performed at the minimum frequency specified by the manufacturer.

(3) Ensure all substations have provided information to the manager compiling the emissions report (if it is not already handled through an electronic inventory system).

(d) GHG Monitoring Plans, as described in § 98.3(g)(5), must be completed by April 1, 2011.

§ 98.305 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations is required. Replace missing data, if needed, based on data from equipment with a similar nameplate capacity for SF_6 and PFC, and from similar equipment repair, replacement, and maintenance operations.

§ 98.306 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the following information for each electric power system, by chemical:

(a) Nameplate capacity of equipment (pounds) containing SF_6 and nameplate capacity of equipment (pounds) containing each PFC:

(1) Existing at the beginning of the year (excluding hermetically sealed-pressure switchgear).

(2) New during the year (all SF_6-insulated equipment, including hermetically sealed-pressure switchgear).

(3) Retired during the year (all SF_6-insulated equipment, including hermetically sealed-pressure switchgear).

(b) Transmission miles (length of lines carrying voltages above 35 kilovolt).

(c) Distribution miles (length of lines carrying voltages at or below 35 kilovolt).

(d) Pounds of SF_6 and PFC stored in containers, but not in energized equipment, at the beginning of the year.

(e) Pounds of SF6 and PFC stored in containers, but not in energized equipment, at the end of the year.

(f) Pounds of SF_6 and PFC purchased in bulk from chemical producers or distributors.

(g) Pounds of SF_6 and PFC purchased from equipment manufacturers or distributors with or inside equipment, including hermetically sealed-pressure switchgear.

(h) Pounds of SF_6 and PFC returned to facility after off-site recycling.

(i) Pounds of SF_6 and PFC in bulk and contained in equipment sold to other entities.

(j) Pounds of SF_6 and PFC returned to suppliers.

(k) Pounds of SF_6 and PFC sent off-site for recycling.

(l) Pounds of SF_6 and PFC sent off-site for destruction.

§ 98.307 Records that must be retained.

In addition to the information required by § 98.3(g), you must retain records of the information reported and listed in § 98.306.

§ 98.308 Definitions.

Except as specified in this section, all terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

Facility, with respect to an electric power system, means the electric power system as defined in this paragraph. An electric power system is comprised of all electric transmission and distribution equipment insulated with or containing SF_6 or PFCs that is linked through electric power transmission or distribution lines and functions as an integrated unit, that is owned, serviced, or maintained by a single electric power transmission or distribution entity (or multiple entities with a common owner), and that is located between: (1) The point(s) at which electric energy is obtained from an electricity generating unit or a different electric power transmission or distribution entity that does not have a common owner, and (2) the point(s) at which any customer or another electric power transmission or distribution entity that does not have a common owner receives the electric energy. The facility also includes servicing inventory for such equipment that contains SF_6 or PFCs.

Electric power transmission or distribution entity means any entity that transmits, distributes, or supplies electricity to a consumer or other user, including any company, electric cooperative, public electric supply corporation, a similar Federal department (including the Bureau of Reclamation or the Corps of Engineers), a municipally owned electric department offering service to the public, an electric public utility district, or a jointly owned electric supply project.

Operator, for the purposes of this subpart, means any person who operates or supervises a facility, excluding a person whose sole responsibility is to ensure reliability, balance load or otherwise address electricity flow.

■ 11. Add Subpart QQ to read as follows:

Subpart QQ—Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams

Sec.

98.430 Definition of the source category.
98.431 Reporting threshold.
98.432 GHGs to report.
98.433 Calculating GHG emissions.

98.434 Monitoring and QA/QC requirements.
98.435 Procedures for estimating missing data.
98.436 Data reporting requirements.
98.437 Records that must be retained.
98.438 Definitions.

Subpart QQ—Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams

§ 98.430 Definition of the source category.

(a) The source category, importers and exporters of fluorinated GHGs contained in pre-charged equipment or closed-cell foams, consists of any entity that imports or exports pre-charged equipment that contains a fluorinated GHG, and any entity that imports or exports closed-cell foams that contain a fluorinated GHG.

§ 98.431 Reporting threshold.

Any importer or exporter of fluorinated GHGs contained in pre-charged equipment or closed-cell foams who meets the requirements of § 98.2(a)(4) must report each fluorinated GHG contained in the imported or exported pre-charged equipment or closed-cell foams.

§ 98.432 GHGs to report.

You must report the mass of each fluorinated GHG contained in pre-charged equipment or closed-cell foams that you import or export during the calendar year. For imports and exports of closed-cell foams where you do not know the identity and mass of the fluorinated GHG, you must report the mass of fluorinated GHG in CO_2e.

§ 98.433 Calculating GHG contained in pre-charged equipment or closed-cell foams.

(a) The total mass of each fluorinated GHG imported and exported inside equipment or foams must be estimated using Equation QQ–1 of this section:

$$I = \sum_t S_t * N_t * 0.001 \quad \text{(Eq. QQ-1)}$$

Where:

I = Total mass of the fluorinated GHG imported or exported annually (metric tons).
t = Equipment/foam type containing the fluorinated GHG.
S_t = Mass of fluorinated GHG per unit of equipment type t or foam type t (charge per piece of equipment or cubic foot of foam, kg).
N_t = Number of units of equipment type t or foam type t imported or exported annually (pieces of equipment or cubic feet of foam).
0.001 = Factor converting kg to metric tons.

(b) When the identity and mass of fluorinated GHGs in a closed-cell foam is unknown to the importer or exporter, the total mass in CO_2e for the fluorinated GHGs imported and exported inside closed-cell foams must be estimated using Equation QQ–2 of this section:

$$I = \sum_t S_t * N_t * 0.001 \quad \text{(Eq. QQ-2)}$$

Where:

I = Total mass in CO_2e of the fluorinated GHGs imported or exported in close-cell foams annually (metric tons).
t = Equipment/foam type containing the fluorinated GHG.
S_t = Mass in CO_2e of the fluorinated GHGs per unit of equipment type t or foam type t (charge per piece of equipment or cubic foot of foam, kg).
N_t = Number of units of equipment type t or foam type t imported or exported annually (pieces of equipment or cubic feet of foam).
0.001 = Factor converting kg to metric tons.

§ 98.434 Monitoring and QA/QC requirements.

(a) For calendar year 2011 monitoring, you may follow the provisions of § 98.3(d)(1) through (d)(2) for best available monitoring methods rather than follow the monitoring requirements of this section. For purposes of this subpart, any reference in § 98.3(d)(1) through (d)(2) to the year 2010 means 2011, to March 31 means June 30, and to April 1 means July 1. Any reference to the effective date or date of promulgation in § 98.3(d)(1) through (d)(2) means February 28, 2011.

(b) The inputs to the annual submission must be reviewed against the import or export transaction records to ensure that the information submitted to EPA is being accurately transcribed as the correct chemical or blend in the correct pre-charged equipment or closed-cell foam in the correct quantities (metric tons) and units (kg per piece of equipment or cubic foot of foam).

§ 98.435 Procedures for estimating missing data.

Procedures for estimating missing data are not provided for importers and exporters of fluorinated GHGs contained in pre-charged equipment or closed-cell foams. A complete record of all measured parameters used in tracking fluorinated GHGs contained in pre-charged equipment or closed-cell foams is required.

§ 98.436 Data reporting requirements.

(a) Each importer of fluorinated GHGs contained in pre-charged equipment or closed-cell foams must submit an annual report that summarizes its imports at the corporate level, except for transshipments, as specified:

(1) Total mass in metric tons of each fluorinated GHG imported in pre-charged equipment or closed-cell foams.

(2) For each type of pre-charged equipment with a unique combination of charge size and charge type, the identity of the fluorinated GHG used as a refrigerant or electrical insulator, charge size (holding charge, if applicable), and number imported.

(3) For closed-cell foams that are imported inside of appliances, the identity of the fluorinated GHG contained in the foam in each appliance, the mass of the fluorinated GHG contained in the foam in each appliance, and the number of appliances imported with each unique combination of mass and identity of fluorinated GHG within the closed-cell foams.

(4) For closed cell-foams that are not imported inside of appliances, the identity of the fluorinated GHG in the foam, the density of the fluorinated GHG in the foam (kg fluorinated GHG/cubic foot), and the volume of foam imported (cubic feet) for each type of closed-cell foam with a unique combination of fluorinated GHG density and identity.

(5) Dates on which the pre-charged equipment or closed-cell foams were imported.

(6) If the importer does not know the identity and mass of the fluorinated GHGs within the closed-cell foam, the importer must report the following:

(i) Total mass in metric tons of CO_2e of the fluorinated GHGs imported in closed-cell foams.

(ii) For closed-cell foams that are imported inside of appliances, the mass of the fluorinated GHGs in CO_2e contained in the foam in each appliance and the number of appliances imported for each type of appliance.

(iii) For closed-cell foams that are not imported inside of appliances, the mass in CO_2e of the fluorinated GHGs in the foam (kg CO_2e/cubic foot) and the volume of foam imported (cubic feet) for each type of closed-cell foam.

(iv) Dates on which the closed-cell foams were imported.

(v) Name of the foam manufacturer for each type of closed-cell foam where the identity and mass of the fluorinated GHGs is unknown.

(vi) Certification that the importer was unable to obtain information on the identity and mass of the fluorinated GHGs within the closed-cell foam from the closed-cell foam manufacturer or manufacturers.

(b) Each exporter of fluorinated GHGs contained in pre-charged equipment or closed-cell foams must submit an annual report that summarizes its exports at the corporate level, except for transshipments, as specified:

(1) Total mass in metric tons of each fluorinated GHG exported in pre-charged equipment or closed-cell foams.

(2) For each type of pre-charged equipment with a unique combination of charge size and charge type, the identity of the fluorinated GHG used as a refrigerant or electrical insulator, charge size (including holding charge, if applicable), and number exported.

(3) For closed-cell foams that are exported inside of appliances, the identity of the fluorinated GHG contained in the foam in each appliance, the mass of the fluorinated GHG contained in the foam in each appliance, and the number of appliances exported with each unique combination of mass and identity of fluorinated GHG within the closed-cell foams.

(4) For closed-cell foams that are not exported inside of appliances, the identity of the fluorinated GHG in the foam, the density of the fluorinated GHG in the foam (kg fluorinated GHG/cubic foot), and the volume of foam exported (cubic feet) for each type of closed-cell foam with a unique combination of fluorinated GHG density and identity.

(5) Dates on which the pre-charged equipment or closed-cell foams were exported.

(6) If the exporter does not know the identity and mass of the fluorinated GHG within the closed-cell foam, the exporter must report the following:

(i) Total mass in metric tons of CO_2e of the fluorinated GHGs exported in closed-cell foams.

(ii) For closed-cell foams that are exported inside of appliances, the mass of the fluorinated GHGs in CO_2e contained in the foam in each appliance and the number of appliances imported for each type of appliance.

(iii) For closed-cell foams that are not exported inside of appliances, the mass in CO_2e of the fluorinated GHGs in the foam (kg CO_2e/cubic foot) and the volume of foam imported (cubic feet) for each type of closed-cell foam.

(iv) Dates on which the closed-cell foams were exported.

(v) Name of the foam manufacturer for each type of closed-cell foam where the identity and mass of the fluorinated GHGg is unknown.

(vi) Certification that the exporter was unable to obtain information on the identity and mass of the fluorinated GHGs within the closed-cell foam from the closed-cell foam manufacturer or manufacturers.

§ 98.437 Records that must be retained.

(a) In addition to the data required by § 98.3(g), importers of fluorinated GHGs in pre-charged equipment and closed-cell foams must retain the following records substantiating each of the imports that they report:

(1) A copy of the bill of lading for the import.

(2) The invoice for the import.

(3) The U.S. Customs entry form.

(4) Ports of entry through which the pre-charged equipment or closed-cell foams passed.

(5) Countries from which the pre-charged equipment or closed-cell foams were imported.

(6) For importers that report the mass of fluorinated GHGs within closed-cell foams on a CO_2e basis, correspondence or other documents that show the importer was unable to obtain information on the identity and mass of fluorinated GHG within closed-cell foams from the foam manufacturer.

(b) In addition to the data required by § 98.3(g), exporters of fluorinated GHGs in pre-charged equipment and closed-cell foams must retain the following records substantiating each of the exports that they report:

(1) A copy of the bill of lading for the export and

(2) The invoice for the export.

(3) Ports of exit through which the pre-charged equipment or closed-cell foams passed.

(4) Countries to which the pre-charged equipment or closed-cell foams were exported.

(5) For exporters that report the mass of fluorinated GHGs within closed-cell foams on a CO_2e basis, correspondence or other documents that show the exporter was unable to obtain information on the identity and mass of fluorinated GHG within closed-cell foams from the foam manufacturer.

(c) For importers and exports of fluorinated GHGs inside pre-charged equipment and closed-cell foams, the GHG Monitoring Plans, as described in § 98.3(g)(5), must be completed by April 1, 2011.

(d) Persons who transship pre-charged equipment and closed-cell foams containing fluorinated GHGs must maintain records that indicated that the pre-charged equipment or foam originated in a foreign country and was destined for another foreign country and did not enter into commerce in the United States.

§ 98.438 Definitions.

Except as provided in this section, all of the terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part. If a conflict exists between a definition provided in this subpart and a definition provided in subpart A, the definition in this subpart must take precedence for the reporting requirements in this subpart.

Appliance means any device which contains and uses a fluorinated greenhouse gas refrigerant and which is used for household or commercial purposes, including any air conditioner, refrigerator, chiller, or freezer.

Closed-cell foam means any foam product, excluding packaging foam, that is constructed with a closed-cell structure and a blowing agent containing a fluorinated GHG. Closed-cell foams include but are not limited to polyurethane (PU) appliance foam, PU continuous and discontinuous panel foam, PU one component foam, PU spray foam, extruded polystyrene (XPS) boardstock foam, and XPS sheet foam. Packaging foam means foam used exclusively during shipment or storage to temporarily enclose items.

Electrical equipment means gas-insulated substations, circuit breakers, other switchgear, gas-insulated lines, or power transformers.

Fluorinated GHG refrigerant means, for purposes of this subpart, any substance consisting in part or whole of a fluorinated greenhouse gas and that is used for heat transfer purposes and provides a cooling effect.

Pre-charged appliance means any appliance charged with fluorinated greenhouse gas refrigerant prior to sale or distribution or offer for sale or distribution in interstate commerce. This includes both appliances that contain the full charge necessary for operation and appliances that contain a partial "holding" charge of the fluorinated greenhouse gas refrigerant (e.g., for shipment purposes).

Pre-charged appliance component means any portion of an appliance, including but not limited to condensers, compressors, line sets, and coils, that is charged with fluorinated greenhouse gas refrigerant prior to sale or distribution or offer for sale or distribution in interstate commerce.

Pre-charged equipment means any pre-charged appliance, pre-charged appliance component, pre-charged electrical equipment, or pre-charged electrical equipment component.

Pre-charged electrical equipment means any electrical equipment, including but not limited to gas-insulated substations, circuit breakers, other switchgear, gas-insulated lines, or power transformers containing a fluorinated GHG prior to sale or

distribution, or offer for sale or distribution in interstate commerce. This includes both equipment that contain the full charge necessary for operation and equipment that contain a partial "holding" charge of the fluorinated GHG (e.g., for shipment purposes).

Pre-charged electrical equipment component means any portion of electrical equipment that is charged with SF_6 or PFCs prior to sale or distribution or offer for sale or distribution in interstate commerce.

■ 12. Add subpart SS to read as follows:

Subpart SS—Electrical Equipment Manufacture or Refurbishment

Sec.
98.450 Definition of the source category.
98.451 Reporting threshold.
98.452 GHGs to report.
98.453 Calculating GHG emissions.
98.454 Monitoring and QA/QC requirements.
98.455 Procedures for estimating missing data.
98.456 Data reporting requirements.
98.457 Records that must be retained.
98.458 Definitions.

§ 98.450 Definition of the source category.

The electrical equipment manufacturing or refurbishment category consists of processes that manufacture or refurbish gas-insulated substations, circuit breakers, other switchgear, gas-insulated lines, or power transformers (including gas-containing components of such equipment) containing sulfur-hexafluoride (SF_6) or perfluorocarbons (PFCs). The processes include equipment testing, installation, manufacturing, decommissioning and disposal, refurbishing, and storage in gas cylinders and other containers.

§ 98.451 Reporting threshold.

You must report GHG emissions under this subpart if your facility contains an electrical equipment manufacturing or refurbishing process and the facility meets the requirements of § 98.2(a)(1). Electrical equipment manufacturing and refurbishing facilities covered by this rule are those that have total annual purchases of SF_6 and PFCs that exceed 23,000 pounds.

§ 98.452 GHGs to report.

(a) You must report SF_6 and PFC emissions at the facility level. Annual emissions from the facility must include SF_6 and PFC emissions from equipment that is installed at an off-site electric power transmission or distribution location whenever emissions from installation activities (e.g., filling) occur before the title to the equipment is transferred to the electric power transmission or distribution entity.

(b) You must report CO_2, N_2O and CH_4 emissions from each stationary combustion unit. You must calculate and report these emissions under subpart C of this part (General Stationary Fuel Combustion Sources) by following the requirements of subpart C of this part.

§ 98.453 Calculating GHG emissions.

(a) For each electrical equipment manufacturer or refurbisher, estimate the annual SF_6 and PFC emissions using the mass-balance approach in Equation SS–1 of this section:

$$\text{User Emissions} = (\text{Decrease in } SF_6 \text{ Inventory}) + (\text{Acquisitions of } SF_6) - (\text{Disbursements of } SF_6) \quad \text{(Eq. SS-1)}$$

Where:

Decrease in SF_6 Inventory = (Pounds of SF_6 stored in containers at the beginning of the year)—(Pounds of SF_6 stored in containers at the end of the year).

Acquisitions of SF_6 = (Pounds of SF_6 purchased from chemical producers or suppliers in bulk) + (Pounds of SF_6 returned by equipment users) + (Pounds of SF_6 returned to site after off-site recycling).

Disbursements of SF_6 = (Pounds of SF_6 contained in new equipment delivered to customers) + (Pounds of SF_6 delivered to equipment users in containers) + (Pounds of SF_6 returned to suppliers) + (Pounds of SF_6 sent off site for recycling) + (Pounds of SF_6 sent off-site for destruction).

(b) Use the mass-balance method in paragraph (a) of this section to estimate emissions of PFCs associated with the manufacture or refurbishment of power transformers, substituting the relevant PFC(s) for SF_6 in Equation SS–1 of this section.

(c) Estimate the disbursements of SF_6 or PFCs sent to customers in new equipment or cylinders or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers using Equation SS–2 of this section:

$$D_{GHG} = \sum_{p=1}^{n} Q_p \quad \text{(Eq. SS-2)}$$

Where:

D_{GHG} = The annual disbursement of SF_6 or PFCs sent to customers in new equipment or cylinders or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers.

Q_p = The mass of the SF_6 or PFCs charged into equipment or containers over the period p sent to customers or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers.

n = The number of periods in the year.

(d) Estimate the mass of SF_6 or PFCs disbursed to customers in new equipment or cylinders over the period p by monitoring the mass flow of the SF_6 or PFCs into the new equipment or cylinders using a flowmeter or by weighing containers before and after gas from containers is used to fill equipment or cylinders.

(e) If the mass of SF_6 or the PFC disbursed to customers in new equipment or cylinders over the period p is estimated by weighing containers before and after gas from containers is used to fill equipment or cylinders, estimate this quantity using Equation SS–3 of this section:

$$Q_p = M_B - M_E - E_L \quad \text{(Eq. SS-3)}$$

Where:

Q_p = The mass of SF_6 or the PFC charged into equipment or containers over the period p sent to customers or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers.

M_B = The mass of the contents of the containers used to fill equipment or cylinders at the beginning of period p.

M_E = The mass of the contents of the containers used to fill equipment or cylinders at the end of period p.

E_L = The mass of SF_6 or the PFC emitted during the period p downstream of the containers used to fill equipment or

cylinders and in cases where a flowmeter is used, downstream of the flowmeter during the period p (e.g., emissions from hoses or other flow lines that connect the container to the equipment or cylinder that is being filled).

(f) If the mass of SF_6 or the PFC disbursed to customers in new equipment or cylinders over the period p is determined using a flowmeter, estimate this quantity using Equation SS–4 of this section:

$$Q_p = M_{mr} - E_L \quad \text{(Eq. SS-4)}$$

Where:

Q_p = The mass of SF_6 or the PFC charged into equipment or containers over the period p sent to customers or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers.

M_{mr} = The mass of the SF_6 or the PFC that has flowed through the flowmeter during the period p.

E_L = The mass of SF_6 or the PFC emitted during the period p downstream of the containers used to fill equipment or cylinders and in cases where a flowmeter is used, downstream of the flowmeter during the period p (e.g., emissions from hoses or other flow lines that connect the container to the equipment that is being filled).

(g) Estimate the mass of SF_6 or the PFC emitted during the period p downstream of the containers used to fill equipment or cylinders (e.g., emissions from hoses or other flow lines that connect the container to the equipment or cylinder that is being filled) using Equation SS–5 of this section:

$$E_L = \sum_{i=1}^{n} F_{Ci} \times EF_{Ci} \quad \text{(Eq. SS-5)}$$

Where:

E_L = The mass of SF_6 or the PFC emitted during the period p downstream of the containers used to fill equipment or cylinders and in cases where a flowmeter is used, downstream of the flowmeter during the period p (e.g., emissions from hoses or other flow lines that connect the container to the equipment or cylinder that is being filled)

F_{Ci} = The total number of fill operations over the period p for the valve-hose combination Ci.

EF_{Ci} = The emission factor for the valve-hose combination Ci.

n = The number of different valve-hose combinations C used during the period p.

(h) The mass of SF_6 or the PFC disbursed to customers in new equipment over the period p must be determined either by using the nameplate capacity of the equipment or, in cases where equipment is shipped with a partial charge, by calculating the partial shipping charge. Calculate the partial shipping charge by multiplying the nameplate capacity of the equipment by the ratio of the densities of the partial charge to the full charge. To determine the equipment's actual nameplate capacity, you must measure the nameplate capacities of a representative sample of each make and model and take the average for each make and model as specified at § 98.454(f).

(i) Estimate the annual SF_6 and PFC emissions from the equipment that is installed at an off-site electric power transmission or distribution location before the title to the equipment is transferred by using Equation SS–6 of this section:

$$EI = M_F + M_c - N_I \quad \text{(Eq. SS-6)}$$

Where:

EI = Total annual SF_6 or PFC emissions from equipment installation at electric transmission or distribution facilities.

MF = The total annual mass of the SF_6 or PFCs, in pounds, used to fill equipment.

MC = The total annual mass of the SF_6 or PFCs, in pounds, used to charge the equipment prior to leaving the electrical equipment manufacturer facility.

NI = The total annual nameplate capacity of the equipment, in pounds, installed at electric transmission or distribution facilities.

§ 98.454 Monitoring and QA/QC requirements.

(a) For calendar year 2011 monitoring, you may follow the provisions of § 98.3(d)(1) through (d)(2) for best available monitoring methods rather than follow the monitoring requirements of this section. For purposes of this subpart, any reference in § 98.3(d)(1) through (d)(2) to 2010 means 2011, March 31 means June 30, and April 1 means July 1. Any reference to the effective date in § 98.3(d)(1) through (d)(2) means February 28, 2011.

(b) Ensure that all the quantities required by the equations of this subpart have been measured using either flowmeters with an accuracy and precision of ±1 percent of full scale or better or scales with an accuracy and precision of ±1 percent of the filled weight (gas plus tare) of the containers of SF_6 or PFCs that are typically weighed on the scale. For scales that are generally used to weigh cylinders containing 115 pounds of gas when full, this equates to ±1 percent of the sum of 115 pounds and approximately 120 pounds tare, or slightly more than ±2 pounds. Account for the tare weights of the containers. You may accept gas masses or weights provided by the gas supplier e.g., for the contents of cylinders containing new gas or for the heels remaining in cylinders returned to the gas supplier) if the supplier provides documentation verifying that accuracy standards are met; however, you remain responsible for the accuracy of these masses and weights under this subpart.

(c) All flow meters, weigh scales, and combinations of volumetric and density measures that are used to measure or calculate quantities under this subpart must be calibrated using calibration procedures specified by the flowmeter, scale, volumetric or density measure equipment manufacturer. Calibration must be performed prior to the first reporting year. After the initial calibration, recalibration must be performed at the minimum frequency specified by the manufacturer.

(d) For purposes of Equations SS–5 of this subpart, the emission factor for the valve-hose combination (EF_C) must be estimated using measurements and/or engineering assessments or calculations based on chemical engineering principles or physical or chemical laws or properties. Such assessments or calculations may be based on, as applicable, the internal volume of hose or line that is open to the atmosphere during coupling and decoupling activities, the internal pressure of the hose or line, the time the hose or line is open to the atmosphere during coupling and decoupling activities, the frequency with which the hose or line is purged and the flow rate during purges. You must develop a value for EF_c (or use an industry-developed value) for each combination of hose and valve fitting, to use in Equation SS–5 of this subpart. The value for EF_C must be determined for each combination of hose and valve fitting of a given diameter or size. The calculation must be recalculated annually to account for changes to the specifications of the valves or hoses that may occur throughout the year.

(e) Electrical equipment manufacturers and refurbishers must account for SF_6 or PFC emissions that occur as a result of unexpected events or accidental losses, such as a malfunctioning hose or leak in the flow line, during the filling of equipment or containers for disbursement by including these losses in the estimated mass of SF_6 or the PFC emitted downstream of the container or flowmeter during the period p.

(f) If the mass of SF_6 or the PFC disbursed to customers in new equipment over the period p is determined by assuming that it is equal to the equipment's nameplate capacity or, in cases where equipment is shipped with a partial charge, equal to its partial shipping charge, equipment samples for

conducting the nameplate capacity tests must be selected using the following stratified sampling strategy in this paragraph. For each make and model, group the measurement conditions to reflect predictable variability in the facility's filling practices and conditions (e.g., temperatures at which equipment is filled). Then, independently select equipment samples at random from each make and model under each group of conditions. To account for variability, a certain number of these measurements must be performed to develop a robust and representative average nameplate capacity (or shipping charge) for each make, model, and group of conditions. A Student T distribution calculation should be conducted to determine how many samples are needed for each make, model, and group of conditions as a function of the relative standard deviation of the sample measurements. To determine a sufficiently precise estimate of the nameplate capacity, the number of measurements required must be calculated to achieve a precision of one percent of the true mean, using a 95 percent confidence interval. To estimate the nameplate capacity for a given make and model, you must use the lowest mean value among the different groups of conditions, or provide justification for the use of a different mean value for the group of conditions that represents the typical practices and conditions for that make and model. Measurements can be conducted using SF_6, another gas, or a liquid. Re-measurement of nameplate capacities should be conducted every five years to reflect cumulative changes in manufacturing methods and conditions over time.

(g) Ensure the following QA/QC methods are employed throughout the year:

(1) Procedures are in place and followed to track and weigh all cylinders or other containers at the beginning and end of the year.

(h) You must adhere to the following QA/QC methods for reviewing the completeness and accuracy of reporting:

(1) Review inputs to Equation SS–1 of this subpart to ensure inputs and outputs to the company's system are included.

(2) Do not enter negative inputs and confirm that negative emissions are not calculated. However, the decrease in SF_6 inventory may be calculated as negative.

(3) Ensure that beginning-of-year inventory matches end-of-year inventory from the previous year.

(4) Ensure that in addition to SF_6 purchased from bulk gas distributors, SF_6 returned from equipment users with or inside equipment and SF_6 returned from off-site recycling are also accounted for among the total additions.

§ 98.455 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations is required. Replace missing data, if needed, based on data from similar manufacturing operations, and from similar equipment testing and decommissioning activities for which data are available.

§ 98.456 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the following information for each chemical at the facility level:

(a) Pounds of SF_6 and PFCs stored in containers at the beginning of the year.

(b) Pounds of SF_6 and PFCs stored in containers at the end of the year.

(c) Pounds of SF_6 and PFCs purchased in bulk.

(d) Pounds of SF_6 and PFCs returned by equipment users with or inside equipment.

(e) Pounds of SF_6 and PFCs returned to site from off site after recycling.

(f) Pounds of SF_6 and PFCs inside new equipment delivered to customers.

(g) Pounds of SF_6 and PFCs delivered to equipment users in containers.

(h) Pounds of SF_6 and PFCs returned to suppliers.

(i) Pounds of SF_6 and PFCs sent off site for destruction.

(j) Pounds of SF_6 and PFCs sent off site to be recycled.

(k) The nameplate capacity of the equipment, in pounds, delivered to customers with SF_6 or PFCs inside, if different from the quantity in paragraph (f) of this section.

(l) A description of the engineering methods and calculations used to determine emissions from hoses or other flow lines that connect the container to the equipment that is being filled.

(m) The values for EF_C for each hose and valve combination and the associated valve fitting sizes and hose diameters.

(n) The total number of fill operations for each hose and valve combination, or, F_{Ci} of Equation SS–5 of this subpart.

(o) The mean value for each make, model, and group of conditions if the mass of SF_6 or the PFC disbursed to customers in new equipment over the period p is determined by assuming that it is equal to the equipment's nameplate capacity or, in cases where equipment is shipped with a partial charge, equal to its partial shipping charge.

(p) The number of samples and the upper and lower bounds on the 95 percent confidence interval for each make, model, and group of conditions if the mass of SF_6 or the PFC disbursed to customers in new equipment over the period p is determined by assuming that it is equal to the equipment's nameplate capacity or, in cases where equipment is shipped with a partial charge, equal to its partial shipping charge.

(q) Pounds of SF_6 and PFCs used to fill equipment at off-site electric power transmission or distribution locations, or M_F, of Equation SS–6 of this subpart.

(r) Pounds of SF_6 and PFCs used to charge the equipment prior to leaving the electrical equipment manufacturer or refurbishment facility, or M_C, of Equation SS–6 of this subpart.

(s) The nameplate capacity of the equipment, in pounds, installed at off-site electric power transmission or distribution locations used to determine emissions from installation, or N_I, of Equation SS–6 of this subpart.

(t) For any missing data, you must report the reason the data were missing, the parameters for which the data were missing, the substitute parameters used to estimate emissions in their absence, and the quantity of emissions thereby estimated.

§ 98.457 Records that must be retained.

In addition to the information required by § 98.3(g), you must retain the following records:

(a) All information reported and listed in § 98.456.

(b) Accuracy certifications and calibration records for all scales and monitoring equipment, including the method or manufacturer's specification used for calibration.

(c) Certifications of the quantity of gas, in pounds, charged into equipment at the electrical equipment manufacturer or refurbishment facility as well as the actual quantity of gas, in pounds, charged into equipment at installation.

(d) Check-out and weigh-in sheets and procedures for cylinders.

(e) Residual gas amounts, in pounds, in cylinders sent back to suppliers.

(f) Invoices for gas purchases and sales.

(g) GHG Monitoring Plans, as described in § 98.3(g)(5), must be completed by April 1, 2011.

§ 98.458 Definitions.

All terms used in this subpart have the same meaning given in the CAA and subpart A of this part.

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Part III

Department of Health and Human Services

45 CFR Part 158

Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act; Interim Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 158

[OCIIO–9998–IFC]

RIN 0950–AA06

Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act

AGENCY: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services.

ACTION: Interim final rule with request for comments.

SUMMARY: This document contains the interim final regulation implementing medical loss ratio (MLR) requirements for health insurance issuers under the Public Health Service Act, as added by the Patient Protection and Affordable Care Act (Affordable Care Act).

DATES: *Effective date:* This interim final regulation is effective January 1, 2011.

Comment date: Comments are due on or before January 31, 2011.

Applicability dates: This interim final regulation generally applies beginning January 1, 2011, to health insurance issuers offering group or individual health insurance coverage.

ADDRESSES: Written comments may be submitted to the address specified below.

All comments will be made available to the public. *Warning:* Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received, and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

In commenting, please refer to file code OCIIO–9998–IFC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the "More Search Options" tab.

2. *By regular mail.* You may mail written comments to the following address only: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: OCIIO–9998–IFC, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address only: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: OCIIO–9998–IFC, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to the following address: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: OCIIO–9998–IFC, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the OCIIO drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the "Collection of Information Requirements" section in this document.

FOR FURTHER INFORMATION CONTACT: Carol Jimenez, Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, at (301) 492–4457.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* Comments received timely will also be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

Customer Service Information: Individuals interested in obtaining information on health reform can be found *http://www.healthcare.gov.*

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I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148, was enacted on March 23, 2010); the Health Care and Education Reconciliation Act (Pub. L. 111–152, was enacted on March 30, 2010). In this preamble we refer to the two statutes collectively as the Affordable Care Act. The Affordable Care Act reorganizes, amends, and adds to the provisions of Part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets.

The Department of Health and Human Services (HHS, or the Department) is issuing regulations in several phases in order to implement revisions to the PHS Act made by the Affordable Care Act. All of the previous regulations were issued jointly with the Departments of Labor and the Treasury. A request for information relating to the medical loss ratio (MLR) provisions of PHS Act section 2718 was published in the **Federal Register** on April 14, 2010 (75 FR 19297) (notice, or request for information). Additionally, a series of interim final regulations were published earlier this year implementing PHS Act provisions added by the Affordable Care Act. Specifically, interim final rules were published implementing (1) section 2714 (requiring dependent coverage of children to age 26) (75 FR 27122 (May 13, 2010)); (2) section 1251 of the Affordable Care Act (relating to status as a grandfathered health plan) (75 FR 34538 (June 17, 2010)); (3) sections 2704 (prohibiting preexisting condition exclusions), 2711 (regarding lifetime and annual dollar limits on benefits), 2712 (regarding restrictions on rescissions), and 2719A (regarding patient protections) (75 FR 37188 (June 28, 2010)); (4) section 2713 (regarding preventive health services) (75 FR 41726 (July 19, 2010)); and (5) section 2719 (regarding internal claims and appeals and external review processes) (75 FR 43330 (July 23, 2010)). Most recently, HHS, Department of Labor, and Department of the Treasury published an amendment to the interim final regulations relating to status as a grandfathered health plan (regarding change in health insurance issuers) in the **Federal Register** on November 17, 2010 (75 FR 70114). The Departments have also published sub-regulatory guidance regarding various issues related to the implementation of the Affordable Care Act, available at *http://www.dol.gov/ebsa and http://www.hhs.gov/ociio*.

This interim final regulation adopts and certifies in full all of the recommendations in the model regulation of the National Association of Insurance Commissioners (NAIC) regarding MLRs. It is being published to implement section 2718(a) through (c) of the PHS Act, relating to bringing down the cost of health care coverage through a new MLR standard. Subpart A implements the requirements for reporting the data to be considered in determining that ratio. Subpart B addresses the requirements for health insurance issuers (issuers) in the group or individual market, including grandfathered health plans, to provide an annual rebate to enrollees, if the issuer's MLR fails to meet minimum requirements: Generally, 85 percent in the large group market and 80 percent in the small group or individual market. In Subpart C, this interim final regulation provides a process and criteria for the Secretary of Health and Human Services (the Secretary) to determine whether application of the 80 percent MLR in the individual market in a State may destabilize that individual market. Finally, enforcement of the reporting and rebate requirements of section 2718(a) and (b) are addressed in Subparts D–F, as specifically authorized in section 2718(b)(3). This interim final regulation is generally applicable for plan years beginning on or after January 1, 2011. Self-insured plans are not a health insurance issuer, as defined by section 2791(b)(2) of the PHS Act, and thus are not subject to this interim final regulation.

II. Provisions of the Interim Final Rule

A. Introduction and Overview

Section 2718 of the PHS Act includes two provisions designed to achieve the objective in the section title: "Bringing down the cost of health care coverage." The first is the establishment of greater transparency and accountability around the expenditures made by health insurance issuers. The law requires that issuers publicly report on major categories of spending of policyholder premium dollars, such as clinical services provided to enrollees and activities that will improve health care quality. The second is the establishment of MLR standards for issuers, which are intended to help ensure policyholders receive value for their premium dollars. Issuers will provide rebates to enrollees when their spending for the benefit of policyholders on reimbursement for clinical services and quality improving activities, in relation to the premiums charged, is less than the MLR standards established pursuant to the statute. The rebate provisions of section 2718 are designed not just to provide value to policyholders, but also to create incentives for issuers to become more efficient in their operations. Section 2718 also contains provisions which allow for modifications to the standards under certain circumstances, which are described in this regulation. To inform decisions about definitions and methodologies for calculating MLRs, the Affordable Care Act directed the NAIC to make recommendations to the Secretary, subject to certification by the Secretary. As described below, this interim final regulation adopts to these recommendations.

As to the reporting provisions, section 2718(a) requires health insurance issuers to "submit to the Secretary a report concerning the ratio of the incurred loss (or incurred claims) plus the loss adjustment expense (or change in contract reserves) to earned premiums." The statute, as implemented by this interim final regulation, requires health insurance issuers to submit data

to the Secretary that will allow enrollees of health plans, consumers, regulators, and others to take into consideration MLRs as a measure of health insurance performance as described in section 2718 of the PHS Act. More specifically, this interim final regulation is intended to provide consumers with information needed to better understand how much of the premium paid to the issuer is used to reimburse providers for covered services, to improve health care quality, and to pay for the "non-claims," or administrative expenses, incurred by the issuer. The caption of subsection (a) reflects this purpose, which is to provide the Secretary and other parties with a "clear accounting for costs."

As quoted above, the statute requires issuers to submit a report that "concerns" the ratio of the "incurred loss" to "earned premium." The statute does not simply require the issuer to report the numeric ratio of the incurred loss to earned premium. In addition, subsection (a)(3) requires issuers to provide an explanation of the "nature" of "non-claims costs." This interim final regulation accordingly describes the type of information that is to be included in the report to the Secretary and made available to consumers, in addition to the numerical ratio. To increase transparency and avoid confusion, this interim final regulation provides that the data to be reported according to section 2718(a) of the PHS Act will include all of the elements of revenue and expenditures that will be needed to calculate the amount of rebates under subsection 2718(b).

For this information to be meaningful to consumers, the report provided to the Secretary and made available to the public must include the amount of premium revenue received as well as the amount expended on each of the types of activity identified in subparagraphs (1), (2), and (3) of section 2718(a) of the PHS Act:

(1) Reimbursement for clinical services provided to enrollees under the health insurance plan (subparagraph (1));

(2) Activities that improve health care quality for enrollees (subparagraph (2));

(3) All other "non-claims" costs (subparagraph (3)); and

(4) Federal and State taxes and licensing or regulatory fees (subparagraph (3)).

In addition, the rebate requirements established by section 2718(b) allow for a State to provide for higher ratios than those required by section 2718(b)(1)(A)(i) and (ii) of the PHS Act. In order to allow a State to do so, the reporting required of health insurance issuers under subsection (a) must be done on a State level. Section 2718(b) also requires a separate calculation of the MLR for the large group market, the small group market, and the individual market. Consequently, the data required under subsection (a) must be reported for the large group market, the small group market, and the individual market within each State.

NAIC model regulation and recommendations. Section 2718(c) of the PHS Act directs the NAIC, subject to certification by the Secretary, to establish:

(1) Uniform definitions of the activities reported under section 2718(a);

(2) standardized methodologies for calculating measures of the activities reported under section 2718(a); and

(3) definitions of which activities and in what regard such activities constitute activities that improve health care quality.

Section 2718(c) also directs that the standardized methodologies for calculating measures of the activities reported under section 2718(a) "shall be designed to take into account the special circumstances of smaller plans, different types of plans, and newer plans."

The NAIC provided its recommendations to the Secretary on October 27, 2010 regarding the above three areas, and made additional recommendations regarding other aspects of section 2718, in the form of a model regulation entitled *Regulation for Uniform Definitions and Standardized Methodologies for Calculation of the Medical Loss Ratio for Plan Years 2011, 2012 and 2013 per Section 2718(b) of the Public Health Service Act* (hereinafter "NAIC model regulation") (*http://www.naic.org/documents/committees_ex_mlr_reg_asadopted.pdf*). The NAIC model regulation is discussed in more detail in connection with the specific provisions of this interim final regulation. The NAIC, in discharging its statutory obligations, conducted a thorough and transparent process in which the views of regulators and stakeholders were discussed, analyzed, addressed and documented in numerous open forums held by staff from State insurance departments, by NAIC staff, and by the commissioners, directors, and superintendents of insurance from the States. This interim final regulation certifies and adopts the NAIC's model regulation in full.

The NAIC model regulation includes definitions to be used for purposes of reporting the types of activities mandated by section 2718(a), and standardized methodologies for calculating measures of such activities including those that improve health care quality. This interim final regulation certifies and adopts these definitions in the NAIC model regulation. Consistent with the mandate of section 2718(b), the NAIC and this interim final regulation require that health insurance issuers aggregate data at the State level by the large group market, small group market, and individual market, and define these markets. The reporting requirements, which follow NAIC's recommendations, are discussed in connection with Subpart A.

The NAIC model regulation addresses in several different ways, as does this interim final regulation, the statutory requirement that the methodologies used to calculate the measures of the activities reported "shall be designed to take into account the special circumstances of smaller plans, different types of plans, and newer plans." The NAIC recommendations address the special circumstance of newer plans and smaller plans. They address newer plans by adjusting when newer plans' experience is to be reported, which is addressed in Subpart A. The special circumstance of smaller plans, which do not have sufficient experience to be statistically valid for purposes of the rebate provisions, are addressed by the NAIC through credibility adjustments to the calculation of the MLR. Because credibility adjustments are necessary to calculate the rebates under section 2718(b), they are addressed in Subpart B of this interim final regulation. The NAIC model regulation does not address the special circumstances of different types of plans such as so-called mini-med plans or expatriate plans, although it does address expatriate plans in a letter to the Secretary. HHS addresses both mini-med plans and expatriate plans in this interim final regulation, and discusses them in connection with Subpart A.

The NAIC model regulation details the MLR rebate calculation for each of the next three MLR reporting years and notes the incurred claims and expenses related to improving health care quality that may be included. HHS has adopted these provisions in Subpart B.

As noted above, the statute directs the NAIC, subject to certification by the Secretary, to establish uniform definitions and methodologies for calculating measures of activities that are used to calculate an issuer's MLR. HHS has reviewed these recommended definitions and methodologies and has decided to certify and adopt the NAIC recommendations in its October 27 model regulation. The NAIC held public, weekly meetings for several months during which interested parties

were encouraged to provide both written and oral comments, and the details surrounding the reporting requirements were thoroughly analyzed. In making the determination to certify the NAIC's recommendations, HHS also considered the NAIC's Issue Resolution Documents, which were produced as a result of the NAIC's process and which contain the NAIC's position regarding numerous related issues. In addition, HHS considered the public comments received by the NAIC as well as comments submitted to HHS in response to its request for information published on April 14, 2010 in the **Federal Register**. HHS also considered the letters submitted by the NAIC to the Secretary with respect to MLR issues, which are also public records.

Organization of this regulation. The basis, scope, applicability, and definitions for this interim final regulation are set forth in §§ 158.101 through 158.103. The structure of Subpart A of this interim final regulation follows the organization of section 2718(a). The obligation to report is established in § 158.110. The way in which issuers are to aggregate data in the required reports is explained in § 158.120. The special circumstances of mini-med plans and expatriate plans are also included in § 158.120. Newer experience is addressed in § 158.121. Section 158.130 addresses provisions that relate to premium revenue. Section 158.140 clarifies what may be reported as reimbursement for clinical services provided to enrollees, also known as incurred claims. Sections 158.150 through 158.151 explain the criteria for determining whether expenditures are for activities that improve health care quality, allocation of such expenses, and treatment of health information technology (HIT) expenses required to accomplish such activities. Section 158.160 clarifies reporting of non-claims costs. Sections 158.161 and 158.162 address the Federal and State taxes and licensing or regulatory fees that may be excluded from non-claims costs pursuant to PHS Act section 2718(a)(3). Section 158.170 addresses allocation of expenses among categories reported as well as an issuer's lines of business.

Similarly, the structure of Subpart B of this interim final regulation follows the organization of section 2718(b). The applicable MLR standards for the large group, small group and individual markets are addressed in § 158.210. States are permitted to establish a higher MLR standard than provided by the Affordable Care Act, and if a State has done so, the State's standard applies, as stated in § 158.211. Section 158.220 explains which MLR reporting year's data is to be used to calculate an issuer's MLR, and § 158.221 directs which data elements should be in the ratio's numerator and which should be in the denominator. Credibility adjustments are delineated in § 158.230, and the details as to how to calculate them are addressed in § 158.231 and § 158.232. Sections 158.240 through 158.242 provide that enrollees must receive a rebate if the applicable MLR standard is not met, and establish who receives the rebate in certain circumstances, and the manner in which the rebate must be made. The de minimis amount below which a rebate need not be provided and how to handle de minimis rebates are addressed in § 158.243. Section 158.250 establishes a requirement for issuers to provide rebate recipients with an explanatory notice, while § 158.260 establishes a requirement for issuers to report to the Secretary data regarding rebate payments.

Subpart C of this interim final regulation addresses the Secretary's discretion in section 2718(b)(A)(ii) to adjust the MLR percentage for the individual market in a State if the Secretary determines that application of an 80 percent MLR standard may destabilize the individual market in such State. This interim final regulation provides that such determinations will be made pursuant to a State request and based on standards that include recommendations made to HHS in a letter from the NAIC on October 13, 2010.

Subparts D, E and F of this interim final regulation implement section 2718(b)(3), Enforcement, which directs the Secretary to promulgate regulations for enforcing section 2718, and allows for providing appropriate penalties as part of the enforcement scheme. Subpart D addresses the enforcement scheme. Subpart E sets forth the requirements for maintaining records and information. Subpart F, Federal Civil Penalties, details the basis for imposing civil penalties, factors that HHS will consider in assessing civil penalties, the amount of the penalties, and the process for assessing them.

B. Scope, Applicability and Definitions

1. Scope and Applicability (§§ 158.101 Through 158.102)

Section 158.101 sets forth the topics and issues covered in Part 158 of this interim final regulation.

Section 158.102 provides that Part 158 applies to health insurance issuers offering group or individual health insurance coverage. Section 2718(a) of the PHS Act expressly provides that this includes grandfathered health plans. Grandfathered health plans are defined in 26 CFR 54.9815–1251T, 29 CFR §§ 2590.715 through 1251, and 45 CFR 147.140, which implements the provisions in the Affordable Care Act regarding status as a grandfathered health plan (see Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Affordable Care Act, 75 FR 34538 (June 17, 2010), as amended, 75 FR 70114 (November 17, 2010)).

Although Section 2718(a) of the PHS Act does not exempt specific categories of plans from its requirements, subparagraph (c) requires that the reporting requirements and methodologies for calculating measures of the activities reported "be designed to take into account the special circumstances of smaller plans, different types of plans, and newer plans." Smaller plans, different types of plans, and newer plans are subject to this interim final rule, and their special circumstances are addressed through the reporting requirements and calculation of the MLR provisions in Subparts A and B.

2. Definitions (§ 158.103)

Section 2718(c) of the PHS Act directs the NAIC, subject to certification by the Secretary, to "establish uniform definitions of the activities reported under subsection (a) and standardized methodologies for calculating measures of such activities, including definitions of which activities, and in what regard such activities, constitute activities described in section (a)(2)."

The NAIC model regulation includes definitions of the activities reportable under section 2718(a) of the PHS Act and this interim final regulation adopts those definitions. Many of the terms defined in the NAIC model regulation refer to specific lines on NAIC financial reporting forms that are broader than the reporting required for the PHS Act MLR provisions.

Any defined term that is used in only one section of this Subpart is defined in that section and is not also contained in the "Definitions" section of the regulation. Such terms include "aggregation," "incurred claims," and "quality improving activities." Thus, these terms are discussed in the preamble section regarding that topic, rather than here. For example, "aggregation" is addressed in § 158.120, "incurred claims" is defined in § 158.140, and "quality improving activities" is defined in § 158.150. Each of these terms is discussed in the section of the preamble regarding the regulation pertaining to it.

Definitions that are used in the regulation as commonly used in the health care industry are not of particular note and therefore are not discussed here. We do discuss several definitions that are unique to this regulation or that may be of particular interest to enrollees, health plans, consumers, regulators and others. The definitions in § 158.103 apply to all of Part 158. Also, in the public comments regarding uniform definitions for activities reported on under section 2718(a) of the PHS Act, the only definition we received any significant amount of comments on is "plan year." Those comments are discussed below with regard to MLR reporting year. Finally, we note that the interim final regulation uses the term "market" as it is used in the statute, to differentiate the small group, large group, and individual market, even if in some contexts these are also referred to as "market segments."

"*MLR reporting year.*" Section 2718(a) requires each health insurance issuer to submit a report to the Secretary "with respect to each plan year." The NAIC has recommended, and HHS concurs, that for purposes of MLR reporting and calculation, the term "plan year" in section 2718 should be interpreted to refer to the calendar year for that plan, and not necessarily the plan year that applies for other purposes. In adopting the NAIC's definition, HHS uses the term "MLR reporting year." Accordingly, this regulation interprets "plan year," as used in section 2718(a), as referring to the "MLR reporting year," and defines the MLR reporting year as the calendar year. We recognize that this definition is different than the definition of the term "plan year" currently in the regulations implementing the PHS Act. This current regulatory definition of "plan year" would continue to apply for all purposes other than the period to be used for MLR reporting and rebate calculation. Specifically, for purposes other than the period for MLR reporting and rebate calculation, the term plan year is defined as "the year that is designated as the plan year in the plan document of a group health plan," although the plan year may under certain conditions be the deductible year, the policy year, the employer's tax year, or the calendar year. We also note that, in the case of individual health insurance coverage, a similar term—"policy year"—is defined. Under these definitions, the "plan year" or "policy year" is specific to the group or individual policy, and can be determined by the issuer. The NAIC recognized that requiring reporting of MLR data for each plan year under this generally applicable definition would be problematic. Meaningful reporting of the data required by section 2718 of the PHS Act requires aggregation of an issuer's experience across health insurance policies and policy forms in each State's large group, small group, and individual markets.

As stated above, the NAIC recommends and requires calendar-year reporting and we adopt this recommendation and require reporting on a calendar-year basis. Issuers will report the premium earned, claims, quality improvement expenses and other non-claims costs incurred under health insurance that is in force during the calendar year. Calendar year reporting will increase the reliability of the experience data that will be reported and that will be used as the basis for rebate calculations. It will reduce the reporting burden on issuers, as they will be required to prepare and file a single loss ratio report and to calculate and pay rebates only once each calendar year. All enrollees under any of the health insurance coverage whose experience is reflected in the report to the Secretary will be eligible for rebates on the premiums paid during that calendar year. To avoid confusion with other uses of the term "plan year," and to make for a clearer presentation and discussion of the MLR reporting requirements, we have adopted the term "MLR reporting year" to refer to the "plan year" referenced in section 2718 for use in the regulation.

The Secretary invited the public to comment on uniform definitions for activities to be reported to the Secretary pursuant to section 2718(a). The only comments received regarding the terms defined in § 158.103 were with respect to "plan year."

Since section 2718 of the PHS Act uses the term "plan year" without specifying whether it means a plan-specific year or a generally applicable reporting period, several commenters requested that we simply clarify its meaning. As explained above, we have done so. A minority of commenters preferred reporting to correspond to the effective dates of each health plan, arguing that non-calendar year plans may have difficulty gathering data on a calendar year basis as health plans are issued at various times throughout the calendar year. However, the calendar year reporting method used in this regulation was supported by several State regulators, health insurance issuers and others because it allows issuers to combine experiences across all policies and will therefore produce more uniform and reliable premium, claims and cost data. They also supported such a calendar-year based reporting period because it is consistent with current industry financial reporting practices, is simpler for consumers to comprehend, and allows States to get the data at one time.

"*Enrollee.*" Section 158.103 defines the term "enrollee" as "an individual who is enrolled, within the meaning of 45 CFR 144.103, in group health insurance coverage, or an individual who is covered by individual insurance coverage, at any time during an MLR reporting year." The NAIC does not define the term "enrollee." However, we believe it is important to clarify that, for reporting purposes, "enrollee" refers to anyone covered by a group plan, including dependents of the subscriber or employee, as well as anyone covered by an individual policy, despite the fact that this term is not ordinarily used in the individual market.

"*Small group market*" and "*Large group market.*" The reporting regulations require in general that issuers report data for the large group market, small group market, and individual market, as that separation of data will be required in order to calculate the ratios and rebates provided for in PHS Act section 2718(b). There is currently more than one option for how to distinguish the small group market and the large group market. The small and large group markets, respectively, refer to coverage sold to a "small employer" or a "large employer." The determination of whether an employer is large or small depends on how many employees it has at particular times. Prior to the Affordable Care Act, the PHS Act defined a small group in terms of 2–50 employees, and a large group in terms of 51 or more employees, while a group with only one employee was considered to be in the individual market. However, the States were permitted to regulate very small groups ("groups of one") in the small group market rather than the individual market. While most States used the statutory definition, several States have chosen to regulate these very small groups in the small group market.

Section 1304(b) of the Affordable Care Act amended the definitions of large and small employer in the PHS Act, defining a small employer as 1–100 employees and a large employer as 101 or more employees. However, section 1304(b)(3) of the Affordable Care Act also allows States to continue to define an employer with up to 50 employees as a "small employer" until 2016.

This interim final regulation provides that for purposes of section 2718 of the PHS Act, consistent with the provisions

in the Affordable Care Act, until 2016 a State may continue to provide a definition of small group as having a maximum of 50 members, and that for States that do so, that definition shall apply to the MLR reporting and rebate requirements set forth in section 2718. This regulation does not address the definition of the term "small employer" as used in ERISA or the Internal Revenue Code, or how the definition in these statutes interact with the definition in the PHS Act for purposes other than the MLR provisions in section 2718. We anticipate that these provisions will be addressed in future guidance.

C. Subpart A—Disclosure and Reporting

1. Reporting Requirements (§ 158.110)

Section 2718(a) of the statute requires issuers to submit a report to the Secretary for each plan year concerning information related to earned premiums and expenditures in various categories, including reimbursement for clinical services provided to enrollees, activities that improve health care quality, and all other non-claims costs. In § 158.110 of this interim final regulation, HHS requires that the report be submitted to the Secretary by June 1 of the year following the end of an MLR reporting year. This allows issuers to include in the report claims for services provided during the MLR reporting year that are processed and paid in the three months following the end of the MLR reporting year, as provided in § 158.140(a)(1), and gives issuers another two months to compile and submit the required data. As discussed in sections 4. and 5. below, mini-med plans and expatriate plans wishing to receive the "special circumstances" adjustment discussed in those sections would be required under § 158.110(b)(1) to submit data on an accelerated schedule.

The precise form and content of the data that issuers must report to the Secretary will be announced in a subsequent **Federal Register** notice. It is anticipated that the data to be submitted will be closely coordinated with the data included on the Supplemental MLR Exhibit that is filed by issuers with State departments of insurance as part of their Annual Statement.

A common practice in insurance is the sale or transfer of blocks of policies between issuers. This practice creates two issues for the reporting requirements under section 2718 of the PHS Act. Consistent with the NAIC's recommendation, § 158.110(c) requires an issuer that has ceded all of the risk associated with a block of policies to another issuer to exclude any experience under those policies from its report. As specified in § 158.110(c), the issuer acquiring the policies must report all of the claims, premium and expenses associated with the acquired policies, including claims and costs incurred and premiums earned during the MLR reporting year by the ceding issuer prior to the effective date of the agreement to transfer responsibility for the policies. The ceding issuer must not include experience under these policies in its report to the Secretary. A second practice in insurance with implications for the reporting requirements under section 2718 of the PHS Act is the use of so-called "assumption reinsurance" to transfer a block of business or group of insurance policies from one issuer to another.

2. Aggregate Reporting (§ 158.120)

Section 158.120 of this interim final regulation requires issuers to report premium, claims and other expenses for all group and individual health insurance coverage (as defined above) on an aggregate basis by State and health insurance market. This follows the approach recommended by the NAIC. That is, a health insurance issuer will submit, for each State in which it writes coverage, data on the aggregate premiums, claims experience, quality-improvement expenditures, and non-claims costs it incurs in connection with the policies it issues in the large group, small group, and individual markets. HHS believes that reporting by State is clearly intended in section 2718 of the PHS Act, which allows a State to set a higher MLR standard than the 80 or 85 percent required by the statute. Reporting by health insurance market—*i.e.,* by large group, small group, and individual markets—is also required by section 2718 of the PHS Act, which requires that MLR standards be met for each such market. The experience for group coverage issued by a single issuer that covers employees in multiple States must be attributed to the State that regulates the insurance contract between the employer and the issuer, as stated in § 158.120(b) of this interim final regulation. Section 158.120(d) also (1) specifies how to attribute experience related to policies sold through associations and trusts, (2) establishes special rules that should be followed in reporting experience under group health insurance coverage offered by multiple affiliated issuers in connection with a single group health plan that gives participants a choice of coverage options, and (3) provides for separate reporting in 2011 for mini-med plans that have a total annual limit of $250,000 or less and for expatriate plans.

The aggregation rules adopted in the regulation are designed to accomplish several objectives. First, the data that are reported and subsequently used to calculate MLRs and rebates should be based on sufficient experience to provide a reliable estimate of the issuer's administrative performance and pricing strategy. To the extent possible, the data used to calculate the MLRs and rebates should not simply represent unpredictable fluctuations in use of services by those covered by the issuer. Second, the reported data should reflect the responsibility of State insurance departments to (1) license issuers to sell insurance within a State (and, where applicable, to approve the products that can be offered in the State by the issuer), and (2) exercise oversight over the premium amounts that are charged for coverage. Third, HHS sought to minimize the burden associated with reporting MLR data, including the quality-improvement expense and non-claims costs that would be reported in connection with each "aggregation."

In developing the regulation, a rule was considered that would disaggregate products by type of coverage—for example, HMO, PPO, and high-deductible coverage—even if offered by the same licensed issuer. The purpose of such a disaggregation would be to have the reported MLRs and rebates reflect experience under more uniform product designs, and to reduce possible inequities in the treatment of different types of plans. However, disaggregation would increase the number of reporting aggregations since one licensed issuer could have to report multiple aggregations, thus reducing the reliability of reported experience and rebates. HHS agrees with the NAIC and has decided against this type of disaggregation. In response to the Request for Comments, commenters generally supported aggregation by State and, within State, by the three market segments identified in the statute: The large group market, the small group market, and the individual market. Consumer advocacy groups generally noted that aggregation would tend to mask variations in MLRs across products. However, other commenters noted that aggregation across policies is needed to calculate reliable MLRs and to reflect the pooling of risk across policies or policy forms. After considering the arguments presented by the commenters, as well as public comments submitted to the NAIC, HHS decided to follow the recommendations submitted to the Secretary by the NAIC

and aggregate at the market level within each State, for reasons described below.

a. Attribution to State-of-Issue

The regulation requires issuers to report experience based on the State-of-issue for each policy that it writes. This requirement is intended to result in a report that describes experience under policies whose benefits and premiums either are regulated, or could be regulated, by a State, since it is at the State level that insurance regulation occurs. The regulation generally defines the State-of-issue based on the "situs" of the insurance contract between the issuer and the policyholder. HHS defines "situs" as the State in which the contract is issued or delivered as stated in the contract. Consistent with NAIC guidance, HHS interprets this as the State that has primary jurisdiction over, or governs, the policy. Special rules that apply to determining the "situs" of a policy marketed to individuals and employers through associations or trusts are discussed below.

The NAIC concluded, and the Department agrees with its conclusion, that the State is the appropriate level of geographic aggregation. Regulation of insurance has been and continues to be primarily the responsibility of States. Benefits offered, premiums, and marketing activities are all regulated under State law. It is the States that review and approve rates, and oversee solvency, and rebates are essentially a retrospective adjustment or correction to premiums. In addition, the statute specifically provides an opportunity for individual States to adopt loss ratio standards that are higher than those required by section 2718(b). It also allows for State-by-State adjustments to the medical loss ratio standard when justified by potential destabilization in the individual market. Applying State-level and State-specific MLR standards would be difficult if experience were aggregated across States that may have different MLR standards. Adopting the State as the basic unit of geographic aggregation will make the reports submitted under section 2718 more meaningful to the exchanges. The Department agrees with the NAIC determination and has decided not to aggregate the experience of a single issuer across States. A rule that would permit aggregation of experience across issuers with common ownership was also considered. Under such a rule, the experience of all issuers owned by a common holding company or corporate group would be combined. Aggregation across such affiliated issuers would have two possible advantages: It would increase the total experience used to prepare the report, thereby increasing the reliability of the data for smaller issuers; and it would combine similar coverage provided in the same market by two related companies. However, aggregation across affiliated issuers might also combine the experience of issuers offering dissimilar coverage or that use different pricing policies. HHS has concluded, as did the NAIC, that reporting should not be done at the level of the holding company in this interim final regulation.

In response to both the April request for information notice and the NAIC's solicitation of comments, extensive comments were received from issuers, regulators, and consumers. In general, comments received from regulators and consumers supported aggregation at no higher than the State level. The reasons given for State aggregation included consistency with the statute, greater meaningfulness of State-level information to consumers and purchasers, consistency with the responsibility of the States for regulation of issuers and oversight of insurance premiums, and the calculation of rebates that appropriately reflect the relationship between premium and claims experience. Many health issuers also recommended aggregation at the State level, although some recommended aggregation at the national level for coverage sold to large employers. Advocates of aggregation at a national level pointed to the greater reliability of reported loss ratios when based on the experience of the combined national enrollment of an issuer and, in the case of large group coverage, the use of experience rating for national or regional employers, and the complexity of allocating certain expenses, particularly Federal taxes, to experience within a single State. Several comments addressed aggregation at a geographic region smaller than a State. Reasons identified for regional aggregation within a State included claims of geographic variations within States of utilization and expenditure patterns and differences across issuers in geographic adjustments that are used to set premiums.

The NAIC considered the arguments made for different approaches to geographic aggregation, including the issues related to multi-State level employers, and decided that aggregation should be at the State level. HHS agrees with and adopts the NAIC's approach. As discussed previously, particularly as to the individual and small group markets, State aggregation is most consistent with the requirements of the statute, particularly provisions permitting State-level exceptions to the minimum loss ratio, and will result in information that is more meaningful to consumers. In addition, aggregation at a national level would preclude States' flexibility to set higher MLR standards as prescribed in the Affordable Care Act. Aggregation at the State level will also ensure value for their health care dollars for consumers in every State.

Some issuers have expressed concern that the reporting and rebate requirements recommended by the NAIC, and adopted in this regulation, would disadvantage large or multi-state employers, including those with a small number of employees in one State and a larger presence in another. This regulation does not require these businesses to change the manner in which they operate, and accommodates issuers that provide coverage to such employers in a number of ways.

First, where an issuer insures employees of a business located in multiple States, the NAIC recommended and HHS agrees that MLR reporting should be based on the "situs of the contract." Under this approach, incorporated in this regulation, the premiums and claims experience attributable to employees in multiple States are combined and reported by the issuer in the MLR report for the State identified in the insurance policy or certificate as having primary jurisdiction over the policy—often the headquarters of the company. This avoids separating the experience of employees from a single company in multiple States.

Second, the NAIC recommended, and HHS adopts, combined reporting across affiliates for "dual contracts." Under these types of insurance contracts, a single group health plan obtains coverage from two affiliated issuers, one providing in-network coverage, and a second affiliate providing out-of-network benefits to the plan. The experience of these two affiliated issuers providing coverage to a single employer can be combined and reported on a consolidated basis as if it were entirely provided by the in-network issuer. This maintains the experience of employees in a single reporting entity.

Thirdly, where affiliated issuers offer blended insurance rates to an employer—rates based on the combined experience of the affiliates serving the employer—the NAIC recommended and HHS agrees that the incurred claims and expenses for quality improving activities can be adjusted among affiliates to reflect the experience of the employer as a whole.

Taken together, these provisions recommended by the NAIC and adopted by HHS are a reasonable

accommodation of the needs of affiliated issuers and the multi-state employers for which the issuers provide coverage.

b. Attribution to Health Insurance Markets Within States

The interim final regulation requires issuers to report experience within a State for each of the three markets referenced by the statute: The individual market, the small group market and the large group market. Experience under a health insurance policy or certificate is to be attributed to the individual market if the policy is not offered in connection with a group health plan, as defined by the PHS Act.

In response to the April request for information notice, HHS received extensive comments on a separate aggregation question: Whether to combine the small group and individual markets. In general, comments supported separate reporting for the individual, small group, and large group markets. Concern was expressed that merging any of these markets would tend to conceal differences in medical loss ratios and perpetuate the pricing of individual or small group policies to achieve a medical loss ratio substantially below the minimums specified in the statue. On the other hand, HHS received comments from both regulators and industry supporting the consolidation of the individual and small group markets, and some comments recommended giving issuers the option of combining or not combining the individual and small group markets. Consolidated reporting could increase the reliability of reported loss ratios by reflecting a larger base of experience. However, it could also deprive consumers in one of these markets of the value of the statutory MLR standard.

The NAIC, in its model regulation, permits an issuer to combine the individual and small group markets for purposes of calculating the MLR rebate if the State in which the coverage is issued requires that the two markets be combined for rating purposes. HHS adopts this approach. This exception is consistent with section 1312(c)(3) of the Affordable Care Act, which allows a State to require the merger of the individual and small group markets. Under such a merger, risk is pooled between individuals and small groups, and it would be appropriate to base rebates on the combined experience in the two markets. While we agree with this approach, it is important that the experience of the small group and individual markets be reported separately even if experience is combined for purposes of calculating the MLR, for a number of reasons. The statute allows the Secretary to adjust the MLR percentage in the individual market of a State if the Secretary determines that the application of the 80 percent MLR may destabilize the individual market in that State. Also, the law states that the Secretary may adjust the MLR "if the Secretary determines appropriate on account of the volatility of the individual market due to the establishment of State Exchanges." In order for the Secretary to make these determinations, reporting of data for the individual market is needed. Separately reported data will also enable HHS to evaluate the impact of the MLR standards on the market, consumers, and the industry, and to consider making changes to the interim final regulation as appropriate based on actual experience.

HHS has considered the arguments made for different approaches to aggregation across markets. It has decided to follow the recommendation to the Secretary submitted by the NAIC and require separate reporting of experience by the three markets.

c. Associations or Trusts

The aggregation rules, in § 158.120(d), adopts the NAIC's approach and also provide guidance for insurance coverage offered through associations or trusts. Under the definition of "group health insurance coverage," only coverage offered to individuals through associations or trusts that are offered in connection with a group health plan should be attributed to the group market. Coverage obtained through an association or trust that is not offered in connection with a group health plan should be attributed to the individual market. Although such coverage is generally considered to be "group" coverage under the conventions of statutory accounting, it is to be reported as individual coverage consistent with the requirements of the PHS Act. This is consistent with ERISA's definition of group health plan, as incorporated in title XXVII of the PHS Act, as well as the NAIC's recommended approach. Although such coverage is generally considered to be "group" coverage for other purposes (for example, the conventions of statutory accounting), this interim final regulation requires non-employment based coverage to be reported as individual coverage consistent with the requirements of the PHS Act. As noted earlier, this interim final regulation does not apply to self-insured plans, including self-insured plans offered through an association or trust.

d. Expatriate Plans

The NAIC model regulation does not address the special circumstances of different types of plans, such as expatriate plans and plans with low annual limits, commonly called "mini-med" plans. However, in a letter dated October 13, 2010 to the Secretary of Health and Human Services, the NAIC expressed its opinion that expatriate plans should be excluded from the requirements of section 2718. HHS has considered the NAIC's views, as well as the public comments received by HHS and by the NAIC regarding these types of plans. Expatriate policies generally cover: Employees working outside their country of citizenship; employees working outside of their country of citizenship and outside the employer's country of domicile; and citizens working in their home country. Their unique nature results in a higher percentage of administrative costs in relation to premiums than plans that provide coverage primarily within the United States, for two reasons. One, administrative costs are related to identifying and credentialing providers worldwide in countries with different licensing and other requirements from those found in the United States, processing claims submitted in various languages that follow various billing procedures and standards, providing translation and other services to enrollees, and helping subscribers locate qualified providers in different countries. Two, because these plans primarily cover care in other countries, issuers are less able to provide quality improving activities.

We note initially that some expatriate plans are not subject to the provisions of the Affordable Care Act, including the MLR reporting and rebate provisions of section 2718. Policies issued by non-U.S. issuers for services rendered outside of the U.S. are not subject to the Affordable Care Act. Therefore, if an expatriate policy is written on a form that was not filed and approved by any State insurance department, or its equivalent, experience under that policy would not be reported for purposes of calculating an issuer's MLR.

HHS agrees with the NAIC that expatriate policies that are issued by U.S. domestic issuers on forms approved by a State insurance department have special circumstances that should be addressed in this interim final regulation. Therefore, the experience of these expatriate policies is to be reported separately from other coverage, as provided in § 158.120(d)(4), and the calculation of claims and quality improving activities is to be

multiplied by a factor of two, as provided in § 158.221(b). HHS believes that this factor is sufficient to account for the special circumstances of expatriate plans, while still requiring that they meet the statutory MLR standards. However, because HHS thinks additional data is necessary to inform this adjustment, this special circumstance adjustment applies for 2011 only. Also, in order to determine whether, and if so what type of, an adjustment may be appropriate for 2012, expatriate plans that wish to avail themselves of this special circumstances adjustment in § 158.221(b)(4) for 2011 will be required to report MLR data on a quarterly schedule under § 158.110(b). We will revisit the special filing circumstances for expatriate plans after reviewing the quarterly filings.

e. "Mini-med" Plans

HHS has received requests from issuers of so-called mini-med plans to be exempted entirely from the MLR and rebate provisions of section 2718. The term "mini-med" plan does not have a statutory basis, and we use it here to generally refer to policies that often cover the same types of medical services as comprehensive medical plans but have unusually low annual benefit limits, often capping coverage on an annual basis for one or more benefits at $5,000 or $10,000, although some have limits above $50,000 or even $250,000. Our analysis of this segment of the insurance market suggests that a large majority of such plans have limits at or below $250,000. As discussed below, we therefore are using this figure as a proxy for capturing this type of plan.

Issuers of mini-med plans assert that their administrative costs are higher as a percentage of the premium collected than is the case for plans having higher annual limits and thus a higher premium base. They assert that they have special administrative burdens because the populations they serve generally have high turnover rates. This high turnover rate may also result in lower claims costs. Mini-med plans are also less likely to spend as much on quality improving activities because of their lower annual limits. Both of these factors would result in administrative costs being a higher percentage of premium dollars than for plans with higher amounts of coverage. These issuers therefore ask that mini-med coverage be exempted entirely from the requirements of section 2718, and have indicated that in the absence of an exemption some may no longer be able to offer coverage. Some consumer groups have disagreed, suggesting that mini-med plans have higher profit margins than do traditional plans with significantly higher limits and should not be exempt from the MLR standards. The Blue Cross and Blue Shield Association sent a letter to Secretary Sebelius on November 1, 2010 in which it urged that HHS not grant "any MLR exceptions for particular companies or product types." However, an issuer, which according to company materials has a relationship with the Blue Cross and Blue Shield system and provides coverage to at least one large employer, asserted that the company would be forced to drop this coverage without an exemption.

The application of the Affordable Care Act to mini-med plans has already arisen in the context of restrictions on annual benefit limits under section 2711 of the PHS Act. HHS has established a process under which certain health plans with annual limits below those established in the interim final regulation implementing section 2711 may be granted a temporary waiver from the application of higher limits if compliance with the standards would result in a significant decrease in access to benefits or a significant increase in premiums. See 26 CFR 54.9815–2711T; 29 CFR 2590.715–2711; 45 CFR 147.126; and OCIIO Sub-Regulatory Guidance (OCIIO 2010–1), September 3, 2010. Data from the applications for waivers described above suggest that over one million individuals have coverage in mini-med plans. There are little publicly available data on these plans because current financial reporting to the States does not separate mini-med experience from other experience on which issuers report.

HHS is concerned about the possibility of the over one million individuals who have coverage through mini-med plans losing that coverage. Based on this concern and the limited data that indicate mini-med plans may have a higher percentage of administrative costs due to lower claims and quality improving activities, HHS has decided to exercise its authority in section 2718(c) to "take into account the special circumstances of smaller plans, different types of plans, and newer plans."

Therefore, for the reporting year 2011, HHS will apply a methodological change to address the special circumstances of mini-med plans. The mini-med issuers, for policies that have a total of $250,000 or less in annual limits, will be permitted to apply an adjustment to their reported experience to address the unusual expense and premium structure of these plans. Specifically, under § 158.221(b)(3), in the case of a plan with a total of $250,000 or less in annual limits, the total of the incurred claims and expenditures for activities that improve health care quality reported under § 158.221(b) are multiplied by a factor of two. We believe this factor is sufficient to account for the special circumstances of mini-med plans based on the limited data available.

Because little information is available to inform this adjustment, this special circumstances adjustment applies for 2011 only. Also, in order to determine whether, and if so what type of, an adjustment may be appropriate for 2012, mini-med plans that wish to avail themselves of this special circumstances adjustment in § 158.221(b)(3) for 2011 will be required to report MLR data on a quarterly schedule under § 158.110(b). We will revisit the special filing circumstances for mini-med plans after reviewing the quarterly filings.

3. Newer Experience (§ 158.121)

Section 2718(c) specifically charges the NAIC with establishing methodologies that take into consideration the special circumstances of newer plans. HHS follows the NAIC's approach in the model regulation, which allows an issuer to defer the experience associated with newly issued health insurance policies under certain circumstances. Specifically, an issuer may defer to the next MLR reporting year the premium and claims experience, as well as the life-years, associated with policies first issued after the start of the MLR reporting period if these policies account for more than half of the issuer's experience in a market segment for an individual State. This condition means that more than half of an issuer's overall premium revenue for a market sector within a State would have to be from newly issued policies that are issued after the first of the year.

The rationale for this provision, as set forth by the NAIC and certified and adopted herein by HHS, has two parts: (1) The rationale for deferring experience under newly issued policies; and (2) the rationale for limiting the deferral of experience to issuers that derive more than half of their premium revenue from newly issued policies. The rationale for deferring experience under newly issued policies is that claims experience is generally expected to be substantially less than the premium revenue from those policies during the year in which the coverage is issued. This is particularly true for policies with substantial deductibles. Applying the rebate provision to these policies would create a substantial barrier to the entry of new issuers into a market.

The rationale for allowing the deferral of experience only when more than half of the premium revenue is derived from newly issued policies is twofold. First, if newly issued policies account for a small percentage of an issuer's total experience in a market, they would have a very limited effect on the aggregated MLR for an issuer. Second, the principal purpose of allowing the deferral of newly issued business in the MLR calculation is to reduce barriers to market entry. Because claims experience is generally low compared to premiums under newly issued policies, including new business would generally result in lowering an issuer's MLR simply because of the new business. Deferral of reporting new business encourages companies to enter new markets, and new companies to enter the market.

In response to the HHS notice requesting public comments regarding section 2718 of the PHS Act, HHS received comments from issuers, consumer advocates, and providers urging that special consideration be given to newer plans. Reasons for this included concern both about the effect on the market if newer plans are not given special consideration, and about the impact on the reliability of reported MLRs if newer plans' experience is included. HHS agrees with these concerns and addresses them by adopting, in § 158.121, the NAIC's method for recognizing the special circumstances of issuers that have substantial new business.

4. Premium Revenue (§ 158.130)

Section 2718(a) of the PHS Act requires health insurance issuers to report information concerning "earned premium," and section 2718(b) provides that these reported data would be used in determining rebates to enrollees. Section 2718(c) charges the NAIC with establishing a uniform definition of premium revenue, subject to certification by the Secretary. HHS is adopting the NAIC definition of premium revenue, as described below.

The NAIC defines "earned premium" as the sum of all monies paid by a policyholder as a condition of receiving coverage from a health insurance issuer subject to section 2718, including any fees or other contributions associated with the health plan, and accounting for unearned premiums. HHS is adopting this NAIC approach in § 158.130(a), and these adjustments to earned premium are discussed below. The NAIC calls for reporting of premium on a direct basis as set forth in § 158.130(a)(1). Earned premium is addressed in § 158.130 and includes any fees or other contributions associated with the health plan.

Adjustments to premium revenue are addressed in § 158.130. Unearned premium is that portion of the premium paid in the MLR reporting year for coverage during a period beyond the MLR reporting year. Any premium for a period outside of the MLR reporting year must not be reported in earned premium for the MLR reporting year. Earned premium is net of premiums associated with group conversion charges that the issuer collects in connection with transfers between group and individual lines of business. Group conversion charges are the portion of earned premium allocated to providing the privilege for a certificate holder terminated from a group health plan to purchase individual health insurance without providing evidence of insurability. In addition, earned premium excludes premium assessments paid to or subsidies received from Federal and State high risk pools. High risk pool subsidies include grants provided under section 2745 of the PHS Act. Earned premium excludes adjustments for experience rating refunds, as provided in § 158.130(b). Experience rating refunds are retrospective premium adjustments arising from retrospectively rated contracts.

Earned premium is to be reported prior to deducting premium refunds to enrollees for health and wellness promotion. These refunds are considered quality improvement expenditures, so they should not be double counted as a reduction in premium, as provided in § 158.130(b)(4).

We have adopted the NAIC's approach to assumption and indemnity reinsurance, in § 158.130(a)(2) and (3). Earned premium for policies that originally were issued by one entity and later assumed by another entity via assumption reinsurance are to be reported as direct earned premium by the assuming entity and are to be excluded from premium revenue reported by the ceding entity. Similarly, if a block of business was subject to indemnity reinsurance and administrative agreements effective prior to the effective date of the Affordable Care Act, such that the assuming entity is responsible for 100 percent of the ceding entity's financial risk and takes on all of the administration of the block, then the assuming entity and not the ceding entity should report the reinsured earned premium as part of its premium revenue.

Section 2718 makes specific reference to "Federal and State taxes and licensing or regulatory fees" in two places: First, in the reporting requirements of subsection (a) it excludes these items from "all other non-claims costs"; second, it excludes these costs from premium revenue in determining the ratio of expenditures on claims and activities to improve quality health care to premium revenue. For reporting purposes, therefore, taxes are excluded from "all other non-claims costs," and are addressed in §§ 158.161 and 158.162, separate from but immediately following the requirements set forth in § 158.160 related to reporting of non-claims costs. Taxes are also discussed in the section of this preamble describing calculation of the MLR.

The PHS Act section 2718(a) requires reporting of "premium revenue, after accounting for collections or receipts for risk adjustment and risk corridors and payments of reinsurance." Because this language so closely parallels the three programs added by the Affordable Care Act (the transitional reinsurance program established by section 1341; the risk-corridor program established by section 1342; and risk-adjustments under section 1343 of the Affordable Care Act), we interpret this requirement as applying exclusively to payments under those provisions, which are not effective until 2014. HHS anticipates providing guidance on these provisions at a later time. Consistent with the statute, § 158.130(b)(v) of this interim final regulation treats payments and collections under these provisions of the Affordable Care Act as adjustments to premium revenue.

In response to the HHS notice requesting public comments regarding section 2718 of the PHS Act, HHS received a number of comments from the industry regarding premium revenue. A few industry commenters recommended adjusting premium revenue for the change in unearned premium reserves. HHS agrees that changes in unearned premium reserves should be reflected in premium revenue, and has provided for this in § 158.130(a). A few industry commenters recommended adjusting premium revenue for commercial reinsurance ceded and assumed. HHS is not adjusting premium revenue for commercial reinsurance (with the exception of 100 percent assumption reinsurance) because this largely would provide a tool for issuers to manipulate reported premiums.

The NAIC considered allowing an adjustment to premium for commercial stop-loss or similar reinsurance, but rejected allowing such adjustments. We adopt the reasoning and recommendation of the NAIC. The argument for allowing such adjustments

for reinsurance was that it might increase the reliability of the medical loss ratio that is used for purposes of calculating rebates. However, the NAIC concluded that allowing adjustments for reinsurance created too much of an opportunity for manipulation of the reported loss ratio and would require extensive and complex regulation of the use of reinsurance. An industry commenter suggested subtracting experience rating refunds from premium revenue. The NAIC recommended, and HHS agrees, that there should be an adjustment for experience rating refunds. A consumer advocate suggested that total revenue (including investment income) be used in place of premium revenue, so consumers would know the universe of funds available to be spent on medical services. However, the commenter points out—and both the NAIC and we agree—that the statute instructs issuers to report "premium revenue" and not total revenue.

5. Reimbursement for Clinical Services Provided to Enrollees (§ 158.140)

Section 2718(a)(1) of the PHS Act requires reporting of "reimbursement for clinical services provided to enrollees under such coverage." The Affordable Care Act charges the NAIC with establishing a uniform definition of reimbursement for clinical services. The NAIC defines reimbursement for clinical services as direct claims paid and incurred claims during the applicable MLR reporting year. In this interim final regulation, HHS is adopting this NAIC approach, at § 158.140. The definition and guidance regarding adjustments to claims are discussed below.

The interim final regulation defines incurred claims as the sum of direct paid claims incurred in the MLR reporting year, unpaid claim reserves associated with claims incurred during the MLR reporting year, the change in contract reserves, reserves for contingent benefits, the claim portion of lawsuits, and any experience rating refunds paid or received. Experience rating refunds exclude rebates based on an issuer's MLR, as required by § 158.140. If there are any group conversion charges for a health plan, the conversion charges should be subtracted from the incurred claims for the aggregation that includes the conversion policies, and this same amount should be added to incurred claims for the aggregation that provides coverage that is intended to be replaced by the conversion policies. Incurred claims must not include claims recovered as a result of fraud and abuse programs. Treatment of the amount expended to reduce fraudulent claims is discussed below in the section regarding quality improving activities. Additionally, if the issuer transfers portions of earned premium associated with group conversion privileges between group and individual lines of business in its Annual Statement accounting, these amounts should be added to or subtracted from incurred claims.

Unpaid claims reserves are included in incurred claims. Unpaid claim reserves are the reserves for claims that were incurred during the reporting period but that had not been paid by the date on which the report was prepared. To minimize reliance on estimates for the amount of the reserve, unpaid claim reserves shall be calculated based on claims that have been processed within three months after the end of the MLR reporting year. This claims collection period provides a better estimate of outstanding liability than the reserve established at the end of the MLR reporting year. Claims reserves are included in incurred claims in order for claims to be paid effectively and to allow for the insurance company to continue operating year after year.

The NAIC includes the change in contract reserves in reimbursement for clinical services, and HHS has followed this approach. The NAIC and this interim final regulation define contract reserves as reserves that are established which, due to the gross premium pricing structure at the time of issue, account for the value of the future benefits that at any time exceeds the value of any appropriate future valuation of net premiums at that time. In the early years of a new product being introduced, reserves are established to cover losses in the future, but as reserves are drawn down to cover current losses the amount collected from reserves will be deducted from claims. An issuer may establish contract reserves to reduce the need to increase premiums for a newly introduced product as the experience under that policy matures. As a policy matures, the reserves that were set aside in the beginning of the policy's existence are used to cover claims that are incurred in the future.

Contract reserves must not include premium deficiency reserves. Premium deficiency reserves are reserves that are established when premium is no longer adequate to cover losses. They are excluded because contract reserves would provide for these future losses over time to the extent that such losses were anticipated and factored into the premiums charged during the reporting period. Contract reserves shall not include reserves for expected MLR rebates.

Guidance is also provided as to types of expenses or revenue that are to be treated as adjustments to claims. The NAIC recommended that prescription drug costs should be included in incurred claims and prescription drug rebates should be deducted from incurred claims. Prescription drug rebates are rebates that pharmaceutical companies pay to issuers based upon the drug utilization of the issuer's enrollees at participating pharmacies. We agree with the NAIC that drug rebates should be accounted for, and under § 158.140(b)(1)(i) we treat such rebates as an adjustment to incurred claims.

The NAIC allows an adjustment to claims for State stop loss, market stabilization, and claims/census based assessments. HHS agrees that these types of expenses should be allowed as an adjustment to incurred claims. These assessments include:

(1) Any market stabilization payments or receipts by issuers that are directly tied to claims incurred and other claims based or census based assessments;

(2) State subsidies based on a stop-loss payment methodology; and

(3) unsubsidized State programs designed to address distribution of health risks across health issuers via charges to low risk issuers that are distributed to high risk issuers.

The NAIC also considered but rejected the inclusion of an adjustment to incurred claims for so-called "large claim pooling" as a means of reducing the need for and magnitude of credibility adjustments. NAIC rejected large claim pooling for two reasons. First, it would not have not addressed the needs of issuers that either are not part of a holding company or company group or that are operate in a single State. Second, it would require extensive and complex regulations and close oversight. We have accepted the NAIC's recommendations.

Incurred medical incentive pools and bonuses to incurred claims are also allowed as an adjustment to incurred claims, and this is reflected in § 158.140(b)(2)(iii) of the interim final regulation. Medical incentive pools are arrangements with providers and other risk sharing arrangements whereby the reporting entity agrees to either share savings or make incentive payments to providers. These payments may not be counted under quality improvement expenditures.

HHS received numerous comments from consumer groups, issuers, and regulators regarding whether, and to what extent, reserves should be included in incurred claims. A consumer advocacy group felt that only

paid claims should be used, arguing that the use of actual claims paid is reasonable because the review is historical; this would avoid the possibility of issuers gaming the system by manipulating reserves. However, several issuers and regulators support the inclusion of unpaid claims reserves in incurred claims. A State regulator indicates that the advantage of such inclusion is that it deals only with data for the one year in which claims are incurred, and avoids any distortion due to possible errors in the estimate of the unpaid claim reserve as of the beginning of the year. The disadvantage is that the result is unduly influenced by the unpaid claim reserve as of the end of the year.

HHS acknowledges the consumer group concern for the potential that reserves can be manipulated, and in particular overstated, and can thus produce a reported MLR for a given calendar year that is higher than the true MLR for that year. Nevertheless, over the long run such over-reserving for one year necessarily results in a reduction, or "releasing," of reserves in future years. HHS concurs with the NAIC that including contract reserves in claims is fair to consumers over the long run, and has adopted this approach.

6. Activities That Improve Health Care Quality (§§ 158.150 Through 158.151)

Section 2718(a)(2) of the PHS Act requires health insurance issuers to submit an annual report to the Secretary concerning the percent of total premium revenue that is spent on activities that improve health care quality. Section 2718(c) of the PHS Act directs the NAIC, subject to certification by the Secretary, to establish uniform definitions of activities that improve health care quality. In developing the definition of a quality improvement activity, the NAIC has relied upon section 2717 of the PHS Act. HHS concurs with the NAIC in this approach and has followed the recommendations of the NAIC.

Section 2717 provides for the development of "reporting requirements for use by a group health plan, and a health insurance issuer offering group or individual health insurance coverage, with respect to plan or coverage benefits and health care provider reimbursement structures that—

(A) improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, including through the use of the medical homes model as defined for purposes of section 3602 of the Patient Protection and Affordable Care Act, for treatment or services under the plan or coverage;

(B) implement activities to prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post-discharge reinforcement by an appropriate health care professional;

(C) implement activities to improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence-based medicine, and health information technology under the plan or coverage; and

(D) implement wellness and health promotion activities.

The NAIC model regulation contains definitions of activities that improve health care quality that track the categories set forth in section 2717. After considering the NAIC's definitions, and public comments thereon, HHS has decided to certify and adopt them. In addition, the NAIC provided examples to illustrate activities that qualify as quality improving activities and these are also certified and adopted in toto in this interim final regulation. Finally, the NAIC designated certain activities as not qualifying as quality improving, and we certify and adopt these exclusions as well.

As recommended by the NAIC, this interim final regulation allows a non-claims expense incurred by a health insurance issuer to be accounted for as a quality improvement activity only if the activity falls into one of the categories set forth in section 2717 and meets all of the following requirements:

(1) It must be designed to improve health quality;

(2) It must be designed to increase the likelihood of desired health outcomes in ways that are capable of being objectively measured and of producing verifiable results and achievements;

(3) It must be directed toward individual enrollees or incurred for the benefit of specified segments of enrollees or provide health improvements to the population beyond those enrolled in coverage as long as no additional costs are incurred due to the non-enrollees; and

(4) It must be grounded in evidence-based medicine, widely accepted best clinical practice, or criteria issued by recognized professional medical associations, accreditation bodies, government agencies or other nationally recognized health care quality organizations. These criteria are recommended by the NAIC in its model regulation.

In this interim final regulation HHS recognizes that some quality improvement activities may be what are sometimes referred to as "population-directed" and may not involve face-to-face interaction between an employee of the health insurance issuer (or a contractor of the issuer) and the enrollee. However, such activities must be directed to identified segments of the issuer's enrollees. The issuer must be able to measure the level of engagement with these enrollees in addition to tracking the effect(s) of these activities on health outcomes in this population through a process that is well defined, well developed, and utilized.

Any quality improvement activity that results in cost savings to an issuer should not, by itself, cause expenditures on that activity to be classified as non-quality improving expenditures, if they meet the criteria set forth in this interim final regulation. However, if the activity is designed primarily to control or contain costs, then expenditures for it may not be included as a quality improvement activity, as provided in § 158.150(d). This approach follows the NAIC's model regulation.

As many quality improvement activities are fluid in nature, they may properly be classified in more than one quality improvement activity category. However, following the recommendation of the NAIC, the interim final regulation does not permit issuers to count any occurrence of a quality improvement activity more than once, as explained in § 158.170(a). Moreover, shared expenses among related entities as well as expenses that are for or benefit lines of business or products other than those being reported, including self-funded plans, must be apportioned among the entities and among the lines of business or products. For example, a quality improvement program that is developed and implemented for self-funded plans and fully insured plans must be pro-rated among the lines of business, and the portion of expenditures for the program that are for the self-funded plans may not be included in quality improvement activities reported under section 2718(a) of the PHS Act.

The NAIC recommended, and HHS adopts in its entirety, the list of activities that are not to be reported as a quality improving activity. Section 158.150(c) sets forth types of activities that are not to be reported as a quality improvement activity. These include:

(1) Those activities which are designed primarily to control or contain costs;

(2) Concurrent and retrospective Utilization Review;

(3) Fraud Prevention activities (beyond the scope of those activities which recover incurred claims);

(4) Development, execution, and management of a provider network;

(5) Provider credentialing;

(6) Marketing expenses;

(7) Costs associated with calculating/administering individual enrollee or employee incentives;

(8) Clinical data collection without any subsequent data analysis;

(9) Establishment and/or maintenance of a claims adjudication system; and

(10) 24-hour customer service/or health care professional hotline addressing non-clinical member questions.

HHS requested public comments regarding the types of activities that would improve the quality of health care. Numerous consumer advocacy groups, issuers, State regulators, and other interested parties responded with various suggestions as to the type of activities that should be included in the definition of quality improving activities.

Many issuers and interest groups advocated for a broad definition for "quality improving activities" that allows for future innovations. However, numerous providers and consumer advocacy groups asserted that HHS should develop a definition for 'quality improving activities' that is not so broad that issuers may improperly classify administrative activities as improving quality. Several commenters also advocated for a definition that requires issuers to clearly articulate the activity's purpose and to provide detailed accounts of the underlying activity with measurable evidence as to the effects of the activity on the quality of care received by enrollees.

This interim final regulation provides a set of criteria in § 158.150 which issuers must comply with in order for the activity in question to be treated as improving quality. The definition, or foundational criteria, of a quality improvement activity should be specific enough so as to provide clear guidance without overly prescribing acceptable activities and possibly stifling future innovative quality improving activities; the NAIC's definition which we have adopted achieves these goals.

Numerous consumer groups advocated for a definition that includes only evidence-based quality improving initiatives, and excludes alleged quality-improving activities that have not been demonstrated to improve quality. Some consumers and providers want issuers to provide specific data illustrating the success of a proposed quality improving measure prior to HHS acknowledging the validity of such an activity. Issuers argue, however, that imposing a specific data requirement prior to engaging in a quality improvement activity will stifle development in future innovations, as data demonstrating the effectiveness of such activity may not yet be available.

The NAIC recommended and HHS agreed that, as provided in § 158.150, a quality improvement activity is "grounded in evidence-based medicine, widely accepted best clinical practice, or criteria issued by recognized medical associations, accreditation bodies, government agencies, or other nationally recognized health care quality organizations." This interim final regulation further requires any proposed quality improving activities to be designed to improve the quality of care received by an enrollee and capable of being objectively measured (taking into account the individual needs of the patient) and of producing verifiable results and achievements. While an issuer does not have to present initial evidence proving the effectiveness of a quality improvement activity, the issuer will have to show measurable results stemming from the executed quality improvement activity.

A consumer advocacy group called for issuers to be required to spend a specified percentage of premiums on preventive and health-lifestyle promotional activities. Several interested parties, including issuers, other interest groups and providers, asserted that capping or limiting quality improvement initiatives would deter issuers from engaging in such activities. Issuers further commented that although these types of activities "add value to the health care system," issuers would be deterred from engaging in such activities if HHS limited the amount an issuer could spend on quality improving activities.

The Affordable Care Act does not dictate the amount an issuer must expend on quality improving activities, nor did the NAIC make a recommendation in this regard, nor does this interim final regulation. Section 158.150 requires that a quality improvement activity be provided by an issuer or through a third party to whom it delegated such responsibilities by contract in connection with which the issuer remains ultimately responsible for the underlying insurance policy. In calculating its MLR, an issuer may allocate any percentage of its expenses to quality improvement activities, so long as the activities comply with the criteria established under § 158.150.

Some industry groups argued that network fees associated with third party provider networks should be classified as quality improving activities, because they increase enrollees' access to providers. Consumer groups argued that these fees are traditional administrative expenses which should not be classified as improving quality. While HHS agrees that administrative expenses such as network fees should not be counted as quality improving, some traditional administrative activities can qualify as quality improving if they meet the criteria set forth in § 158.150. For example, expenses for prospective utilization review and fraud recovery activities up to the amount of fraudulent claims recovered may be classified as expenses for quality improving activities. Prospective utilization review is considered a quality improving activity because it is rendered before care is given and can help ensure that the most appropriate medical treatment is given in the most appropriate setting. In contrast, the network fees associated with third party provider networks do not stem from a quality improving activity and therefore only count as an administrative expense.

Issuers pointed out that the recovery of fraudulently paid claims reduces their MLR. They argued, therefore, that costs of preventing and discovering fraud should be counted as a quality improving activity; otherwise, there would be a reduced incentive to incur these costs. We agree with this concern. The NAIC model regulation addresses this concern by allowing fraud recovery expenses as a quality improving activity expense up to the amount of fraudulent claims recovered. This treatment would help mitigate whatever disincentive might occur if fraud recovery expenses were treated solely as non-claims and non-quality improving expenses. We adopt the NAIC's approach.

HHS also adopts the NAIC's recommendation to exclude the conversion of International Classification of Disease code sets from ICD–9 to ICD–10 as a quality improvement activity with the following qualification. As a general matter, the development and maintenance of claims adjudication systems are not designed primarily to improve the quality of care received by an individual and, therefore, are not classified as a quality improvement activity. However, there is general recognition that the conversion to ICD–10 will enhance the provision of quality care through the collection of better and more refined data. The difficulty is in parsing expenses associated with ICD–10 conversions that may be solely "development and maintenance of claims adjudication systems" as opposed to those that are uniquely conversion costs. As with some other reporting categories defined in this regulation, little public data currently exist to guide decision making

regarding this distinction. Although the NAIC excluded these costs as a quality improving activity, the NAIC supplemental forms allow for the collection of data relating to the conversion for the calendar year 2010 that will be reported in 2011. HHS intends to examine the reported conversion costs along with other quality activity costs and other administrative costs in the NAIC supplemental form in 2011 to determine whether the policy in this regulation should be revisited. HHS solicits further comments on whether ICD–10 expenses should be included as a quality improving activity.

Health Information Technology (Section 158.151). Section 158.151 of this interim final regulation provides guidance on the use of Health Information Technology ("HIT") in conjunction with quality improving activities. Although HIT is not specifically addressed in section 2718(a) of the PHS Act, it is addressed in other provisions within the Affordable Care Act, and HHS has determined that it is important to address HIT's role in quality improvement activity. HHS recognizes HIT as its own separate category of quality improving activities, provided that the use of HIT meets certain requirements. In doing so, HHS has followed the approach of the NAIC.

HIT offers providers, issuers and patients the capability to share clinical information in a real-time setting. Any HIT expenditure that is attributable to improving health care, preventing hospital readmissions, improving patient safety and reducing errors, or promoting health activities and wellness to an individual or an identified segment of the population, is classified as a quality improvement activity. HIT resources that are designed to improve the quality of care received by an enrollee include the provision of electronic health records and patient portals, as well as the monitoring, measuring, and reporting of clinical effectiveness measures. As indicated in § 158.151, HIT expenses that are consistent with Medicare/Medicaid meaningful use requirements may be treated as an expenditure to improve health care quality. This treatment of HIT is also recommended by the NAIC.

7. Other Non-Claims Costs (§ 158.160)

The report required by section 2718(a) of the PHS Act must include information on expenditures for "all other non-claims costs, including an explanation of the nature of such costs, and excluding Federal and State taxes and licensing or regulatory fees." "Other non-claims costs" refers to expenditures that are not used to adjust premiums, incurred claims, or activities that improve quality care. HHS interprets this to mean that issuers must account for the use of all premium revenue, not just claims expenses and expenses to improve quality. The NAIC includes in these non-claims expenses sales expenses, agents' and brokers' fees and commissions, other taxes, community benefit expenditures, and general administrative expenses. HHS supports the NAIC approach to defining non-claims costs and has followed it in § 158.160 of this interim final regulation. For example, direct sales salaries and work force salaries and benefits should be allocated as non-claims costs unless a specific position can be directly correlated with an activity that improves health care quality, as defined in this regulation. The NAIC's inclusion of "other taxes" as non-claims expenses does not refer to taxes that section 2718(a) of the PHS Act excludes from "all other non-claims costs" and which section 2718(b) allows to be excluded from premium revenue. Rather, "other taxes" refers to taxes that may not be excluded from premium revenue, such as taxes of a foreign country and sales taxes (excluding State sales taxes) if an issuer does not exercise the option of including such taxes with the cost of goods and services produced. Another type of expense included in non-claims costs is cost containment expenses not included as an expenditure related to a quality improving activity under § 158.150.

Notably, in correspondence with HHS, the NAIC raised concerns regarding the potential impact of this regulation on agents' and brokers' fees and commissions. Some companies in some States may be particularly reliant on producers to distribute their products. Agents and brokers perform a range of functions on behalf of consumers and companies. In some cases, issuers may have entered into longer term compensation arrangements with agents and brokers which the MLR standard may stress. The NAIC considered, but declined to incorporate in the model regulation, special treatment for such expenses in the MLR calculations. The NAIC opted instead to establish a working group with HHS to address the impact of the Affordable Care Act on agents and brokers, especially during years leading up to 2014. As discussed below, the potential impact of the MLR standard on agents and brokers merits recognition, and in this regulation the impact of the MLR standard on agents and brokers will be a factor in considering whether a particular individual markets would be destabilized. HHS seeks comments on the approach taken in this regulation and on the issues related to agents and brokers during years leading up to 2014.

Loss adjustment expense is part of other non-claims costs that cannot be excluded from premium revenue and cannot be considered part of reimbursement for clinical services to enrollees or a quality improving activity. Loss adjustment expense is referred to as "claims adjustment expenses" in the forms the NAIC has developed for reporting by issuers. Claims adjustment expenses are not reported as an adjustment to premium revenue or as an adjustment to claims. Instead, they are expenses associated with claims and are reported as "other non-claims costs." One type of claims adjustment expenses is cost containment expenses. Such expenses reduce either the number of health services provided or the cost of such services. They may include: Post and concurrent claim case management activities associated with past or ongoing specific care; utilization review; detection and prevention of payment for fraudulent requests for reimbursement; expenses for internal and external appeals processes; and network access fees to preferred provider organizations and other network-based health plans (including prescription drug networks), and allocated internal salaries and related costs associated with network development and/or provider contracting.

Examples of other types of claims adjustment expenses include: Estimating the amounts of losses and disbursing loss payments; maintaining records, general clerical, and secretarial; office maintenance, occupancy costs, utilities, and computer maintenance; supervisory and executive duties; and supplies and postage. As previously explained, claims adjustment expenses are other non-claims costs.

8. Federal and State Taxes and Licensing and Regulatory Fees (§§ 158.161–158.162)

Section 2718 of the PHS Act requires that Federal and State taxes and licensing and regulatory fees be reported. Section 2718(a) lists these expenses as an exclusion from non-claims costs. Section 2718(b)(1)(A) requires that Federal and State taxes and licensing or regulatory fees be excluded from the total amount of premium revenue when calculating an issuer's MLR. Section 2718(b)(1)(B)(i)(II) also requires that such taxes and fees be excluded from the total amount of premium revenue when determining

any rebates. However, section 2718 does not specifically define what is included in Federal and State taxes.

The NAIC defines Federal taxes as all Federal taxes and assessments allocated to health insurance coverage reported under section 2718 of the PHS Act, excluding Federal income taxes on investment income and capital gains. This interim final regulation adopts the NAIC recommendation that Federal income taxes on investment income and capital gains are not taxes based on premium revenues, and thus should not be used to adjust premium revenues, as specified in § 158.162, while all other Federal taxes allocated to health insurance coverage should be excluded from non-claims costs for purposes of the report required by section 2718. Section 158.162 also makes clear that Federal taxes which are excluded from non-claims costs are to be excluded from premium revenue when calculating an issuer's MLR.

We have adopted the NAIC's recommended approach to reporting State taxes and assessments. State taxes and assessments that must be separately identified and reported to the Secretary include: Any industry-wide (or subset) assessments (other than surcharges on specific claims) paid to the State directly, or premium subsidies that are designed to cover the costs of providing indigent care or other access to health care throughout the State; assessments of State industrial boards or other boards for operating expenses or for benefits to sick unemployed persons in connection with disability benefit laws or similar taxes levied by States; advertising required by law, regulation or ruling, except advertising associated with investments; State income, excise, and business taxes other than premium taxes; State premium taxes plus State taxes based on policy reserves, if in lieu of premium taxes; State sales taxes, if the issuer does not exercise the option of including such taxes with the cost of goods and services purchased; and any portion of commissions or allowances on reinsurance assumed that represents specific reimbursement of premium taxes.

The NAIC has interpreted the language in section 2718(a)(3) that refers to "excluding Federal and State taxes and licensing or regulatory fees" from non-claims costs as encompassing the community benefit expenditures by not-for-profit health plans that they are required to make in lieu of State and Federal taxes. As discussed below, we adopt the NAIC's approach.

Under the NAIC's recommendation, "community benefit expenditures" are limited to expenditures that the non-profit issuer is required to make under State law in lieu of State taxes that would otherwise apply, or that the Federal government requires them to make in order to preserve their Federal tax exempt status, and that they report to the Federal government. The proceeds of such expenditures fund activities or programs that seek to achieve the objectives of improving access to health services, enhancing public health and relief of government burden.

Under the NAIC's interpretation, these mandated community benefit expenditures are essentially deemed to be the equivalent of State and Federal taxes for non-profit issuers for purposes of the exclusion in section 2718(a)(3). The NAIC recommended that non-profit issuers be permitted to report community benefit expenditures as a deduction from premium revenue, and further recommended that they be permitted to split such expenditures between Federal and State taxes as applicable, but not to report them more than once.

HHS believes that NAIC's interpretation avoids an inequity between for-profit and non-profit plans, and that it is reasonable to interpret community benefit expenditures by non-profits that they are required by the State or Federal government to make as the equivalent of taxes for purposes of the exclusion in section 2718(a)(3). Thus, in § 158.162(c) and (e), HHS has adopted the NAIC's approach and allows such mandatory community benefit expenditures by not-for-profit plans, made in lieu of income taxes, to be excluded from premium revenue to the same extent as State taxes. In order to implement the NAIC-recommended approach that community benefit expenditures may be split between Federal and State taxes as applicable, § 158.162(e) of this interim final regulation provides that the NAIC's approach applies equally to Federal and to State taxes, and that community benefit expenditures made in lieu of income taxes, whether Federal or State, may be reported as a deduction from premium revenue.

A commenter representing not-for-profit plans asserted that community benefit expenditures should be more broadly recognized in the MLR calculation, and not be limited to the amount required to be paid in lieu of taxes. This commenter pointed out that not all States impose a premium tax, that the amount of premium tax varies among States, and that the NAIC rule would discourage not-for-profits from making these contributions to the community.

Although the NAIC did not recognize community benefit expenditures beyond the amount of taxes that would have been paid, we share the concern that the MLR standard should not create a disincentive for not-for-profits to make community benefit expenditures beyond those required in lieu of taxes. Thus, we invite comments on the proper treatment of community benefit expenses.

The NAIC defines and specifies the licensing and regulatory fees that must be reported and whether they may be included as an adjustment to premium revenue. In § 158.161, we adopted the NAIC approach under which statutory assessments to defray operating expenses of any State or Federal department, and examination fees in lieu of premium taxes as specified by State law are included in the licensing and regulatory fees that may be used as an adjustment to premium revenue. HHS believes that, consistent with the Affordable Care Act, examination fees under State law should also be included as an adjustment to premium revenue, and § 158.161 of the interim final regulation has such a provision. Fines and penalties of regulatory authorities and fees for examinations by State and Federal departments other than referenced above must be separately reported, but may not be used as an adjustment to premium revenue.

9. Allocation of Expenses (§ 158.170)

Section 2718(a)(3) of the PHS Act requires health insurance issuers to submit an annual report to the Secretary concerning the percentage of total premium revenue spent "on all other non-claims costs, including an explanation of the nature of such costs, and excluding Federal and State taxes and licensing or regulatory fees." However, section 2718(a) does not provide a standardized method for allocating such expenditures. Section 2718(c) directs the NAIC to develop definitions and methodologies, which are subject to the certification of the Secretary, to assist issuers in reporting the information stipulated under section 2718(a). The NAIC's model regulation and this interim final regulation require issuers to report their expenses by State and by line of business. Section 158.170 of this interim final regulation addresses the allocation of claims and non-claim related expenses as well as expenses stemming from quality improving activities. Issuers operating within the individual market, small group market, and large group market who also offer products, such as Medicare supplemental insurance, or services, such as administration of group health

plans, must report and properly allocate all related expenses stemming from each individual line of business.

There are several different methods for allocating costs incurred by health issuers allowable under statutory accounting principles. The NAIC model regulation requires issuers to allocate costs consistent with these principles. HHS has therefore not prescribed a standardized method for allocating costs beyond the allocation method designated in § 158.170. All costs reported by issuers must be allocated according to generally accepted accounting methods that yield the most accurate results and are well documented. An issuer's allocation method must illustrate the costs associated with a specific activity and any resulting effect the activity has had on a particular line of business. Section 158.170(d) further provides that issuers must maintain records containing an explanation of all incurred expenditures allocated as non-claims costs and quality improving activities. If the expense is related to a specific activity, the allocation of such expenditure must be on a direct basis. If an expense is not easily attributable to a specific activity, then the expenses must be apportioned based on pertinent factors or ratios, such as studies of employment activities, salary ratios or similar analyses. Section 158.170(b) provides that any shared expenses between two or more affiliated entities must be "apportioned pro rata to the entities incurring the expense" even if the expense has been paid solely by one of the incurring entities.

Each expense that is allocated by an issuer for each State in which it is licensed to conduct an insurance business must be appropriately attributed using a generally accepted accounting method to each line of business in each State, as designated in § 158.170(b). However, all Federal taxes paid by a health insurance issuer must be attributed proportionately and appropriately to each State in which the issuer reports. While Federal taxes are not typically allocated to health insurance issuers on a State-by-State basis, for purposes of complying with the reporting requirements in § 158.110 all health insurance issuers are required to report some percentage of Federal taxes paid on their behalf.

HHS received a number of comments regarding allocation issues in response to the April **Federal Register** solicitation. Several State regulators and issuers noted that issuers currently have considerable flexibility in establishing and utilizing product and State-by-State allocation methods and that such flexibility should be maintained. Numerous regulators and issuers also advocated for allowing multiple methods of approved allocation, including the current financial reporting requirements provided by statutory accounting principles. A few State regulators, medical providers and other interested parties called for a standardized methodology for allocating administrative and quality improvement expenses among States and lines of business. In contrast, issuers stated that a revamped reporting methodology would be costly, administratively burdensome and less efficient in distinguishing a subcontractor's medical versus administrative expenses. A few industry groups also indicated that HHS should not develop an allocation methodology that is inflexible and inconsistent with current statutory accounting requirements and the accounting guidance provided under generally accepted accounting principles.

The NAIC did not mandate the use of a specific methodology for apportioning non-claims costs to health insurance issuers. Section 158.170 adopts this flexible approach and requires health insurance issuers to explain how premium revenue is used to pay for non-claims expenditures (as provided for in § 158.160). Health insurance issuers are required to allocate their non-claims and quality improving expenses on a State-by-State basis, and further allocate such expenses to each line of business within a State, as stated in § 158.170. If an expense is attributable to a specific activity, then an issuer should allocate the expense to that particular activity. However, if it is not feasible for an issuer to allocate such expenditure to a specific activity, then the issuer must apportion the costs using a generally accepted accounting method that yields the most accurate results. Each reporting health insurance issuer must identify in its required report under § 158.110 the specific basis used to allocate to each State its reported expenses, and within each State, to each line of business which the issuer operates. HHS believes that a clear allocation method for all expenses stemming from services provided by issuers includes allocation to each line of business as designated in § 158.170(c). This level of detailed expense reporting is crucial in order to verify that issuers are properly allocating and reporting such expenses.

D. Subpart B—Calculating and Providing the Rebate

1. Applicable MLR Standard and States With Higher MLR Standards (§§ 158.210–158.211)

Section 158.210 mirrors PHS Act section 2718(b)(1)(A)(i) and (ii) by stating the general requirement that issuers must provide their enrollees a rebate if their MLR is less than 85 percent in the large group market or less than 80 percent in the small group market and individual market. While explained in greater detail in subsequent sections of Subpart B of this interim final regulation, this means that issuers must spend at least 85 or 80 percent, respectively, of each premium dollar, as adjusted for taxes and regulatory and licensing fees, on reimbursement for clinical services provided to enrollees and activities that improve health care quality. Additionally, § 158.210 acknowledges that the Secretary may, in her discretion, adjust the MLR standard that applies in the individual market in a State if the Secretary determines, upon application by the State, that the application of the 80 percent MLR may destabilize the individual market in such State. The requirements related to that statutory provision are delineated in Subpart C of this interim final regulation.

Section 158.211 provides that in States that have established under State law a higher MLR standard than that prescribed by section 2718, such higher percentage applies to issuers in that State and should be substituted for the percentages set forth in § 158.210. In States that have established, under State law, a lower MLR standard than that of section 2718, the higher percentage set forth in section 2718 applies to issuers.

2. Calculating an Issuer's MLR (§§ 158.220 Through 158.221)

The NAIC model regulation addresses the calculation of an issuer's MLR, and HHS has certified and adopted the NAIC's uniform definitions and methodologies. The NAIC, in its model regulation, combines calculating the MLR with instructions related to how an issuer should aggregate data in certain instances, such as in connection with employer groups with blended rates, newer experience (deferring reporting of business with less than 12 months' experience), and other related issues such as a credibility, or statistical adjustment for smaller issuers. The requirements for reporting data and handling special circumstances, such as group policies with blended rates, mini-med plans, expatriate plans, and issuers

with newer experience, are set forth in Subpart A of this interim final regulation. These special circumstances are discussed in section II.B of the preamble.

Sections 158.220 and 158.221 of this interim final regulation contain the instructions for calculating an issuer's MLR for each MLR reporting year for purposes of determining whether any rebate is owed and, if so, in what amount. In the 2013 MLR reporting year, an issuer's MLR is calculated using the data for a three-year period, consisting of the MLR reporting year whose MLR is being calculated, and the data for the two prior MLR reporting years. Numerous commenters strongly support the use of a three year, rolling average MLR calculation in determining rebates, and some also support beginning it with the first MLR reporting year, or 2011. One commenter questioned whether the three year MLR was based on averaging three different one-year MLR values or based on accumulating experiences over the three-year period and calculating an MLR for that three-year period. The Department adopts the recommendation that the data should consist of the accumulated experience, rather than the average three MLRs.

For the 2011 and 2012 MLR reporting years, there will not be sufficient data reported to use a three-year average. The NAIC has addressed this in its model regulation, and in § 158.220(b), HHS has adopted the NAIC's approach. For the 2011 MLR reporting year, an issuer's MLR will be calculated using only the data reported for the 2011 MLR reporting year. For the 2012 MLR reporting year, the data that should be used in calculating an issuer's MLR depends in part upon whether the issuer's experience is credible. Credible experience refers to whether an issuer insures a sufficiently large number of lives to be statistically valid, and is defined and discussed later in this preamble. If an issuer's experience for the 2012 MLR reporting year is fully credible, then its MLR for that year is calculated using only the data reported for the 2012 MLR reporting year. If an issuer's experience for the 2012 MLR reporting year is partially credible or non-credible, then its MLR is calculated using the data reported for both the 2011 and 2012 MLR reporting years. To prevent double counting, an adjustment will be made to incurred claims when any rebate owed for the 2012 and 2013 MLR reporting years is calculated using data from 2011 or 2012, as provided in § 158.221(b)(1).

With respect to the issue of which portions of the data reported by an issuer are to be used to determine the numerator of the MLR and which portions of the data reported are to be used to determine the denominator of the MLR, the numerator equals the issuer's incurred claims and expenditures for activities that improve health care quality, and the reporting of data for these categories of expenses is detailed in §§ 158.140, 158.150 and 158.151. As discussed above, Section 158.221(b)(3) provides, for 2011 only, in the case of a mini-med plan reporting separately under § 158.120(d)(3) and an expatriate plan reporting separately under § 158.120(d)(4), that the numerator amount specified in § 158.221(b) shall be multiplied by a factor of two. The purpose of this adjustment is to recognize the "special circumstances" applicable to these plans by restating claims and quality improvement expense (if any) associated with these types of plans so that they are commensurate with the higher administrative expenses of these plans relative to premium. These types of plans are discussed at greater length under Subpart A.

The denominator of the MLR equals the issuer's premium revenue minus the issuer's Federal and State taxes and licensing and regulatory fees. The reporting of data for premium revenue is detailed in § 158.130 and the reporting of data regarding Federal and State taxes and licensing and regulatory fees is set forth in §§ 158.161 and 158.162. Section 2718(b)(1)(A) also provides that the total amount of premium revenue used for the denominator of the MLR shall take into account payments or receipts for risk adjustment, risk corridors, and reinsurance. However, in the reporting requirements related to premium revenue in § 158.130, the Department has provided that the premium revenue reported be adjusted for these types of payments or expenses. Because these issues have been addressed in the cited earlier sections of this interim final regulation, there is no need to address them again in § 158.221 regarding the calculation of an issuer's MLR.

This interim final regulation also provides that an issuer's MLR must be rounded to the nearest one-tenth of one percentage point, after dividing the numerator by the denominator when calculating the MLR. HHS has adopted the NAIC's approach in this regard.

3. Credibility Adjustment (§§ 158.230–158.232)

Section 2718(c) of the PHS Act charges the NAIC with developing uniform methodologies for calculating measures of the expenditures that make up the MLR calculation, and provides that "such methodologies shall be designed to take into account the special circumstances of smaller plans, different types of plans, and newer plans." To address the special circumstances of smaller plans, the NAIC model regulation allows smaller plans to adjust their MLRs by applying a so-called "credibility adjustment." HHS adopts this method of "credibility adjustment" in § 158.230.

A credibility adjustment is a method to address the impact of claims variability on the experience of smaller plans. All issuers experience some random claims variability, where actual claims experience deviates from expected claims experience. In a health plan with a large customer base the impact of such random deviations is less than in plans with fewer insureds. One source of variability is the impact of large claims, which are infrequent, but have greater impact on financial experience than average or typical claims. Large claims have a disproportionate impact on small plans because the higher claim cost is spread across a smaller premium base. These random variations in the claims experience for enrollees in a smaller plan may cause an issuer's reported MLR to be below or above the statutory standard in any particular year, even though the issuer estimated in good faith that the combination of the premium it projected it would collect and the claims it projected would produce an MLR that meets the statutory standard.

The credibility adjustment is a method to address the problem associated with this random variation. A credibility adjustment serves to modify the reported MLR of an issuer by adding to the reported percentage additional percentage points in recognition of the statistical unreliability of the reported number. A number of stakeholders in the NAIC proceedings have supported credibility adjustments in concept, including the American Academy of Actuaries and a number of the consumer representatives to the NAIC.

In evaluating the desirability of including a credibility adjustment, it is important to emphasize that health insurance rates are the product of assumptions, estimates, and projections, and not of calculations based entirely on hard data. When an actuary projects that the rate it has calculated will produce an 80 percent MLR, whether in fact it will produce an 80 percent MLR depends on whether the assumptions the actuary has made—such as those concerning the mix of business it will attract, the intensity and frequency with

which its insureds will use health care services, and unit costs—turn out to be correct. All things being equal, it is more likely that those assumptions will turn out to be correct when an issuer insures a large number of risks rather than a small number.

Credibility adjustments have advantages and disadvantages. Issuers benefit from credibility adjustments because such adjustments—and thus the ability to report a higher MLR than what the issuer's MLR would be using the methodology that applies to other plans—make it less likely that an issuer will be required to pay a rebate. For consumers, on the other hand, credibility adjustments eliminate some rebates that would otherwise have been paid.

In general, the smaller the size of the insured population whose experience is used to calculate the MLR, the more variable the reported MLR will be. Statistical analysis conducted for the NAIC by an independent actuarial consulting firm based on historical data for companies offering coverage in the group and individual markets examined the statistical variation that would be expected in reported MLR. The consultants concluded that if a company estimates that its premium will produce an MLR of 80 percent, random variation would cause the company to pay a rebate of:

- 0.9 percent or more in 1 out of every 4 years if it insures 75,000 lives,
- 2.6 percent or more in 1 out of every 4 years if it insures 10,000 lives, and
- 8.8 percent or more in 1 out of every 4 years if it insures only 1,000 lives.

After extensive analysis and public discussion, the NAIC adopted a credibility adjustment table designed to result in an issuer that charges premiums intended to produce an 80 percent MLR to pay a rebate less than 25 percent of the time. Toward the conclusion of its public proceedings on these issues, the NAIC gave some consideration to setting the base credibility factors so that such an issuer would be required to pay a rebate less than ten percent of the time. The credibility factors in that case would have been roughly twice as large as the factors the NAIC adopted. The argument made in favor of making this change is that it would reduce the likelihood of requiring a plan to pay a rebate simply because of chance variation in claims experience. However, it would also have increased the likelihood that a plan setting premiums to achieve an MLR that is less than the applicable MLR standard would avoid paying a rebate, and it would have reduced the size of the rebates that plans pricing below the MLR standard would have to pay. The NAIC concluded, and HHS agrees, that the credibility factors it adopted more equitably balance the consumers' interest in requiring plans that should pay rebates to pay rebates against the issuers' interest in minimizing the risk of paying rebates as a result of chance variations.

HHS adopts the NAIC credibility adjustment methodology in § 158.230. The NAIC recommends that the credibility factors be evaluated and updated as the Affordable Care Act reforms are implemented over the next several years. HHS concurs with this recommendation and notes its intention both to monitor the effects of the credibility adjustment and, as appropriate, to update the credibility adjustment method.

This interim final regulation adopts the approach taken by the NAIC by, in § 158.230(c)(3), designating as "non-credible" any reported MLR that is based on experience from fewer than 1,000 life-years. Thus, § 158.240(a)(1) provides that issuers with non-credible experience do not owe rebates because there is no valid data to determine that the issuer has failed to meet the MLR standard.

This interim final regulation also adopts the NAIC's assumption that variations of less than approximately one percent are reasonably to be expected based on ordinary variation in claims experience of very large plans. The experience of such plans is "fully credible," and such a plan therefore should be required to pay a rebate based on its reported MLR. The model regulation designates as "fully credible" any reported MLR that is based on experience from 75,000 or more life-years, and this definition is adopted, as provided in § 158.230(b)(1) of this interim final regulation.

The NAIC model regulation provides that a reported MLR that is based on experience from 1,000 to 75,000 life-years is "partially credible" and entitled to a credibility adjustment, as stated in § 158.230(b)(2) of the interim final regulation. The magnitude of the "credibility adjustment" for "partially credible" aggregations is intended to represent the amount by which an issuer's reported MLR would be expected to vary as a result of random variation in claims experience. Under the credibility provisions of the NAIC model regulation, which HHS adopts in § 158.232 of the interim final regulation, the "credibility adjustment" for a specific issuer is the product of two components: A "base credibility factor," determined by the number of life-years of experience used to calculate the issuer's reported MLR; and a "deductible factor," determined by the average deductible of the policies whose experience went into the reported MLR. The credibility adjustment will be added to the reported MLR, as provided in § 158.221(a), before calculating rebates. As stated above, the credibility adjustment applies to partially credible issuers.

The base credibility factor recommended by the NAIC is based on an actuarial analysis of anticipated claims experience. The results of this analysis are summarized in Table 1, below.

Table 1: Base Credibility Factors

Life-Years	Base Credibility Factor
<1,000	Not credible
1,000	8.3%
2,500	5.2%
5,000	3.7%
10,000	2.6%
25,000	1.6%
50,000	1.2%
75,000	0.0%

The deductible factor recommended by the NAIC is also based on the independent actuarial consulting firm's analysis. It is intended to recognize that the variability of claims experience is greater under health insurance policies with higher deductibles than under policies with lower deductibles. Few people incur claims above $10,000, which means that high cost claims represent a much larger portion of the total claims experience in a higher deductible policy than in a lower deductible policy. As a result, issuers who write a small number of high deductible policies are more likely to report a low MLR than an issuer who covers the same number of lives under a low deductible policy, even if the premium they establish is set to achieve the MLR required by section 2718. Therefore, the deductible factor takes into account greater variability among high deductible plans. The deductible factors recommended by the NAIC are shown in Table 2.

Table 2. Deductible Factors

Deductible	Deductible Factor
$0	1.000
$2,500	1.164
$5,000	1.402
$10,000	1.736

Under the NAIC model regulation, an issuer would use the deductible factors from Table 2 to determine a deductible factor for the average deductible of the coverage whose experience was used to calculate the reported MLR. The factors included in Table 2 were developed by the actuarial consultants to the NAIC using methods consistent with standards of professional actuarial practice.

NAIC methodology uses "linear interpolation" to determine life year factors for experience between the life year categories in table 1. HHS adopts this methodology in § 158.230. When the number of life-years reported by an issuer falls between two numbers on Table 1, the base credibility factor is calculated by first determining where, by percentage of the difference between those two numbers, the reported number of lives falls. Thus if Issuer X reports 4,000 life-years, its number of life-years falls 60 percent of the way between 2,500 and 5,000. To calculate the interpolated adjustment factor it is necessary to determine the base credibility factor for the number of lives 60 percent of the way between 2,500 and 5,000. Therefore, this percentage is multiplied by the difference between the base credibility factor corresponding to the number of life-years on Table 1; $0.60 \times (.052 - .037) = .009$. To find the base credibility factor, this amount is then subtracted from the factor corresponding to the lower number of lives on Table 1. Thus, $0.052 - .09$ is equal to .043, which is the base credibility factor for an issuer covering 4,000 lives.

The deductible factor is based on the average deductible of all policies whose experience is included in the reported MLR. When the average deductible is greater than $2,500 and is between two of the deductible categories shown in Table 2, the NAIC model regulation calls for the deductible adjustment to be calculated by linear interpolation. In § 158.232 of this interim final regulation, HHS adopts the methodology using linear interpolation.

The NAIC specifies that the number of life-years used to calculate the base credibility factor matches the number of life-years that comprise an issuer's experience as reported under subpart A. HHS adopts this approach in § 158.231. An issuer's credibility adjustment for the 2011 MLR reporting year is based on the life-years and weighted-average deductible for the 2011 MLR reporting year. An issuer's 2012 MLR reporting year credibility adjustment is based on experience from the 2012 MLR reporting year, unless issuer experience for 2012 is less than 75,000 life-years. In that circumstance, the 2012 MLR reporting year experience is combined with 2011 MLR reporting year experience to calculate the 2012 credibility adjustment.

An issuer's credibility adjustment for 2013 is based on three years' experience, comprised of the current MLR reporting year and the two previous MLR reporting years. In 2013, an issuer is not eligible for a credibility adjustment if (1) the MLR (prior to any

credibility adjustment) in each of the three MLR reporting years was below the MLR standard for each year, and (2) each of the three MLR reporting years included 1,000 life-years or more. This exception prevents issuers from receiving a credibility adjustment when the issuer consistently sets its prices to produce an MLR below the statutory 80 percent MLR standard.

In responding to HHS's request for comments, many issuers, industry associations, and State departments of insurance emphasize that to avoid requiring issuers to pay rebates due to statistical variations, rather than due to their underlying pricing and benefits structure, it is important to assess MLRs on sufficient numbers of lives for statistical credibility. Commenters also argue that requiring issuers to pay rebates when statistical variations lead to surpluses (low MLRs) but requiring issuers to absorb losses when statistical variations lead to losses (high MLRs) will lead to product volatility, market exit, and inadequate levels of surplus to ensure solvency. HHS agrees that rebates should be based on the underlying premium pricing, rather than chance variation in claims experience. But as noted above, any credibility adjustment can also serve to deprive insureds of rebates to which they would otherwise be entitled under the Affordable Care Act. HHS has concluded that the NAIC credibility adjustment methodology provides an acceptable balance between the interests issuers have in not paying rebates when a low MLR is the result of ordinary variation in claims experience, and the interests consumers have in receiving rebates when issuers provide coverage and establish prices that do not result in MLRs, and therefore the value, required by the Affordable Care Act.

4. Rebating Premium if MLR Standard Not Met (§ 158.240)

Section 158.240, subsections (a), (b) and (c), delineates the general requirement regarding rebates, the calculation of the rebate amount, and the time frame for payment of any rebate that may be due. Section 158.240(a) simply provides that if an issuer does not meet the applicable MLR standard set forth in § 158.210 and, if applicable, § 158.211, then the issuer must provide a rebate to each enrollee unless the issuer has too little experience to calculate a reliable MLR. As discussed above, because an issuer that has fewer than 1,000 covered lives does not have sufficiently credible data to determine that the MLR standard has not been met, a non-credible issuer is not required to pay any rebates.

Section 158.240 explains the amount of the rebate due to enrollees. The Affordable Care Act provides a rebate that is the amount by which the applicable MLR standard exceeds the issuer's actual MLR multiplied by "the total amount of premium revenue (excluding Federal and State taxes and licensing or regulatory fees and after accounting for payments or receipts for risk adjustment, risk corridors, and reinsurance * * *)." This language describing premium revenue as the premium paid minus taxes and other adjustments is the same as statutory language describing the denominator of the MLR. The NAIC model regulation matches the statutory methodology, and HHS adopts this methodology. Therefore, the rebate paid to each enrollee is based on the earned premium paid by or on behalf of the enrollee minus taxes and other permissible adjustments.

The Affordable Care Act requires the issuer to "provide an annual rebate to each enrollee under such coverage, on a pro rata basis." The NAIC determined, and the Department concurs, that this requirement is most simply met by requiring the rebate returned to the enrollee to be proportional to the amount of premium paid by or on behalf of the enrollee. As noted above, the total rebate owed by the issuer is required, by statute, to be a percentage of the issuer's total earned premium. An individual who was covered by an issuer for only three months would have paid substantially less than an individual who was covered by the issuer for the entire MLR reporting year. It would be unfair to pay both individuals the same dollar rebate. Similarly, an individual or group that purchases coverage from the issuer that has a higher deductible but lower premium should not receive the same dollar rebate as an individual or group that paid a higher premium for a product with a lower deductible. The rebate paid to a policyholder or enrollee would be based upon the amount of premium paid minus taxes and other permissible adjustments, multiplied by the amount by which the issuer MLR is below the applicable MLR standard; the result is the actual rebate.

For example, take an issuer who owes a five percent rebate to its enrollees in the individual market. An enrollee may have paid $2,000 in premiums for the MLR reporting year. If the Federal and State taxes and licensing and regulatory fees that may be excluded from premium revenue as provided in §§ 158.161(a), 158.162(a)(1) and 158.162(b)(1) are $150 for a premium of $2,000, then the issuer would subtract $150 from premium revenue, for a base of $1,850 in premium. The enrollee would be entitled to a rebate of five percent of $1,850, or $92.50.

Section 158.240(d) requires issuers to provide any rebates that are due no later than August 1 following the end of the MLR reporting year. Since the report is due by June 1 of the year following the MLR reporting year, this allows issuers two full months (a) to provide any rebate that may be due, (b) for the group market, to notify their employer clients to arrange for the distribution of the rebates, if applicable, and (c) to prepare and send the notice of rebate that is required by § 158.250.

5. Form of Rebate (§ 158.241)

While the NAIC model regulation does not specifically address some of the administrative details of section 2718(b)(1)(A) of the PHS Act, which requires an issuer offering group or individual health insurance coverage to provide an annual rebate to each enrollee if the issuer's MLR is less than the statutory minimum, the NAIC advisory group's proposals in this regard have been adopted. The statute does not specify the particular form of rebate that is to be provided to enrollees. For example, must the rebate be provided in the form of cash or check, or may it be provided through a credit to premium? Does the requirement differ based on whether the enrollee to whom a rebate is owed is a current or former enrollee? Section 158.241 of this interim final regulation addresses the method by which an issuer must provide any rebate owing to enrollees and the issuer has the choice as to form of the rebate for then-current enrollees but not for former enrollees, who must receive an actual payment.

Several commenters addressed the administrative expenses involved in distributing rebates. Although the NAIC model regulation does not specifically address the form in which an issuer must disburse rebates, an NAIC advisory group suggested that an issuer should be able to choose whether to disburse rebate payments to current enrollees as a premium credit or a cash lump sum. The NAIC advisory group also proposed that an issuer should have to disburse rebate checks to former enrollees. HHS considered the comments it received and has concluded that the proposals made by the NAIC advisory group may reduce the administrative burden felt by an issuer in providing rebates to its enrollees.

Section 158.241(a) of this interim final regulation thus states that an issuer may choose to provide current enrollees with a rebate in the form of a premium credit (i.e., reduction in a premium

owed), lump-sum check, or, if an enrollee paid by credit card or debit card, by lump-sum reimbursement to the same account that the enrollee used to pay the premium. We believe that this ensures that enrollees receive any rebate owing while giving issuers the ability to provide the rebate in a way that has the least administrative burden. If an issuer chooses to provide a premium credit to a recipient, the issuer must apply the full amount of the rebate owing to the first premium due on or after August 1. If the rebate exceeds the amount of the first premium due on or after August 1, the issuer must apply any overage to succeeding premium payments until the entire rebate has been credited. With respect to rebates owing to former enrollees, § 158.241(b) requires the rebate to be made in a lump-sum, but allows an issuer the flexibility to provide it by check or using the same method that was used for payment of the premium, such as credit card or debit card. Regardless of the method used to pay rebates, all enrollees eligible for rebates must be notified as required by § 158.250.

6. Recipients of Rebates (§ 158.242)

Section 2718(b) requires an issuer to provide a rebate to each enrollee on a pro rata basis if the issuer has not met the applicable MLR standard. However, it does not prescribe how rebates must be distributed. This interim final regulation establishes methods for distributing rebates that are efficient and cost-effective, and that ensure that enrollees receive any rebate to which they may be entitled.

The NAIC, in an Issue Resolution Document on which it did not vote, discussed that the rebates should be provided to the group policyholder and that the group policyholder should be advised that enrollees may have a claim to some or all of the rebate to the extent that they have contributed to the premium. Numerous commenters also suggested that any rebate should go to the company or person who actually paid the premium, and not to the enrollee. They point out that under a group policy the employer often pays a portion, or even all, of the premium. In addition, when an employee pays a portion of the premium, it is generally the employee and not every enrollee in the employee's family who makes payment. This concept applies in the individual market as well; it is often one family member who pays the premium on behalf of all enrollees in the family. The Department agrees with the NAIC's and the commenters' concerns. A technical reading of section 2718(b)(1)(A) requires that the rebate shall be provided "to each enrollee under such coverage, on a pro rata basis." However, the purpose of the section 2718 is to ensure that value is achieved for the premium paid. It would frustrate the purpose of the section to deprive those who actually paid premiums of the rebate, and to instead provide a windfall to those who did not pay premiums with the "value" that was returned by the issuer. Consistent with the NAIC discussion, HHS therefore interprets this provision as requiring any rebate be provided on a pro rata basis to the person or entity that paid the premium on behalf of the enrollee. This requirement is addressed in § 158.242.

Several comments HHS received in response to its April request for information pertaining to this regulation also pointed out that group policyholders may be in a better position to determine the rebate amount each individual enrollee should receive. They suggested that issuers be permitted to pay rebates to group policyholders for distribution to enrollees. The Department agrees that group policyholders and subscribers are in a better position than issuers to fairly distribute rebates to individual enrollees given that it is the group policyholders and subscribers, and not the issuers, who know the extent to which the enrollees made the original premium payments. However, the statute provides that it is the issuer's obligation to provide the rebate, if any.

HHS has adopted an approach which satisfies both the statutory requirement that an issuer provide any rebates and the practical reality that group policyholders and subscribers are in a better position to distribute any rebates. Section 158.242 of this interim final regulation allows an issuer to enter into an agreement with a group policyholder to distribute the rebates on behalf of the issuer. HHS invites public comment on to whom rebates should be paid.

The regulation specifies that, regardless of whether an issuer provides rebates to enrollees directly or indirectly through a group policyholder, an issuer must take steps to ensure that each enrollee receives a rebate that is proportional to the amount of premium paid by that enrollee and that the group policyholder does not retain more of the rebate than is proportional to the amount of premium it paid.

Therefore, this interim final regulation allows an issuer to delegate its rebate distribution functions to a group policyholder, but provides that the issuer remains liable for complying with all of its obligations under the statute and maintains records received from the group policyholder demonstrating that rebates were accurately distributed.

7. *De Minimis* Rebates (§ 158.243)

Although the NAIC model regulation does not specifically address de minimis rebate payments because the distribution of rebates was outside the scope of the NAIC's statutory mandate, an NAIC actuarial subgroup suggested that issuers should not be required to provide rebates in minimal amounts that are largely of symbolic value. It argued that setting the minimum threshold somewhere in the range of $1 to $20 should be sufficient to avoid requiring largely symbolic rebates to enrollees. HHS agrees with this approach.

Section 2718(b) is also silent on the subject of whether there is a *de minimis* amount below which issuers need not pay a rebate to an enrollee. Without a minimum threshold, each enrollee would receive the rebate owed to him or her, but the cost of processing and distributing the rebate might be greater than the amount of the rebate.

The Department received several comments from issuers and others who recommended that HHS set a minimum threshold for issuer payment of rebates because of this potential for relatively high administrative expenses associated with the provision of very small rebates.

We agree that it does not make sense for issuers to provide rebates when the administrative cost of providing them exceeds their value to enrollees. Thus, § 158.243 provides that an issuer need not provide rebates when the combined dollar amount of a rebate owed to the policyholder and subscribers under a group policy, or to the subscriber in the individual market, is less than five dollars per subscriber covered by the policy. Five dollars is an amount that is commonly used by States when setting *de minimis* levels for issuer refunds.

Although each *de minimis* rebate may seem insignificant, the aggregate amount of such rebates by market type may be quite substantial. Thus, consistent with the rebate requirements of the Affordable Care Act, issuers should not be allowed to retain these unpaid rebate funds, which belong to enrollees. Furthermore, if issuers retained the unpaid rebate funds, it would in essence lower their MLR. Instead, issuers must aggregate the *de minimis* rebates and distribute them in equal amounts to all then-current enrollees who receive a premium credit.

8. Unclaimed Rebates (§ 158.244)

The Affordable Care Act does not specifically address the situation of rebates being unclaimed. This situation

is likely to occur either because an issuer has not been able to locate certain enrollees, or enrollees have not redeemed their rebate payments.

Some consumer representatives recommended that an issuer be required to make all reasonable efforts to provide a rebate to an enrollee and that an issuer be prohibited from keeping any unclaimed funds. At least one consumer group recommended that such funds be directed to a State consumer assistance program that has been approved by the Department, or if such a program is unavailable, to the Department itself. Another group recommended that rebates for any individuals who cannot be located should be applied toward reduction of premiums for all policyholders in the subsequent plan year.

We agree that an issuer should be required to make a good faith effort to locate enrollees and to distribute to them any rebate that is owed. This requirement is reflected in § 158.244. We also believe that an issuer should be prohibited from retaining unclaimed rebates. However, unclaimed rebates will be subject to relevant State law provisions.

9. Notice of Rebates to Enrollees (§ 158.250)

The Affordable Care Act and the NAIC model regulation provide that an issuer must provide enrollees with rebates if its MLR falls below the statutory standard, but neither specifies what information should accompany a rebate. Section 158.250 of this interim final regulation requires issuers to provide enrollees with a rebate notification along with any rebate check or premium credit.

There are several reasons for this notification. Enrollees may not understand why they are receiving a rebate and may not be familiar with the significance of the MLR and the rebate requirement in the Affordable Care Act. Without the information provided by this notification, enrollees have no explanation as to how rebates are calculated. In addition, MLR transparency is a way to educate consumers and promote informed decision-making in the purchasing of health insurance.

The rebate notification must accompany the rebate check or be sent at the same time as the premium credit is applied. The rebate notification must include a brief explanation of what an MLR is, why the Affordable Care Act created the policy (for example, increased transparency, incentive to lower premiums), and why the enrollee is receiving a rebate. It must also include the aggregate amount of premium revenue reported by the issuer during the MLR reporting year, the issuer's MLR (taking into account any adjustment allowed by the regulation), the required MLR threshold, the percentage of premium being rebated, and the total amount being paid or credited to enrollees, including the amount paid or credited to an employer based on its having paid all or a portion of the premium. In addition, the notification to enrollees must explain that rebates to current enrollees are being provided in the form of premium credit, and that rebates to former enrollees are being provided either by check or in the same form as the premium was paid. For example, an issuer has the option of reimbursing enrollees who paid the premium by credit card or debit card by applying the rebate amount back to the credit or debit card. The form of the rebate notification will be established by the Secretary and published in guidance.

HHS is not requiring issuers who do not have to provide a rebate to provide notification to enrollees about the MLR and the fact that no rebate is owed. However, issuers who do meet the MLR standard may choose to provide such notice to their enrollees.

10. Reporting Rebates to the Secretary (§ 158.260)

Section 2718(b) of the PHS Act is meant to ensure that consumers receive value for their premium payments, and does so by requiring an issuer that does not meet a specified MLR to rebate a portion of the premium to enrollees. In order to provide for appropriate oversight and enforcement for which regulations are specifically authorized by section 2718(b)(3), HHS needs the ability to validate an issuer's calculation and distribution of rebates. Accordingly, the interim final regulation prescribes certain data retention, data access, and reporting requirements.

Subpart A of this interim final regulation requires an issuer to report to the Secretary data concerning premium revenue, how premium revenue is spent, and the various categories of expenses that go into determining the issuer's MLR. In Subpart B, the Department implements the statutory requirement for rebates to enrollees, and as part of this implementation, requires issuers to report to the Secretary certain information regarding rebates.

The interim final regulation requires issuers to report, for each MLR reporting year, information regarding the rebates it makes to enrollees. Consistent with the reporting requirements in Subpart A, § 158.260(b) requires that the information reported regarding rebates be aggregated by State, and by the large group, small group, and individual markets within a State. The information required includes:

(1) the number and percent of enrollees who receive a rebate;

(2) the amount of rebates provided to enrollees, including a breakdown of how much of the rebates were paid to policyholders and how much of the rebates were paid to subscribers;

(3) the amount of de minimis rebates that were aggregated and a breakdown of how they were disbursed to enrollees; and

(4) the amount of unclaimed rebates, a description of the good faith efforts that were made to locate the applicable enrollees, and a description of how the unclaimed rebates were disbursed.

HHS considered several options for the timing of reporting the information required by § 158.260. In doing so, HHS has tried to balance the need for timely information and the desire to minimize the administrative burden on issuers. Almost all of the information required by § 158.260 should be available to issuers at the time they submit the report required under § 158.110 for each MLR reporting year. Thus, for that set of information, the Department is requiring that it be submitted with the report required under § 158.110. The amount of unclaimed rebates would be the only information that would not be available to the issuer at the time it reports its data for the MLR reporting year, since the issuer needs time to make a good faith effort to locate former enrollees and to know if certain enrollees fail to cash their rebate checks. HHS is requiring that this information be submitted with the report required under § 158.110 for the subsequent MLR reporting year.

11. Effect of Rebate Payments on Solvency (§ 158.270)

Section 158.270 addresses concerns expressed in some comments that the obligation to pay rebates might cause an issuer's surplus to decline to levels threatening its solvency. The NAIC also raised concerns about issuer solvency in its October 13, 2010 letter to the Secretary. Issuer solvency is, of course, an important consideration and is a major focus of State insurance regulators. Consistent with the NAIC's concern, this interim final regulation provides, therefore, that the Secretary may permit the payment of rebates by an issuer to be deferred if the insurance commissioner in its State of domicile informs the Secretary that the timely payment of rebates would cause the issuer's risk based capital (RBC) level to

fall to a level that causes concern about its solvency.

Section 158.270 provides that a State's insurance commissioner, superintendent, or other responsible official must notify the Secretary if the payment of rebates by a domestic issuer will cause the issuer's RBC level to fall below specific regulatory thresholds. The State must provide the Secretary with the domestic issuer's RBC reports for the current year and the prior two years, along with a calculation of the amount of rebates that would be owed by the issuer.

Section 158.270 provides that the Secretary will review this information, along with any other information requested from the issuer, and will determine whether the timely payment of rebates would cause the issuer's RBC level to fall below the specified regulatory action level. When the Secretary makes this determination, the Secretary will provide that the issuer must pay these rebates, with interest, in a future year in which payment of the rebates would not cause the issuer's RBC level to fall below the specified regulatory action level.

E. Subpart C—Potential Adjustment to the Medical Loss Ratio for a State's Individual Market

1. Introduction

Section 2718(b)(1)(A) of the PHS Act establishes MLR standards for insurance coverage sold in the individual market, the small group market, and the large group market. For the small group and individual markets, the MLR standard is 80 percent. For the large group market, the MLR standard is 85 percent. However, if a State sets a higher MLR within its State, that higher MLR must be met.

Section 2718(b)(1)(A)(ii) also provides that "the Secretary may adjust" the 80 percent level with respect to the individual market of a State "if the Secretary determines that the application of such 80 percent may destabilize the individual market in such State." The PHS Act does not, however, define "destabilize the individual market" or provide the process or criteria for making a determination regarding potential destabilization of that market. In addition, the section does not specify the kind or amount of adjustment the Secretary may make.

Subpart C of this interim final regulation implements this provision of section 2718(b)(1)(A)(ii) by addressing these important considerations, and adopts the recommendations of the NAIC on this issue. It sets forth the process by which the Secretary may exercise the authority provided under section 2718(b)(1)(A)(ii). It also establishes the criteria the Secretary will apply in determining whether to lower the MLR standard applicable to the individual market in a State.

2. Subpart C's Approach and Framework

HHS has received comments from many interested parties regarding the application of MLR standards in the individual market and the process for granting requests to adjust the required standard.

Notably, in an October 13, 2010 letter to the Secretary, the NAIC observed that the MLR standard "may enhance the value of plans for consumers and improve carrier accountability for spending and pricing decisions," but also that improper application of it "could threaten the solvency of insurers or significantly reduce competition in some insurance markets." The NAIC further stated that "the threshold consumer protection is ensuring a health insurance company is solvent." HHS agrees with the NAIC on the importance of maintaining issuer solvency. If an insurance company does not have enough money to pay claims, then any MLR standard becomes irrelevant.

Further, while the focal point of any market destabilization analysis must be the manner in which any requested MLR adjustment may affect consumers, as the NAIC points out, consumers have numerous interests that extend beyond whether they will receive rebates, including an interest in multiple health insurance options. To that end, this interim final regulation adopts the recommendation the NAIC Consumer Representatives made in an October 25, 2010 letter to the Secretary, that the Secretary "establish a formal process that provides ample opportunity for consumers and consumer advocate input and involvement in determining whether and to what extent adjustments should be made in any State." The Department believes the recommendation by the Consumer Representatives should apply to all stakeholders, including issuers, agents and brokers, health care providers, as well as consumers, and has therefore established a process by which all stakeholders may provide information and input.

This interim final regulation does not require the Secretary to find that adherence to the 80 percent MLR standard is certain to result in market destabilization in order to grant an adjustment from it. Nor does it allow the Secretary to grant an adjustment in the case where market destabilization is a remote possibility. Rather, this interim final regulation both allows and requires an adjustment to a State's MLR to be granted when there is a reasonable likelihood that market destabilization, and thus harm to consumers, will occur.

Subpart C establishes the procedure and criteria the Secretary will use to assess requests to adjust the MLR standard that applies in the individual market in a State. We note that the law allows adjustments of the MLR for the individual market in a State and does not apply to the small group market or to the large group market.

Section 158.301 states the criteria the Secretary will apply in considering requests to adjust the minimum individual market MLR standard applicable to a State. Subpart C then proceeds to address the four major issues that HHS believes are relevant to any potential requests for adjustments to the statutory MLR standard. The first is who may submit a request and the duration of such a request. The second is the information the submitter of such a request will be required to supply. The third is the criteria the Secretary will use in making her decision regarding the request. The fourth is the process by which the Secretary will receive information and make her determination. Each of those issues is discussed separately below.

Finally, in its October 13, 2010 letter, the NAIC did not recommend a national transition, but instead wrote that "while some states seek national relief from the 2011 MLR, all states recognize that transitional relief may be appropriate for *some* state insurance markets." (Emphasis added.) Commenters in the industry have also advocated for a "national" transition or "national" relief from the MLR standards. As indicated above, the Affordable Care Act does not contemplate or provide for such relief in the context of § 158.301 which, as required by section 2718(b)(1)(A)(ii), provides for State-specific relief.

However, it is clear that other sections of this regulation do in fact provide for national rather than State-specific relief from the immediate application of the MLR standards, and not just in the individual market. The credibility adjustments provided for in §§ 158.230–158.231 are national in scope and apply without regard to State-specific market conditions. First, the credibility adjustments result in many issuers being presumed to meet the MLR standards altogether because of their small size. Second, the adjustments add up to 8.3 percent to an issuer's reported MLR for smaller plans that are not

presumed to meet the MLR standard already. Third, issuers with policies that have large deductibles may receive an additional adjustment of up to 6.1 percent on top of the 8.3 percent. Other components of the MLR formula, such as treatment of expenses for quality improving activities and treatment of Federal and State taxes, also better enable issuers to meet the MLR standard. In addition, the process set out in Subpart C provides further opportunity to modify MLR standards in the individual market to address state-specific circumstances. The rationale for a national transition—which is to provide accommodation for issuers to meet the MLR standards—we believe is satisfied by these many adjustments.

3. Who May Request Adjustment to the MLR and Duration of Request (§§ 158.310–158.311)

Section 158.310 provides that a request for an adjustment to the MLR standard for a State must be submitted by that State's insurance commissioner or other applicable State official. State insurance commissioners have valuable local knowledge of their State's insurance market and share a responsibility to protect consumers, which makes them best qualified to attest to the impact of the MLR standard on consumers within their State. State insurance regulators also often have considerable power to compel or influence issuers to take steps that may reduce the risk of market destabilization.

It is appropriate for three reasons that requests for an adjustment to the MLR standard come from State insurance commissioners on behalf of the State individual insurance market as a whole. First, the statute allows such an adjustment only for all issuers in the individual market in a State; it does not allow an adjustment for specific issuers. Second, only the State commissioner has knowledge of all issuers' experience and market conduct in the State and as to any action the State might deem appropriate to address any potential for market destabilization. Third, State insurance commissioners have responsibility for protecting the interests of the general public, policyholders, and enrollees within their respective States.

Section 158.311 provides that a request for an adjustment to the MLR standard may be for one, two, or three MLR reporting years. This permits a State to request an adjustment for up to three years, as deemed appropriate by the State, based on the condition of its individual health insurance market. Allowing for multi-year adjustments, when necessary, will provide certainty to issuers within the State regarding the applicable MLR standard, which in turn enhances stability of the market.

4. Required Information (§§ 158.320–158.323)

Subpart C requires the applicable State official to provide the Secretary with information on the applicant State and the market that is the subject of the request. Section 158.323 requests contact information for the person submitting the State's request. This information is needed because the Secretary anticipates working closely with individual States regarding their requests.

The remaining information requested by Subpart C falls into two general categories. The first is information about how the individual health insurance market is organized and functions in the State. Section 158.321 requests the following structural and operational information about the submitting State's individual health insurance market:

- The State's current MLR standard for the individual market, if any. Such an MLR is relevant to determining the effect the statute's 80 percent MLR may have in the State.
- Any requirements that an issuer seeking to withdraw from the State's individual health insurance market must meet before doing so.
- Any limitations imposed by the State on issuers regarding rating based on health status.
- Mechanisms available in the State to provide consumers with options in the event an issuer in the individual market withdraws from the State, such as a guaranteed-issue or issuer-of-last-resort requirement or a State-operated high-risk pool.
- Operational and financial information about the issuers operating in the State's individual market, including the capacity of incumbent issuers to write additional business, the premiums such issuers charge and the benefits they offer, and the amount they pay to agents and brokers.

Notably, in its October 13, 2010 letter to the Secretary, the NAIC stated that among the factors State regulators would consider in making their own determinations as to whether application of the statutory 80 percent MLR standard would destabilize the individual market are the "potential impact on premiums paid by current policyholders," the "potential impact on benefits and cost-sharing of existing products," and "the potential impact on consumer access to agents and brokers." This information will assist the Secretary in understanding the insurance market in the State submitting a request and will enable her to better address the criteria for assessing the request set forth in this subpart.

The second general category of information a State must provide is its own assessment of how best to address any risk of destabilization through an adjustment to the MLR standard. In its October 13 letter, the NAIC stated that "when recommending to HHS that a transitional exception should be applied to a state or insurance market, the regulator shall also propose a solution to the factors on which the recommendation is based." The NAIC also suggested that HHS give deference to its analysis and recommendations. HHS agrees with the NAIC that, just as a State commissioner is best qualified to request an adjustment to the MLR standard, a State commissioner seeking an MLR adjustment is also best qualified to suggest an appropriate alternative MLR standard for each of the reporting years for which the State is requesting an adjustment. Thus, § 158.322 further requires any request for an MLR adjustment to estimate the rebates that would be paid under the 80 percent individual market MLR standard and under the alternate proposal a State official submits for each year for which the State is requesting an adjustment.

Section 158.320 also provides some flexibility in the event certain data are unavailable or collection of certain data is unduly burdensome. In such situations, a State may provide notice of this to the Secretary and the Secretary may request alternative supporting data or move forward with her determination on the State's request without the data the State is unable to provide.

5. Assessment Criteria (§ 158.330)

Section 158.330 sets forth the criteria the Secretary will use in determining the risk of destabilization. It does not set forth a single test for determining that risk, but rather states that the Secretary may consider five main criteria in assessing such risk.

The first criterion the Secretary will consider, as set forth in § 158.330(a), is the number of issuers reasonably likely to exit the individual market or cease offering specific products in a State absent an adjustment to the 80 percent MLR and the resulting impact on competition in the State. In making this determination, the Secretary may consider (1) each issuer's MLR relative to an 80 percent MLR, (2) each issuer's profitability and risk-based capital level, (3) the requirements and limitations within the State with respect to market withdrawals, and (4) the number of

issuers that may not be required to pay rebates pursuant to § 158.240.

Second, the Secretary may consider the number of individual market enrollees covered by issuers that are reasonably likely to exit the State absent the adjustment. All other things being equal, the greater the number of policyholders in a market who are enrollees of issuers reasonably likely to exit the market, the greater the likelihood of market destabilization.

Third, the Secretary will consider whether, absent an adjustment to the MLR standard, consumers may be unable to access insurance agents or brokers. Access could be restricted if, in order to comply with MLR standards, issuers reduced compensation to agents or brokers to the point where agents or brokers were not available to assist consumers in finding coverage and other options for consumers were limited. In its October 13th letter, the NAIC noted the important role that agents and brokers will play in the next four years as markets transition to Exchanges, and encouraged HHS to "recognize the essential role served by producers and accommodate producer compensation arrangements in any MLR regulation promulgated." This criterion recognizes that role.

Fourth, the Secretary will consider the alternate coverage options available within the State for enrollees of issuers that are reasonably likely to exit the market—or as the NAIC puts it in its October 13 letter, she will consider "the ability of consumers to find easily affordable products in the State should their carrier leave the State market." Section 158.330(d) provides that, in assessing alternative coverage options, the Secretary will take into account (1) any requirement that issuers who exit the State's individual market must have their block(s) of business assumed by another issuer, (2) which issuers may remain in the State if the adjustment request were denied, and the breadth and price of the products offered by such issuers, (3) the capacity of incumbent issuers to write additional business, (4) the mechanisms, such as guaranteed-issue products, an issuer of last resort, or a State high risk pool, available to the State to provide coverage to consumers to the extent, if any, that issuers withdraw from the market, and (5) any authority the insurance commissioner might have that would help stabilize the State's individual insurance market.

Fifth, the Secretary will consider the impact on premiums charged, the benefits offered, and the cost-sharing provided to consumers by issuers remaining in the market in the event one or more issuers were to withdraw from the market. For example, premiums may rise if the loss of one or more issuers reduced competition to an extent that allowed remaining issuers to increase premiums beyond what competitive conditions would have allowed.

Section 158.330 also states that the Secretary will consider any other relevant information submitted by the State's insurance commissioner, superintendent, or comparable official in the State's request.

6. Process (§§ 158.340 Through 158.350)

Section 158.340 provides that the request for adjustment must be submitted in electronic format, and § 158.340(a) provides that all the information that Subpart C requires in support of a request must be submitted electronically. HHS has determined that these requirements are necessary if, as the PHS Act envisions and the public interest demands, State requests for MLR adjustments are to be handled as expeditiously as possible. Section 158.340(b) permits a State, solely at its option and only if it wishes, also to submit to the Secretary a copy of its request by regular or express mail.

Section 158.341 provides that the State's request will be promptly posted on the Secretary's healthcare.gov website. In addition, § 158.342 states that the Secretary will invite public comment upon the request when it is posted, and will, when assessing the request, consider any comments filed by the public within 10 days of that posting. Section 158.343 provides that any State that submits a request may, at its option, hold a public hearing and create an evidentiary record with respect to its request. If the State does so, the Secretary will consider the evidentiary record of the hearing in making her determination as to the State's request for an adjustment. Section 158.344 provides that the Secretary may also hold a public hearing with respect to a State's request, at the Secretary's discretion. HHS believes that a transparent yet expeditious process will allow all interested parties to provide input while satisfying the need to come to a prompt determination.

Once the Secretary determines that the request has sufficiently satisfied the information required by the interim final regulation and the public comment period has expired, the Secretary will make a determination within 30 days as to whether to grant a State's request for an adjustment to the MLR standard. Section 158.345 also allows the Secretary to extend that 30-day period up to an additional 30 days at her discretion. The Secretary believes that it is in the interests of both issuers and consumers in a State to have certainty about the applicable MLR for the individual market in the State at the earliest practicable date.

Section 158.350 provides that a State submitting a subsequent request for an adjustment shall "submit information as to what steps the State has taken since its initial and other prior requests, if any, to increase the likelihood that enrollees who have health coverage through issuers that are considered likely to exit the State's individual market will receive coverage at a comparable price and with comparable benefits if the issuer does exit the market."

A State that disagrees with the Secretary's initial decision regarding its request for an adjustment to the statutory 80 percent MLR standard may request reconsideration of a denial if it does so in writing within 10 days of the initial decision. Section 158.345(b) provides that the Secretary will issue her determination on the request for reconsideration within 20 days of receiving the request. Section 158.345(a) makes clear that a State may include any additional information it wishes in support of its reconsideration request.

The process established in Subpart C seeks to give States and interested parties full opportunity to present all information necessary and helpful to a determination of requests for adjustments to the statutory 80 percent MLR standard while ensuring that States and issuers will know as early as possible the standard that issuers in the State will be required to meet.

7. Public Comments

In creating this framework for considering a State's request for an adjustment of the MLR for the individual market, HHS reviewed and took into consideration the public comments submitted in response to its Notice. Only a relatively few of the comments received mentioned the authority granted to the Secretary regarding potential destabilization in a State's individual market and offered suggestions with respect to the process and criteria for determining destabilization.

Commenters specifically suggested that markets may become destabilized if issuers choose to withdraw from the market or terminate or materially change existing policies. Commenters also suggested that markets may become destabilized if customers losing coverage have insufficient product choice or are unable to find new

coverage that covers pre-existing conditions. The determination whether to adjust the MLR standard should, commenters suggested, take into account guaranteed issue options, issuers of last resort, requirements that issuers offer individual coverage, and eligibility flexibility under State high risk pools. HHS agrees that these are important considerations, and has incorporated into this Subpart consideration of both the potential causes of destabilization and the systems in place that mitigate destabilization risks.

Other commenters suggested potential warning signals of market destabilization. These included volatility in premium rates, decreases in issuers' reported capital levels, increases in assumption reinsurance, changes in marketing, increases in complaints from brokers or consumers, declines in insurance coverage, increases in applications to State high risk pools, and significant changes in benefit design. State insurance commissioners may wish to further comment on these factors and other local trends in their requests for an adjustment.

One insurance issuer's comment letter suggested that whether at least 10 percent of enrollees are impacted by exiting issuers or at least 10 percent of products are withdrawn from the marketplace may be valid criteria for determining market destabilization. While HHS agrees that market destabilization could not occur absent a significant impact on consumer welfare, HHS believes it is difficult to generalize and create a single numeric test given the different characteristics of State insurance markets, different State laws, and different types of issuers.

As the NAIC Consumer Representatives noted in their letter, the NAIC addressed market destabilization in an "issue resolution document." That document suggested the Secretary consider existing State laws and historic MLRs in each State. The Secretary seeks information regarding existing State laws and issuers' MLRs in order to consider them in connection with a State's request for an adjustment of the MLR standard in the individual market. HHS notes that although State MLR standards are, in general, lower than the 80 percent MLR standard, many issuers are currently above both the 80 percent MLR standard and the applicable State regulatory standard. HHS also received comments suggesting that the MLR standard in all States be adjusted to historic MLR levels and increased to 80 percent over a three year period until 2014. The NAIC did not recommend a national transition. Instead, while noting in its October 13th letter that "*some* states seek national relief from the 2011 MLR, all states recognize that transitional relief may be appropriate for *some* State insurance markets." (Emphasis added.)

Finally, an NAIC advisory subgroup suggested that the Secretary may consider State laws and regulations regarding cancellation and non-renewal of health insurance and the cost to issuers of withdrawing from the individual health insurance market. HHS agrees that in making a determination regarding market destabilization, alternatives available to a State and to an issuer should be considered, and has provided that these are factors to be considered in assessing whether to grant an adjustment to the 80 percent MLR for a State's individual market.

F. Subparts D–F—HHS Enforcement, Additional Requirements on Issuers, and Federal Civil Penalties

Section 2718 of the PHS Act created two requirements for health insurance issuers. Under section 2718(a) of the PHS Act, all health insurance issuers in the group and individual markets are required to report to the Secretary certain data concerning the amount of premium revenue as well as the amounts spent on clinical care, quality improvement activities, and adjusted non-claims expenses. Section 2718(b) requires the calculation of MLR and payments of rebates to enrollees if the MLR standard is not met.

The data that must be reported to the Secretary under section 2718(a) of the PHS Act are addressed in Subpart A of this interim final regulation. The calculation of rebates is addressed in Subpart B. Subparts D through F of this interim final regulation implement enforcement authority in section 2718(b)(3) and provide for enforcement of the reporting obligations set forth in section 2718(a) and rebate requirements in section 2718(b).

Section 2718(b)(3) of the PHS Act [as added by the Affordable Care Act] specifically requires the Secretary to promulgate regulations to enforce the provisions of section 2718. It makes HHS responsible for direct enforcement of the reporting and rebate provisions of section 2718. This interim final regulation implements this statutory mandate.

Section 2718(a) requires issuers to report the data specified directly to the Secretary, rather than to the States. HHS is thus best situated, consistent with the mandate in section 2718(b)(3), to directly enforce the requirement that data be reported to it. This does not mean, however, that the States should play no role in enforcement of these provisions.

States are currently responsible for solvency and, in many States, rate oversight as well. In performing these functions, many states collect and review data and conduct audits of issuer information related to MLRs. In addition, some twenty-nine States already have experience in regulating MLRs either prospectively through rate filing or retrospectively through rebate requirements. States already receive detailed financial reporting from issuers for solvency purposes. Finally, section 2718 of the PHS Act gives States the discretion to impose a higher MLR standard than that prescribed in section 2718. Taking all of these factors into consideration, together with the historical role that States have had in regulating insurance, it is appropriate for the States to have an oversight role with respect to the reporting provisions of section 2718(a), even though the statute gives HHS direct enforcement authority.

Under the regulation, while HHS is responsible for enforcing the reporting provisions and for conducting audits to test the validity and accuracy of the data reported (§ 158.401), HHS may also, in its discretion, accept the findings of audits conducted by State regulators, so long as certain specified conditions are met (§ 158.403). In particular, HHS may accept the findings of audits from a State which report on:

(1) The validity of data on expenses and premiums reported to the Secretary, including the appropriateness of the allocations of expenses, taxes, and revenues used in such reporting;

(2) Whether the activities associated with the issuer's reported expenditures for quality improving activities meet the definition of such activities; and

(3) The accuracy of rebate calculations and the timeliness and accuracy of rebate payments.

In addition, in order to accept the findings of audits from a State, the State's laws must permit the public release of the audit findings of health insurance issuers and the State must submit its audit findings to HHS within 30 days of finalization and submit all preliminary or draft reports within six months of the completion of audit field work unless the audit findings have already been finalized and reported to HHS.

While this interim final regulation provides that HHS may accept audit findings from a State, it makes clear that pursuant to the statutory requirement in section 2718(b)(3), HHS is responsible

for direct enforcement of the MLR reporting and rebate provisions, and retains the discretion to conduct its own audits of issuers, including in States that have acceptable audit programs as defined in the regulation. This approach recognizes that although States have traditionally conducted financial examinations for the purpose of determining solvency, the type of audit needed to assess whether the data reported pursuant to section 2718 is accurate and valid is quite different. As HHS and the States develop greater experience and expertise in conducting these audits, it is likely that the States' role will increase.

This interim final regulation sets forth the procedure to be followed by HHS when it conducts an audit of an issuer to determine whether the reports it has submitted pursuant to this regulation are accurate and valid. The procedure set forth is comparable to the procedures used by HHS when conducting audits of Medicare Advantage plans pursuant to 42 CFR Part 422.

This interim final regulation contains provisions requiring issuers to retain documentation relating to the data reported, and requiring issuers to provide access to that data to HHS or its outside auditors. These provisions are intended to make it possible for HHS or the relevant State to have access to the information needed to determine whether the reports submitted are accurate and valid.

Finally, this interim final regulation provides for the imposition of civil monetary penalties in the event an issuer fails to comply with the reporting and rebate requirements set forth in the regulation. It provides criteria and a process for determining whether and in what amount such penalties should be imposed. While HHS's intent is not to be punitive to issuers, given the importance of receiving timely and accurate reporting and making appropriate rebates, and given the desire to bring down the cost of health care for consumers as soon as practicable following the effective date of the Affordable Care Act, this regulation strikes a balance between penalties that are severe enough so as to encourage compliance with the requirements of the regulations but not so severe as to be punitive. The civil monetary penalties provided for are identical to those for violations of title XXVII that are set forth in the current regulations on enforcement, 45 CFR 150.301 *et seq.* They provide for a penalty for each violation of $100 per entity, per day, per individual affected by the violation. HHS is interested in public comments as to the proper amount or range of penalties for violations of various provisions of this interim final rule. This interim final regulation also adopts the provisions in the existing enforcement regulation regarding factors in aggravation and mitigation that HHS will take into account in determining whether to impose civil monetary penalties and if so, in what amount.

The interim final regulation also provides that if a State has assessed a penalty against an issuer, then HHS will take that into account in considering whether it should assess any penalty for violation of the requirements of this Part.

III. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

IV. Waiver of Proposed Rulemaking and Delay of Effective Date

Section 2792 of the PHS Act authorizes the Secretary to promulgate any interim final rules determined to be appropriate to carry out the provisions of Part A of title XXVII of the PHS Act. The provisions of these interim final regulation requirements in section 2718, and the foregoing interim final rule authority applies to this interim final regulation.

In addition, under section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. Although the provisions of the APA that ordinarily require a notice of proposed rulemaking do not apply here because of the specific authority granted by section 2792 of the PHS Act, even if the APA were applicable, the Secretary has determined that it would be impracticable and contrary to the public interest to delay putting the provisions of this interim final regulation in place until a public notice and comment process was completed.

Prior notice and comment in this situation is impracticable because section 2718 of the PHS Act directs the NAIC, not later than December 31, 2010, and subject to certification by the Secretary, to establish uniform definitions of the activities reported as reimbursement for clinical services, activities that improve health care quality, and non-claims costs. However, the reporting required by section 2718 of the PHS Act applies to plan years beginning not later than January 1, 2011. The NAIC transmitted its recommendations to the Secretary on October 27, 2010, in the form of a model regulation. The regulation implementing the reporting requirements must be in effect on or before January 1, 2011, so that issuers, regulators, and consumers know what information must be reported and how to aggregate it prior to the time period which they must report. There are fewer than 60 days between when HHS would be able to review the NAIC's recommendations, certify them, and issue an implementing regulation.

Therefore, we find good cause to waive the notice of proposed rulemaking and to issue this final rule on an interim basis. We are providing a 60-day public comment period.

In addition, the Congressional Review Act, at 5 U.S.C. 801(a)(3), ordinarily requires that the effective date of a "major rule" such as this interim final rule be at least 60 days after publication. However, under 5 U.S.C. 808(2), this delay of effective date may be modified when an agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Specifically, where "good cause" is found to waive prior notice and comment, the rule may "take effect at such time as the Federal agency promulgating the rule determines." 5 U.S.C. 808. Given the exigencies discussed above, and the fact that the provisions of this rule apply, by statute, on January 1, 2011, we find good cause under section 808 to make this interim final rule effective on that date.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.

• The accuracy of our estimate of the information collection burden.

• The quality, utility, and clarity of the information to be collected.

• Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

A. ICRs Regarding MLR and Rebate Reporting Requirement (§ 158.101 Through § 158.170)

This interim final regulation describes the information that will be reported by health insurance issuers on an annual basis to the Secretary starting in 2012, and quarterly in 2011 only for certain plans. Issuers' submissions will include information regarding reimbursement for clinical services, expenditures for activities that improve health care quality, other non-claim costs, earned premiums, and Federal and State taxes and regulatory fees, among other data elements. Issuers will be required to calculate MLRs and rebates as part of their submission to the Secretary.

Generally, the data and methodologies that the regulation instructs issuers to use follow the NAIC 2010 blank, approved August 17, 2010 and the NAIC MLR model regulation, which was finalized on October 27, 2010. Most issuers file information with the NAIC on a regular basis, in accordance with State laws; it is expected that issuers who typically file information with the NAIC will file the supplemental exhibit and the rebate reporting documents that the NAIC created in fulfilling its mandate in section 2718. We expect the NAIC to collect MLR and rebate information beginning for plan year 2010 and to continue collecting such data for the foreseeable future.

HHS's data collection requirements described in this interim final regulation are very similar to the NAIC's. One exception is that we are requiring health insurance issuers who sell expatriate plans or mini-med plans to disaggregate that business from the rest of their business in that market segment and report the MLR data separately. As discussed above in the impact analysis section, HHS estimates that approximately 442 entities will submit reports for each of the States and markets in which they operate; further, we estimate that approximately 25 health insurance issuers will report data for expatriate plans and 50 health insurance issuers will report data for mini-med plans.

At this time, HHS has not developed the MLR and rebate forms that health insurance issuers will have to complete on an annual basis beginning for plan years starting January 1, 2011. In addition, as described above, we are requiring issuers who opt to separately report the experience for expatriate plans and mini-med plans to submit quarterly reports in 2011, so that we can better understand these products. We will revisit the special filing circumstances for expatriate plans and mini-med plans after reviewing the quarterly filings. We plan to publish the instructions and forms that issuers must file for all plans in future guidance. At that time we will solicit public comments on both the forms the estimated burden imposed on health insurance issuers for complying with the provisions of this interim final regulation. The information collection requirements associated with §§ 158.101–158.170 will become effective upon OMB approval. HHS will publish a notice in the **Federal Register** notifying the public of OMB approval at the appropriate time.

B. ICRs Regarding Notice of Rebates to Enrollees (§ 158.250)

Within Subpart B of this interim final regulation, we describe the obligation of health insurance issuers to calculate and pay rebates to consumers in years when the issuer's MLR does not meet the applicable minimum MLR threshold. In addition, the interim final regulation requires issuers to provide information to consumers about the rebate they are receiving. At this time, HHS has not developed the model disclosure language for the rebate notice to enrollees that issuers will be required to send beginning August 1, 2012, based upon plan years starting January 1, 2011. In the near future, HHS will publish the model disclosure language and will solicit public comment. At that time, and per the requirements outlined in the Paperwork Reduction Act, we will estimate the burden on health insurance issuers of complying with this provision of this interim final regulation. The information collection requirements associated with § 158.250 will become effective upon OMB approval. HHS will publish a notice in the **Federal Register** notifying the public of OMB approval at the appropriate time.

C. ICRs Regarding Retention of Records (§§ 158.501–158.502)

Subpart E of the interim final regulations establishes the Secretary's enforcement authority regarding the reporting requirements under section 2718. Issuers must maintain all documents and other evidence necessary to enable HHS to verify that the data required to be submitted comply with the definitions and criteria set forth in this interim final regulation, and that the MLR is calculated and any rebates owing are calculated and provided in accordance with this interim final regulation. The interim final regulation requires issuers to maintain all of the documents and other evidence for the current year and six prior years, unless a longer period is required under § 158.501.

We expect all issuers will have to retain data relating to the calculation of MLRs; we expect only some issuers will have to retain information regarding the payment of rebates and the notice to enrollees. We believe that the burdens associated with our record retention requirements do not exceed standard record retention practices in that issuers are already required to retain the records and information required by this interim final regulation in order to comply with the legal requirements of their States' departments of insurance. For that reason, we are assigning a minimal burden to these requirements. We estimate that 442 issuers must comply with the aforementioned requirements. We further estimate that it will take each issuer a total of one hour to file and maintain both the data for MLR calculations and the information regarding payment of rebates and notices to enrollees. The total estimated annual burden associated with the requirements in §§ 158.501 through 158.502 is 442 hours at a cost of $10,045.

However, we welcome comments regarding the burden associated with maintaining the information described in subpart E of this interim final regulation.

D. ICRs Regarding State Request for MLR Adjustment (§§ 158.301–158.350)

Subpart C of this interim final regulation implements the provisions of section 2718(b)(1)(A)(ii). The interim final regulation describes the data and narratives which States must submit that are seeking an adjustment to the applicable MLR in the individual market for their State. There is no standardized application form associated with a State's request. As discussed in §§ 158.321, 158.322, and158.323, the data elements that a requesting State must provide include:

• The applicable State minimum required MLR, if any;

• State individual market withdrawal requirements, if any;

- Any mechanisms to provide options to consumers in case of issuer withdrawal;
- Information on issuers in the State's individual market;
- The State's proposed adjustment to the minimum MLR for the State's individual market; and
- The contact information for the State representative.

In addition, a State whose request for adjustment to the MLR standard has been denied by the Secretary may request reconsideration of that determination. A request for reconsideration must be submitted in writing to the Secretary within 10 days of her decision to deny the State's request for an adjustment, and may include any additional information in support of its request.

Based on preliminary data analysis and indications by a few States that they may apply for an adjustment, the Department estimates that approximately 20 States will submit applications and that it will take approximately ten working days for a State to complete the application. An exact time burden estimate is uncertain because some States may have better access to the required application information elements than others; some States may have to seek some of the required information from health insurance issuers in their States, which could increase their burden. Some States may, if providing the requested information is an undue burden, have the Secretary consider their application without some of the information elements.

The Department estimates that it will take a State 94 hours to complete an application including gathering data, developing data analyses, synthesizing information, and developing the adjusted MLR threshold. For the purposes of this estimate, the Department assumes that this application will take various professional staff approximately 75 hours (at an average rate of $125 an hour), an associate general counsel 10 hours (at $175 an hour), a senior general counsel 5 hours (at $350 an hour), and the Commissioner 4 hours (at $450 an hour) to assemble and review the various components of the application.[1] The Department estimates that the total cost burden associated with the submission of a MLR adjustment application to be approximately $14,675 per response for a total estimated burden of $293,500.

The Department is soliciting public comments for 60 days concerning the process described in subpart C of the preamble whereby a State may request an adjustment of the minimum MLR applicable in the individual market. The Department has submitted a copy of these interim final regulations to OMB in accordance with 44 U.S.C. 3507(d) for review of the information collections. If you comment on this information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* CMS Desk Office, 9998–IFC. *Fax:* (202) 395–6974; or *E-mail: OIRA_submission@omb.eop.gov.*

VI. Regulatory Impact Analysis

A. Summary

As stated earlier in this preamble, this interim final regulation implements sections 2718(a) through (c) of the PHS Act, which set forth requirements for reporting of certain medical loss ratio (MLR)-related data to the Secretary on an annual basis by issuers offering coverage in the individual and group markets, and calculating and providing rebates to policyholders in the event that an issuer's MLR fails to meet the minimum statutory requirements. This interim final rule also establishes uniform definitions and standardized methodologies for calculating MLR-related data; provides a process and criteria for the Secretary to determine whether application of the 80 percent minimum MLR threshold may destabilize the individual market in a given State; and addresses enforcement of the reporting and rebate requirements. These provisions are generally effective for plan years beginning January 1, 2011.

The Department is publishing this interim final regulation to implement the protections intended by Congress in the most economically efficient manner possible. We have examined the effects of this rule as required by Executive Order 12866 (58 FR 51735, September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2). In accordance with OMB Circular A–4, the Department has quantified the benefits, costs and transfers where possible, and has also provided a qualitative discussion of some of the benefits, costs and transfers that may stem from this interim final regulation.

B. Executive Order 12866

Executive Order 12866 (58 FR 51735) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity).

Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year); and a "significant" regulatory action is subject to review by the Office of Management and Budget (OMB). As discussed below, we have concluded that this rule is likely to have economic impacts of $100 million or more in any one year, and therefore meets the definition of "significant rule" under Executive Order 12866. Therefore, the Department has provided an assessment of the potential costs, benefits, and transfers associated with this interim final regulation. Accordingly, OMB has reviewed this interim final regulation pursuant to the Executive Order.

1. Need for Regulatory Action

Consistent with the provisions in Section 2718 of the PHS Act, this interim final rule requires health insurance issuers offering coverage in

[1] Estimates were developed by interviewing two former insurance commissioners, a former insurance department actuary, and a former health plan employee familiar with the burden of submitting financial data to health insurance departments.

the individual and group markets to provide a rebate to consumers if they do not spend a specified portion of premium income on reimbursement for clinical services (i.e., incurred claims) and activities that improve quality. Section 2718(a) of the PHS Act (captioned "clear accounting of costs") requires health insurance issuers to "submit to the Secretary a report concerning the ratio of the incurred loss (or incurred claims) plus the loss adjustment expense (or change in contract reserves) to earned premiums." Section 2718(b) of the PHS Act (captioned "ensuring that consumers receive value for their premium payments") requires issuers to provide an annual rebate to each enrollee if the ratio of the amount of premium revenue expended on reimbursement for clinical services and activities that improve quality is less than the applicable minimum standards, specifies how the rebate is to be calculated, and allows the Secretary to adjust the 80 percent minimum MLR threshold if the Secretary determines that applying this standard may destabilize the individual market in a given State. Section 2718(c) of the PHS Act directs the NAIC to establish uniform definitions and calculation methodologies subject to certification by the Secretary. As discussed elsewhere in this preamble, after considering the NAIC's recommendations, HHS in this interim final regulation certifies and adopts them in full. Consistent with Section 2718(b)(3) of the PHS Act, which requires the Secretary to promulgate regulations, this interim final regulation sets forth the provisions in Sections 2718(a) through (c) and is needed for their implementation to provide rules that issuers can use to implement effective processes for reporting the required data and calculating and paying applicable rebates.

2. Summary of Impacts

In accordance with OMB Circular A–4, Table VI.1 below depicts an accounting statement summarizing the Department's assessment of the benefits, costs, and transfers associated with this regulatory action. The Department limited the period covered by the regulatory impact analysis (RIA) to 2011–2013 Estimates are not provided for subsequent years both because there will be significant changes in the marketplace in 2014 related to the offering of new individual and small group plans through the exchanges, and because there will be statutorily required adjustments to the MLR formula to account for payments or receipts for risk adjustment, risk corridors, and reinsurance under sections 1341, 1342, and 1343 of the Affordable Care Act that are not effective until 2014. Those provisions require additional regulations that have not yet been promulgated.

The Department anticipates that the transparency and standardization of MLR reporting in this interim final regulation will help consumers to ensure that they receive good value for their premium dollars. Additionally, the inclusion of activities that improve quality in calculating the MLR could help to increase the level of investment in and implementation of effective quality improving activities, which could result in improved quality outcomes and lead to a healthier population. The Department estimates that issuers' total one-time administrative costs related to the MLR reporting, record retention, and rebate payment and notification requirements represent less than 0.02 percent of their total premiums for accident and health coverage, and their total annual ongoing administrative costs related to these requirements represent less than 0.01 percent of their total premiums for accident and health coverage. Executive Order 12866 also requires consideration of the "distributive impacts" and "equity" of a regulation. As described in this RIA, this regulatory action will help ensure that issuers spend at least a specified portion of premium income on reimbursement for clinical services and quality improving activities and will result in a decrease in the proportion of health insurance premiums spent on administration and profit. It will require issuers to pay rebates to consumers if this standard is not met. As the table shows, although we are unable to quantify benefits, the transfers (rebates from issuers to consumers) could be substantial—estimated monetized rebates of $0.6 billion to $1.4 billion annually. As noted, Executive Order 12866 requires consideration of "distributive impacts" and "equity." The rebates will help insure that issuers spend at least a specified portion of premium income on reimbursement for clinical services and quality improvement, resulting in less disparate MLRs and value to consumers across issuers and States. In accordance with Executive Order 12866, the Department believes that the benefits of this regulatory action justify the costs.

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Table VI.1 - Accounting Table

Benefits:						
Qualitative: * increased transparency relating to portion of premium spent on benefits and quality could help policyholders to select higher value coverage * increased quality of medical care as a result of increased spending on quality-improving activities by issuers * improved health as a result of increased spending on medical care by issuers						
Costs:	Low Estimate	Mid-range Estimate	High Estimate	Year dollar	Discount rate percent	Period covered
Annualized Monetized ($millions/year)	24.8	37.4	57.0	2010	7	2011-2013
	23.0	34.7	52.8	2010	3	2011-2013
One-time costs to develop methods for capturing data, and annual costs related to reporting data to the Secretary and providing rebate notifications and payments.						
Qualitative: * increased spending on quality-improving activities by issuers * increased spending on medical care by issuers * potential market disruption if some issuers limit plan offerings as a result of the MLR requirements (offset, as with all benefits, costs, and transfers, to the extent that States obtain adjustments to the MLR due to such potential disruptions)						
Transfer:						
Annualized Monetized ($millions/year)	633.1	930.8	1,541.8	2010	7	2011-2013
	587.4	863.5	1,430.4	2010	3	2011-2013
Annual transfer from shareholders or nonprofit stakeholders to enrollees of rebates paid by issuers for coverage in the individual, small group, and large group markets that do not meet the minimum MLR standards (approximately 2.8 million to 9.6 million enrollees could receive rebates each year)						
Qualitative: * savings for consumers and reduced profit for issuers						

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3. Qualitative Discussion of Anticipated Benefits, Costs and Transfers

The medical loss ratio (MLR) is an accounting statistic that, stated simply, measures the percentage of total premiums that insurance companies spend on health care and quality initiatives, versus what they spend on administration, marketing and profit. In the following sections, we discuss some of the anticipated benefits, costs and transfers associated with the Affordable Care Act MLR requirements.

a. Benefits

In developing this interim final regulation, the Department carefully considered its potential effects including both costs and benefits. Because of data limitations, the Department did not attempt to quantify the benefits of this regulation. Nonetheless, the Department was able to identify several potential benefits which are discussed below.

Health insurance markets in the United States are often not highly competitive. The share of the US population living in areas where markets are least competitive has been increasing.[2] Even in markets with multiple competing plans, lack of transparency in pricing may prevent adequate competition based on the value of product, since it is difficult to ascertain if a low premium is due to high efficiency, low coverage of medical claims, or a healthy underlying population of enrollees. As a result, insurers can provide an inefficient, low-value product without consumers being fully aware of what they are purchasing. A potential benefit to this regulation is greater market transparency and improved ability of consumers to make informed insurance choices. The uniform reporting required under this regulation, along with other programs required by Affordable Care Act such as *http://www.HealthCare.gov,* a Web site with plan-level information, will mean that consumers will have better data to inform their choices, enabling the market to operate more efficiently.

In addition, issuers that would not otherwise meet the MLR minimum defined by this regulation may increase spending on quality-promoting activities. These programs, which include case management, care coordination, chronic disease management and medication compliance, have the potential to create a societal benefit by improving outcomes and population health.

Issuers that would not otherwise meet the MLR minimum may also expand covered benefits or reduce cost sharing. To the extent that these changes result in increased consumption of effective health services, the regulation could result in improved health outcomes, thereby creating a societal benefit.

b. Costs

The Department has identified the primary sources of costs associated with this regulation as the costs associated with reporting, recordkeeping, rebate notifications and payments, and other costs.

The Department estimates that issuers will incur approximately $33 million to $67 million in one-time administrative costs, and $11 million to $29 million in annual ongoing administrative costs related to complying with the requirements of this interim final regulation from 2011 through 2013. Additional details relating to these costs are discussed later in this regulatory impact analysis.

Other Costs—There are two other potential types of costs associated with this regulation: Costs of potential increases in medical care use, the cost of additional quality-improving activities, and costs to consumers if some issuers decide to limit offered products as a result of this interim final regulation.

As discussed under benefits, there may be increases in quality-improving activities or in consumption of medical care due to this regulation. Both of these very likely have some benefit to enrollees but they also represent an additional cost to issuers and society.

It is also possible that some issuers in particular areas or markets will not be able to operate profitably when required to comply with the requirements of this regulation. They may respond by changing or reducing the number of products they offer. The Department anticipates that issuers' decisions regarding whether to limit offered products will not be governed solely by short-term profitability. Issuers are likely to consider whether they expect to be successful competitors in Exchanges in 2014 and beyond.[3] Some low MLR plans may decide to leave a given market entirely or be acquired by a larger company, while other low MLR plans (particularly those that are subsidiaries of larger organizations) may find ways to achieve higher MLRs through increased efficiencies.

To the extent that issuers do decide to limit product offerings, group purchasers or individual enrollees in these plans may bear some costs associated with searching for and enrolling in a new insurance plan. For employers, particularly small employers, these costs may include increased administrative expenses. For consumers, this may lead to reduced choice, the inability to purchase similar coverage, and higher search costs related to finding affordable insurance coverage. States may apply for an adjustment of the MLR threshold in the individual market if the Secretary concurs that the adjustment is necessary to prevent market destabilization. This could mitigate the potential costs.

c. Transfers

To the extent that insurers' MLR experience falls short of the minimum thresholds, they must provide rebates to enrollees. These rebates would reflect transfers of income from the insurers or their shareholders to the policy holders. Based on the methods described above, we have estimated ranges for the rebates that may occur during 2011–2013. These estimates are discussed later in this regulatory impact analysis (see Tables VI.7, VI.8, and VI.9).

4. Overview of Data Sources, Methods, and Limitations

The most complete source of data on the number of licensed entities offering fully insured, private comprehensive major medical coverage in the individual and group markets is the National Association of Insurance Commissioners (NAIC) Annual Financial Statements and Policy Experience Exhibits database. These data contain multiple years of information on issuers' revenues, expenses, and enrollment collected on various NAIC financial exhibits called "Blanks" that issuers submit to the NAIC through State insurance regulators. The NAIC has four different Blanks for different types of insurers: Health, Life, Property & Casualty, and Fraternal issuers.[4] A Technical Appendix for this analysis, available at *http://www.hhs.gov/ociio/regulations/index.html,* provides more detail on the

[2] Dafny, Leemore S.. 2010. "Are Health Insurance Markets Competitive?" American Economic Review, 100(4): 1399–1431.

[3] Bernstein, Jill, "Recognizing Destabilization in the Individual Health Insurance Market," Changes in Health Care Financing and Organization (HCFO) Issue Brief, July 2010, accessed at *http://www.hcfo.org/files/hcfo/HCFO%20Policy%20Brief%20July%202010.pdf.*

[4] If a company's premiums and reserve ratios for its health insurance products equals 95 percent or more of their total business for both the current and prior reporting years, a company files its annual statement using the Health Blank. Otherwise, a company files the annual statement associated with the type of license held in its domiciliary State, i.e. it files either the Life, Property& Casualty, or Fraternal Blank.

precise NAIC data sources used for this analysis.

A total of 618 insurers offering comprehensive major medical coverage filed annual financial statements in 2009, with the Health and Life Blank filers accounting for approximately 99 percent of all comprehensive major medical premiums earned. It is for this reason that we have restricted our analysis to Health and Life Blank companies. Comprehensive major medical coverage [5]—including both coverage offered in the individual and group markets that is subject to this interim final regulation—accounted for approximately 47.8 percent of all Accident and Health (A&H) premiums in 2009.

Although the NAIC data represent the best available data source with which to estimate impacts of the MLR regulation, the data contain certain limitations that should be noted. For example, the NAIC data do not include issuers regulated by California's Department of Managed Health Care (DMHC) as well as small, single-State insurers that are not required by State regulators to submit NAIC annual financial statements. When we compare the NAIC enrollment data to InterStudy data, we estimate that these limitations cause the NAIC data to exclude approximately 9 percent of the total fully insured, private comprehensive major medical market.[6] Additionally, the NAIC data do not break out small and large group coverage at the State level, and administrative expenses such as taxes are reported at the national level for all A&H lines of business. We developed imputation methods to account for these limitations. Finally, we made several edits to the data that led us to exclude from the analysis 176 of the companies that the NAIC data identify as reporting comprehensive major medical coverage.[7] However, these excluded companies represent a small portion of the overall comprehensive major medical market (3 percent of life years and 2 percent of earned premiums). The Technical Appendix (available at *http://www.hhs.gov/ociio/regulations/index.html*) contains a detailed description of the limitations of the NAIC data, and the data edits that were made by the Department. We use the remaining 442 companies to estimate the regulatory impacts discussed below.

5. Estimated Number of Affected Entities Subject to the MLR Provisions

Section 2718(a) of the PHS Act specifies that the MLR provisions apply to health insurance issuers offering group or individual health insurance coverage, including grandfathered health plans. As discussed earlier in this preamble, in this context, the term "issuer" has the same meaning provided in 45 CFR 144.103, which states that an issuer is "an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of ERISA)." As discussed elsewhere in this preamble, and consistent with the NAIC recommendations, the MLR provisions in this interim final rule apply to issuers that offer comprehensive major medical coverage, and these issuers will be required to report these data and determine if rebates are owed at the company, State, and market level (*e.g.,* individual, small group, and large group).[8] The following sections summarize the Department's estimates of the number of entities that will be affected by the requirements of this interim final regulation.

a. Estimated Number of Affected Entities

The MLR provisions will apply to all health insurance issuers offering comprehensive major medical coverage in the individual and group markets. For purposes of the regulatory impact analysis, we have estimated the total number of issuers that will be affected by the requirements of this interim final regulation at the company level because this is the level at which issuers currently submit their annual financial reports to the NAIC (including both company- and State-level exhibits where appropriate). However, because issuers will be required to report MLRs and calculate any rebates that are owed at the company/State level for each market in which they offer coverage (for example, individual, small group, large group), we have estimated rebates by "licensed entity" (company/State combination) for each market.

Table VI.2 shows the estimated distribution of issuers offering coverage in the individual, small group and large group markets for the analytic sample used in this RIA.[9] Approximately 70 percent (311) of these issuers offer coverage in the individual market, 77 percent (342) offer coverage in the small group market, and 77 percent (338) offer coverage in the large group market. Approximately half (224) of these issuers offer coverage in all three markets that are subject to the MLR requirements, while the other half offer coverage in one or two of the markets that are subject to the requirements (118 and 100, respectively).

Additionally, the Department estimates that there are 74.8 million enrollees in the analytic sample in coverage that is subject to the requirements in this interim final rule, including approximately 10.6 million enrollees in individual market coverage (estimated based on "life years" for 2009 NAIC Health and Life Blank filers, which as discussed earlier excludes data for companies that are not required to file annual statements with the NAIC), 24.2 million enrollees in small group coverage, and 40.0 million enrollees in large group coverage (excluding enrollees in companies that did not file annual financial statements on the NAIC's Health or Life Blanks in 2009).[10]

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[5] Comprehensive major medical coverage sold to associations and trusts has been included in individual comprehensive major medical coverage for purposes of the RIA. The Department's estimates exclude Medigap, which is reported separately in the NAIC data from comprehensive major medical coverage offered in the individual and group markets. The NAIC data do not allow us to identify mini-med plans or expatriate plans.

[6] This estimate is based on a comparison of 2008 NAIC and InterStudy data. Interstudy data report 79.7 million enrollees for comprehensive major medical coverage in 2008 whereas NAIC data report approximately 72.9 million enrollees. The NAIC enrollment number represents 91 percent of the Interstudy total enrollment figure.

[7] These exclusions reflect the restriction to Health and Life Blank companies, which drops 22 Fraternal and Property and Casualty companies from the analysis.

[8] This includes some issuers that offer mini-med plans which, as discussed elsewhere in the preamble, often cover the same types of medical services as comprehensive medical plans, but have low annual benefit limits and typically have lower premiums than plans providing higher ceilings on benefits. Data for mini-med plans are not broken out separately from other data that issuers reported to NAIC in 2009. Therefore, the regulatory impact analysis does not include separate estimates relating to mini-med plans.

[9] As noted above, the analytic sample excludes companies that are regulated by the Department of Managed Health Care in California, as well as small, single-State insurers that are not required by State regulators to submit NAIC annual financial statements.

[10] The estimate provided here of the size of the individual market differs from estimates provided in previous rulemaking for a number of reasons. First, as discussed in this regulatory impact assessment, issuers that are regulated by the Department of Managed Health Care in California do not file with the NAIC. Second, and more importantly, the estimate provided here is of enrollment at an average point in time, while previous estimates included people who were enrolled at some point during the year. Third, the Current Population Survey, which was the source of previous estimates, is thought by some analysts to overestimate the number of people purchasing individual coverage.

Table VI.2
Estimated Number of Issuers and Licensed Entities Subject to the Medical Loss Ratio Reporting Requirements By Market

Description	Issuers (1) Offering Comprehensive Major Medical Coverage		Licensed Entities (2) Offering Comprehensive Major Medical Coverage		Enrollees in Comprehensive Major Medical Coverage (3)	
	Number	% of Total	Number	% of Total	Number (thousands)	% of Total
Total Issuers (4)	442	100.0%	2,002	100.0%	74,830	100.0%
By Market:						
Individual Market	311	70.4%	1,429	71.4%	10,603	14.2%
Small Group Market (5)	342	77.4%	976	48.8%	24,189	32.3%
Large Group Market	338	76.5%	912	45.6%	40,039	53.5%
By Number of Markets:						
Single Market Only	118	26.7%	1,159	57.9%	3,722	5.0%
Individual Market Only	66	14.9%	792	39.6%	2,317	3.1%
Small Group Market Only	27	6.1%	187	9.3%	845	1.1%
Large Group Market Only	25	5.7%	180	9.0%	560	0.7%
Two Markets	100	22.6%	371	18.5%	9,934	13.3%
All Three Markets	224	50.7%	472	23.6%	61,173	81.7%

Notes: (1) Issuers represents companies (e.g., NAIC company codes). (2) Licensed Entities represents company / State combinations. (3) Enrollment represents "life years" (total member months divided by 12). (4) Total issuers represents 2009 NAIC Health and Life Blank filers with valid data. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. (5) Small group is defined based on the current definition in the PHS Act.
Sources: 2009 NAIC Health and Life Annual Statements and A&H Policy Experience Exhibit data.

b. Characteristics of the Affected Entities

Table VI.3 provides additional information about the characteristics of the issuers that are subject to the MLR requirements. Most (80 percent) of these companies are subsidiaries of larger carriers, and more than two thirds (315) only offer coverage in a single State. A third (143) of the issuers that are subject to the MLR requirements collected less than $50 million in earned premiums for individual and group comprehensive major medical coverage in 2009, 21 percent (92) collected $50 to $149 million, 31 percent (138) collected $150 to $999 million, and 16 percent (69) collected $1 billion or more in earned premiums that year. Meanwhile, 80 percent of the affected issuers also offer other types of accident and health coverage that is not subject to the requirements of this interim final regulation.

Table VI.3
Selected Characteristics of Issuers Subject to the Medical Loss Ratio (MLR) Reporting Requirements

Description		Number of Issuers (1)	Percent of Total
Estimated Total Number of Issuers Subject to the MLR Requirements (2)		442	100.0%
By Corporate Structure			
	Independent Company	87	19.7%
	Subsidiary of a Larger Carrier (3)	355	80.3%
By Number of States in Which Coverage is Offered			
	1 State	315	71.3%
	2 to 5 States	74	16.7%
	5 to 19 States	22	5.0%
	20 or More States	31	7.0%
By Total Earned Premiums for Individual and Group Comprehensive Major Medical Coverage			
	Less Than $10 Million	72	16.3%
	$10 million to $49 million	71	16.1%
	$50 million to $149 million	92	20.8%
	$150 million to $999 million	138	31.2%
	$1 billion or more	69	15.6%
By Scope of Coverage Offered			
	Only Offers Individual and Group Comprehensive Major Medical Coverage	82	18.6%
	Also Offers Other Types of Accident and Health Coverage	360	81.4%

Notes: (1) All data are based on the issuers' 2009 NAIC annual financial statements. (2) Total issuers represents 2009 NAIC Health and Life Blank filers with valid data. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. (3) The Department estimates that in addition to the 87 independent companies, approximately 109 multi-company carriers offer coverage that is subject to the requirements of this interim final rule.
Sources: 2009 NAIC Health and Life annual statements and A&H Policy Experience Exhibit data.

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While all 442 of these issuers will be subject to the requirements of this interim final regulation, the Department estimates only a subset of these companies will be required to pay MLR-related rebates to policyholders during any given year. The following section contains estimates of the number of entities whose coverage will not meet the applicable minimum MLR thresholds, the estimated MLR rebate payments, and the estimated number of enrollees that would receive the MLR rebates.

6. Estimated MLR Rebate Payments

To date, there have been few published studies that document MLRs for comprehensive major medical coverage offered in the individual, small group and large group markets at the State and company levels nationwide.[11] Additionally, as discussed earlier, there are a number of challenges related to using the 2009 NAIC data. Despite these limitations, the Department believes that the 2009 NAIC data provide a reasonable basis for developing a model to be used for estimating the universe of entities that are likely to be affected by the MLR requirements, and estimating a potential range of other impacts including rebate amounts.[12] Specifically, the Department believes that a reasonable range of assumptions can be applied to the 2009 NAIC data making it the best available source for estimating the potential impacts of this interim final regulation. Therefore, using data from NAIC annual financial statements, the Department summarized data on traditional or unadjusted MLR values prior to the enactment of Affordable Care Act and estimated the impact of the Affordable Care Act's MLR provisions on the market.

In considering how to model the MLR impacts, the Department examined State experience with various types of related policies. Some States have traditionally used MLR standards for reviewing rate filings, others have set minimum standards, a few States require rebates to be made if minimum standards are not met, and many States have no requirements. The Department estimates that prior to the enactment of the Affordable Care Act, approximately 32 States (including the District of Columbia) had enacted requirements relating to minimum MLR standards or administrative expense limits for coverage in at least some segments of the individual and group markets,[13] primarily in the context of submitting historical and anticipated loss ratios as part of their rate filings; approximately 19 States did not have any minimum MLR requirements for individual or group coverage prior to the enactment of the Affordable Care Act. State-level MLR requirements, where they existed, often varied by the type of coverage being offered, were sometimes optional, and lacked standardization in the way that the MLRs were to be calculated. In addition, States' minimum MLR requirements were often quite low—approximately 10 States had loss ratio requirements that were as low as 55 percent for at least some segments of the market, and another 13 States had minimum MLR thresholds between 60 and 75 percent for at least some segments of the market. The Department estimates that nine States have enacted minimum MLR thresholds or administrative expense limits requiring that at least 80 percent of premiums be spent on clinical services in at least some segments of the individual and group markets.

For several reasons, the State experience with MLR requirements was not useful for modeling the effects of imposing an 80 percent MLR requirement nationwide for the individual and small group markets, and an 85 percent MLR requirement nationwide for the large group market. First, as described above, the States varied considerably in terms of MLR definitions and policy implementation. The experience of the nine States that have enacted 80 percent or higher MLR thresholds for at least a portion of the affected market may have been relevant, but there was not sufficient data available to estimate the impact of their policies and generalize to the national level. For example, in five of these States, the 80 percent or higher thresholds only apply to a portion of the market.[14] Additionally, there is limited data available for several of these States; for example, there is limited availability of California HMO data because they do not file with the NAIC; New Jersey first imposed its 80 percent requirement for the individual and small group markets in 2009 (prior to that, the State had a 75 percent minimum MLR standard for individual and small group coverage);[15] and New Mexico's 80 percent and 85 percent standards for the small group and large group markets, respectively, were just enacted on March 3, 2010 (prior to that, the State had a 55 percent minimum MLR standard for small group coverage, and no minimum MLR standard for the large group market). Additionally, in New York and New Jersey, the market for individual unsubsidized insurance is extremely small, largely as a result of rating rules. Finally, Ohio's provision limiting the administrative expenses that an insurer can spend to no more than 20 percent applies to the insurance company as a whole (*e.g.,* the State does not have separate requirements for coverage offered in the individual, small group and large group markets, as required by the Affordable Care Act).[16] The State's regulators estimate that carriers will be close to the Affordable Care Act's minimum MLR thresholds for small group and large group coverage, but that some carriers will have to "raise the bar" in order to meet the standards for the individual market.[17]

[11] For example, the Senate Commerce Committee used NAIC data to report on nationwide MLRs for selected companies, but did not analyze MLRs at the State level (see "Implementing Health Insurance Reform: New Medical Loss Ratio Information for Policymakers and Consumers: Staff Report For Chairman Rockefeller," U. S. Senate, Committee on Commerce, Science and Transportation, April 15, 2010, accessed at *http://commerce.senate.gov/public/index.cfm?p=Reports*). It is also important to note that MLRs calculated for other purposes may not provide an accurate picture of MLRs under the Affordable Care Act, which includes adjustments for administrative expenses related to quality improving activities and small plans.

[12] The NAIC has developed a "Supplemental Blank" that will be used to collect 2010 comprehensive major medical data by company, State and market that are consistent with the uniform definitions and standardized calculation methodologies that NAIC was required to develop under Section 2718(c) of the PHS Act (subject to certification by the Secretary). However, this information will not be available until the Spring of 2011.

[13] This is consistent with America's Health Insurance Plans (AHIP) data, which suggest that there are 32 States that have established MLR guidelines or imposed limitations on administrative expenses for comprehensive major medical insurance (excluding States that require filing of loss ratios, but have not established minimum standards), see "State Mandatory Medical Loss Ratio (MLR) Requirements for Comprehensive, Major Medical Coverage: Summary of State Laws and Regulations, as of April 15, 2010", AHIP, accessed at *http://www.naic.org/documents/committees_lhatf_ahwg_100426_AHIP_MLR_Chart.pdf.*

[14] The 80 percent or higher minimum MLR requirements apply only to HMOs in California, only to HMO point of service plans in Arkansas, only to small group special health care plans in Connecticut, only to small group plans assessed 3 percent or more of the total annual amount assessed by the State's high risk pool in Minnesota, and only for nonprofit medical and dental indemnity or health and hospital service corporation individual direct payment contracts in New York.

[15] Carriers in New Jersey are required to pay rebates if they have a loss ratio below the minimum standard. In 2008, total standard and non-standard market refunds paid by carriers in the State were approximately $850,000. New Jersey Department of Banking and Insurance, "SEH Loss Ratio and Refund Reports for 2008," April 19, 2010, accessed at *http://www.pdcbank.state.nj.us/dobi/division_insurance/ihcseh/sehrpts/seh08lossratiorpt.pdf.*

[16] Ohio Revised Code § 3923.022, accessed at *http://codes.ohio.gov/orc/3923.*

[17] Adamczak, Rick, "New Regs Unlikely to Have Much Impact on Ohio Insurers," Dayton Legal News, November 1, 2010, accessed at *https://www.dailycourt.com/articles/index/id/7284.*

It is difficult to draw general lessons from the experience in these nine States about the likely results of imposing an 80 percent MLR requirement for the individual and small group market nationwide—relevant data are not available in many of the States, the level of aggregation is not consistent in one of the States, and rating rules in two of the States are so different than in most of the rest of the country that results are not likely to be generalizable. Most importantly, in all nine States data were not available over a sufficient time period to establish causality between State policies and observed MLRs.

a. Data Limitations and Modeling Assumptions

As discussed earlier in section VI.B.4 of this regulatory impact analysis, and in a Technical Appendix that is available at *http://www.hhs.gov/ociio/regulations/index.html,* the available data are less than perfect for the task at hand. Among the larger imperfections: The data do not measure quality improving activities as defined by this interim final regulation; the data for some issuers and States are clearly in error; and the data capture administrative expenses at the national level, but do not allocate them to States or to markets (individual, small group, and large group).

The Department expects that as a result of this interim final regulation that issuer behavior may well change, and even if the data could precisely measure MLRs in 2009, MLRs in 2011 may well be different as a result of issuer behavioral change. However, for purposes of this analysis we do not explicitly model these behavioral changes in our estimates. Potential behavioral changes as a result of this regulation and impact on our estimates are discussed below, including:

- Insurer Pricing Policy—Companies will likely consider a number of responses in pricing 2011 policies (e.g., reducing premium increases or increase health care expenditures) that would minimize or avoid rebates. As a result of these anticipated responses, estimates based on the 2009 data would result in upwardly biased estimates of potential rebates;
- Allocation of Expenses Across States and Markets and Affiliates—Issuers were not previously required to allocate company-level expenses by State and by line of business in their annual financial report submissions to the NAIC. However, companies are likely to focus more attention on the methodologies that they use for allocating administrative expenses now that this information will be used in determining if they owe rebates for a given company/State/market. The choices issuers make in determining allocation methods could have a material impact on MLR rebates;
- Activities That Improve Quality—Issuers may increase their quality-improving activities given the financial incentive to do so, or newly describe existing activities as such, and spending on these activities may vary significantly by State or company;
- Other Changes in Categorization—Companies are expected to carefully scrutinize all of their expenditures to determine whether some could legitimately be categorized as expenditures for clinical services or quality improvement based on the definitions implemented by this regulation;
- Other Behavioral Changes—It is unclear to what extent companies may make other behavioral changes that could affect MLR rebates (*e.g.,* expanding coverage to increase medical claims, limiting premium increases, consolidation, etc.); and
- Potential Impact of Destabilization Policy—It is unknown to what extent State Commissioners of Insurance will request adjustments of the 80 percent individual market minimum MLR threshold under the destabilization policy, and unknown whether the justifications provided with these requests will be sufficient to allow the Secretary to grant the adjustments. Thus, it is unknown how these potential adjustments will affect the size of MLR rebates.

b. Methods for Estimating MLR Rebates

The analysis includes estimates that are based on both unadjusted and adjusted MLRs. Information on unadjusted MLRs, which are simply incurred claims divided by earned premiums, is included to assess the impact of the adjustments allowed by the regulation on companies' State-level MLRs.[18]

The adjusted MLRs include three sets of adjustments for: (1) Taxes and fees; (2) credibility adjustments; and (3) quality improvements. First, the adjustments include deductions for Federal and State taxes and licensing and regulatory fees from premiums. These adjustments follow the policy described in the regulation.

Second, they apply estimates of the credibility adjustments for licensed entities that have partially credible experience, that is, issuers with life years that are greater than or equal to 1,000 life years but less than 75,000 life years, based on the 2009 NAIC data.[19] Section D of the preamble describes the rationale and method for calculating credibility adjustments. As stated in this section, there are two components to the credibility adjustment: A base factor that depends on the number of life years a company has in a particular market and State and a factor that depends on average per person deductible for the experience reported in the MLR for a particular market and State. The total credibility adjustment to the MLR equals the base factor times the deductible factor. We used linear interpolation to calculate the base credibility adjustment factor for life years that fall between the values in Table 1 of the preamble.

Third, the adjusted MLRs reported in this analysis also incorporate assumptions about the size of expenses for quality improvement activities, as well as assumptions about other actions that insurers might take to increase their reported MLR. Because the definitions of quality improving activities are new to this rule, the NAIC data collected in 2009 cannot be used to directly estimate how much insurers spent on quality improving activities in 2009 or how much they are expected to spend on these activities in 2011. The closest category in the NAIC data is "cost containment expenses", which averaged approximately 1 percent of premiums in 2009, but the definition of quality improving activities includes many activities that were not included in cost containment expenses. Discussions with industry experts suggest that quality improving activities are likely to account for an average of approximately 3 percent of premium, but there is substantial uncertainty concerning this estimate. Few observers think that quality improving activities will be greater than 5 percent of premium, and few expect that they will be less than 1 percent of premium. In the mid-range estimate, the Department assumes that quality improving activities will account for 3 percent of premium, and uses the 1 percent and 5 percent estimates as the range in a sensitivity analysis.

In addition to uncertainty about the magnitude of quality improving activities, as discussed above, there are many other sources of uncertainty about how insurers will respond to this

[18] As discussed earlier, data for mini-med plans are not broken out separately from other data that issuers reported to NAIC in 2009. Therefore, this regulatory impact analysis does not include separate estimates relating to mini-med plans.

[19] For purposes of this analysis, the Department has not made any assumptions relating to the potential for annual fluctuations in the estimated number of issuers with non-credible and partially credible experience.

interim final regulation, and the effects of these responses on MLRs and rebate amounts.

Given the combination of data imperfections and behavioral uncertainties, the Department has chosen to provide a range of estimates, based on a range of assumptions. A reasonable range of assumptions is that, in the mid-range estimate, MLRs will increase by 1 percentage point relative to the data reported in 2009, with a reasonable bound for this assumption being on one end, no change from the 2009 data, and, on the other end, an assumption that MLRs will increase by 2 percentage points relative to the 2009 data.

Combined with the low-rebate assumption that quality improving activities will increase MLRs by 5 percentage points, the assumption that other behavioral changes may increase MLRs by an additional 2 percentage points will result in estimated MLRs in the low-rebate scenario being 7 percentage points higher than they would be with no allowance for either quality improving activities or other behavioral changes. Consultation with industry experts suggests that this is a reasonable upper bound for the low-rebate assumption as an average for the industry. It is possible that some issuers may invest greater than 5 percent of premium in quality improving activities, or change their behavior in ways that result in a greater than 2 percentage point increase in MLR, but the Department thinks it is unlikely that the changes across the industry for quality improving activities and behavioral changes will be greater than 7 percentage points.

The Department further assumes that issuers with an MLR that is already above the minimum threshold (80 percent in the individual and small group markets, 85 percent in the large group market) will have less incentive to change their behavior in an attempt to increase their MLR than will issuers with lower MLRs that would require them to pay rebates. In the mid-range and low-rebate scenarios, the Department assumes that issuers whose adjusted MLR is above the minimum threshold after an assumed 3 percent increase for quality improving activities will not further increase the MLR with additional quality improving activities or other behavioral changes.

Table VI.4 summarizes the values that are added to the base MLR to adjust for quality improving expenses and other behavioral uncertainties.

Table VI.4
Assumptions used to estimate MLRs under a range of scenarios

Category	Low estimate for rebates *(in percentage points)*	Medium estimate for rebates *(in percentage points)*	High estimate for rebates *(in percentage points)*
Quality improvement activities	+5	+3	+1
Behavioral uncertainties	+2	+1	+0
Total impact on MLRs	+7	+4	+1

NOTE: In the low-range and mid-range scenarios, for issuers whose MLR is above the minimum threshold after 3 percentage points are added for quality improving activities, additional adjustments are not made.

These three sets of adjustments are combined to produce the following formula for estimating companies' adjusted MLRs for the individual, small group, and large group markets by State, rounded to the nearest thousandth decimal place as dictated in the regulation: [20]

$$\text{Adjusted MLR} = (c)/(p - t - f) + (b * d) + u,$$

p = earned premiums
t = Federal and State taxes
f = licensing and regulatory fees
b = base credibility adjustment factor
d = deductible credibility adjustment factor
u = low, medium, or high assumptions to account for quality improving activities, unknown behavioral changes and data measurement error

We then calculate rebates for a company whose adjusted MLR value in a State falls below the minimum MLR standard in a given market using the following formulas:

$$\text{Rebates} = [(m - a) * (p - t - f)]$$

where m = minimum MLR standard for a particular market
a = adjusted State MLR for that market

Finally, to estimate impacts for each year covered by the regulation, we assume that the number of issuers, enrollment, and experience are stable over time. This interim final regulation requires that experience be combined across multiple years for issuers that are not fully credible based on a single year of data. Given the assumption that enrollment is stable over time, the Department estimates that issuers which are not fully credible in 2011 will have twice as much enrollment in the combined experience for 2011 and 2012, and three times as much enrollment in the combined 2011 through 2013 data. As a result, the magnitude of the credibility adjustment in 2012 will be smaller than in 2011, and smaller again in 2013. The Department is unable to model the impact of losing the MLR

[20] The text states that in the mid-range assumption, quality improving activities will account for 3 percent of premium. In the formula above, quality improving (and other behavioral change assumptions) are expressed as percentage point increases in the MLR amount. That is, in the mid-range assumption, we assume that quality improvement expenses will add 3 percentage points to the MLR. As a practical matter, because Federal and State taxes and licensing and regulatory fees are quite small, there is virtually no difference between assuming that quality improvement expenses account for 3 percent of premium or assuming that they will add 3 percentage points to the MLR.

credibility adjustment beginning in 2013 if licensed entities report partially credible experience for the current year and the two previous years and have MLRs below the minimum standard in all three years. Rebates are estimated in 2011 through 2013 by applying the projected growth rate in private health insurance premiums from the National Health Expenditures Accounts to the 2009 NAIC adjusted premiums. However, the analysis does simulate the impact of doubling life years in 2012 or tripling life years in 2013 for licensed entities that have non-credible or partially credible experience using a single year of data to estimate how this affects the portion of insurers that are deemed to have credible experience as well as their associated MLR values in those years. Additionally, rebates are estimated in 2011 through 2013 by applying the projected growth rate in private health insurance premiums from the National Health Expenditures Accounts (per privately insured) to the 2009 NAIC adjusted premiums.

c. Estimated Number of Issuers and Individuals Affected By the MLR Rebate Requirements

As shown in Table VI.5, the Department estimates that 68 percent of the licensed entities (State/company combinations) nationwide selling comprehensive major medical insurance in the individual market in 2011 will have fewer than 1,000 enrollees in at least one State, and will be designated as "non-credible" according to the standards of this interim final regulation, 30 percent of licensed entities will be partially credible, and 2 percent will be fully credible.[21] As discussed elsewhere in this preamble, issuers with non-credible experience in a given State, for a given market, during a given MLR reporting year are not required to provide any rebate to enrollees in that State/market because the issuer does not insure a sufficiently large number of lives to yield a statistically valid MLR.

Although the Department estimates that more than two-thirds of licensed entities (State-company combinations) have non-credible 2011 experience for the individual market, and will not be required to provide rebates to their enrollees, there are relatively few enrollees in licensed entities that are non-credible—the non-credible licensed entities account for 68 percent of all entities, but only 1 percent of enrollees and 2 percent of earned premiums in the individual market. Fully credible licensed entities, accounting for only 2 percent of licensed entities, account for 50 percent of enrollees and 49 percent of premiums.

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[21] As described above, insurers with non-credible experience are those with less than 1,000 life years in a particular State market and they are not subject to the rebate requirements. Insurers with partially credible experience are those with 1,000 or more life years but fewer than 75,000 life years. These insurers receive a credibility adjustment to their adjusted MLRs to account for statistical variability that is inherent in smaller blocks of business. Finally, insurers with fully credible experience are those with 75,000 life years or more. Reported MLR values for fully credible insurers are used without a credibility adjustment in a given reporting year to determine their rebate obligation.

Table VI.5. Percent distribution of credible experience, by market and year (2011-2013)

Year	Measure	Individual Market			Small Group Market			Large Group Market		
		Licensed entities	Life years (Millions)	Premiums earned (Millions)	Licensed entities	Life years (Millions)	Premiums earned (Millions)	Licensed entities	Life years (Millions)	Premiums earned (Millions)
2011	Non-credible coverage(%)	68%	1%	2%	40%	0%	0%	32%	0%	0%
	Partially credible coverage(%)	30%	49%	50%	52%	30%	31%	54%	24%	22%
	Fully credible coverage(%)	2%	50%	49%	7%	70%	68%	15%	76%	78%
	Total	1,429	11	$28,540	976	24	$92,142	912	40	$164,337
2012	Non-credible coverage(%)	60%	1%	1%	33%	0%	0%	28%	0%	0%
	Partially credible coverage(%)	36%	34%	34%	54%	17%	18%	48%	12%	11%
	Fully credible coverage(%)	4%	65%	65%	13%	82%	82%	24%	88%	89%
	Total	1,429	11	$29,513	976	24	$95,283	912	40	$169,938
2013	Non-credible coverage(%)	56%	0%	1%	30%	0%	0%	26%	0%	0%
	Partially credible coverage(%)	38%	26%	26%	53%	13%	13%	44%	8%	8%
	Fully credible coverage(%)	7%	73%	73%	17%	87%	87%	30%	92%	92%
	Total	1,429	11	$30,146	976	24	$97,326	912	40	$173,583

Source: 2009 NAIC Health and Life annual statements and A&H Policy Experience Exhibit data.

Notes: The analysis assumes that number of licensed entities, life years, and experience are stable over time. Excludes data for companies that are regulated by non-Health and Life Blank filers.

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Non-credible entities account for a smaller share of total entities, and a smaller share of enrollees and premiums in the small group market than in the individual market, and an even smaller share in the large group market than in the small group market. Conversely, fully credible entities are a larger share of the market in both the small group and large group markets than in the individual market.

As described above, the Department assumes that MLRs and enrollment are constant in 2012 and 2013. As a result of this assumption, the number of non-credible entities declines somewhat in 2012 and again in 2013, because experience is combined across multiple years.

d. Impact of Adjustments on MLRs

As shown in Table VI.6, the estimated average unadjusted MLR among all fully or partially credible entities in the individual market in 2011 is expected to be 79.5 percent—very close, on average, to the 80 percent minimum threshold required under the Affordable Care Act. When adjustments are made for taxes, licensing and regulatory fees, quality improving activities, and assumed behavioral changes, the Department's mid-range estimate is that the average MLR in the individual market in 2011 will be 86.5 percent, with a low-range estimate (where low-range refers to low-range for the rebate estimate) of 87.2 percent, and a high-range rebate estimate of 84.2 percent. The mid-range estimate is approximately 7 percentage points above the unadjusted estimate. Of this difference, 3.5 percentage points results from the assumption made about quality improving and other behavior assumptions (3 percentage points for quality improving activities and 0.5 percentage points for other behavioral assumptions), and 3.6 of the percentage point difference comes from the other adjustments, primarily the exclusion of Federal and State taxes and licensing and regulatory fees from the denominator, as well as the credibility adjustment.

The average adjusted MLR in the small group market in 2011 is estimated to be 90.8 percent for the mid-range estimate, and is estimated at 94.2 percent for the mid-range estimate in the large group market.

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Table VI.6. Average unadjusted and adjusted MLRs all credible filers, by market and year (2011)

Year	Individual Market					Small Group Market					Large Group Market				
	Number of licensed entities	Average Unadjusted MLRs	Average adjusted MLRs			Number of licensed entities	Average Unadjusted MLRs	Average adjusted MLRs			Number of licensed entities	Average Unadjusted MLRs	Average adjusted MLRs		
			Low rebate estimate	Medium rebate estimate	High rebate estimate			Low rebate estimate	Medium rebate estimate	High rebate estimate			Low rebate estimate	Medium rebate estimate	High rebate estimate
2011	461	79.5%	87.2%	86.5%	84.2%	584	85.1%	90.8%	90.8%	88.7%	624	88.6%	94.2%	94.2%	92.2%

Source: 2009 NAIC Health and Life annual statements and A&H Policy Experience Exhibit data.

Notes: Average MLRs are weighted by premiums in the market. Estimates are for insurers that are subject to rebate requirements in a given year. The analysis assumes that number of licensed entities, life years, and experience are stable over time. The variation in the average MLRs across the years is due to doubling life years in 2012 and tripling life years in 2013 for licensed entities that have non-credible or partially credible experience using a single year of data. This simulation affects the pool of insurers that are subject to the rebate requirements in any given year and the credibility adjustment factors they receive for their adjusted MLRs. The low, medium, and high estimates reflect assumptions for the adjusted MLRs that will give a low to high range of rebate etimates. Consequently, the low rebate estimate will have the highest average MLRs and the high rebate estimate will have the lowest average MLRs. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers.

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e. Estimated Range of MLR Rebates

As shown in Table VI.7, in the mid-range estimate in the individual market, rebates in 2011 are estimated to be $521 million. The $521 million accounts for approximately 7 percent of premium revenue at companies required to pay a rebate—that is, the average rebate at companies required to pay a rebate in the individual market is estimated to be 7 percent of premium. The $521 million accounts for approximately 2 percent of all premiums written in the individual market. Approximately 3.2 million people, accounting for approximately 30 percent of enrollees in the individual market are estimated to receive a rebate, and the average rebate per person receiving a rebate is estimated as $164.

Over the 2011–2013 period, the Department's mid-range estimate is that rebates will total $1.8 billion in the individual market, $770 million in the small group market, and $440 million in the large group market. Additionally, the Department estimates that 9.9 million enrollees in the individual market, 2.3 million enrollees in the small group market, and 2.7 million enrollees in the large group market will receive rebates over the 2011–2013 period under the mid-range estimate. Summing across all three markets, the mid-range estimate is a total of $3.0 billion in rebates over the 2011–2013 period. The low rebate estimate across all three markets for 2011–2013 is $2.0 billion, and the high rebate estimate is $4.9 billion.

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Table VI.7. Individual Market - Percent of market below minimum MLR threshold and total rebate amounts using unadjusted and adjusted MLR values, by year (2011-2013)

Year	Measure		Adjusted MLRs		
			Low rebate estimate	Medium rebate estimate	High rebate estimate
2011	Licensed entities	N	151	179	218
		% of total	11%	13%	15%
	Life years	N (Millions)	2.2	3.2	5.3
		% of total	21%	30%	50%
	Premiums	$ (Millions)	$5,364	$7,931	$13,329
		% of total	19%	28%	47%
	Rebates	$ (Millions)	$337	$521	$839
		% of total premiums	1%	2%	3%
		% of premiums below	6%	7%	6%
		Rebates per life year below	$150	$164	$157
2012	Licensed entities	N	204	233	277
		% of total	14%	16%	19%
	Life years	N (Millions)	2.4	3.3	5.4
		% of total	22%	31%	51%
	Premiums	$ (Millions)	$5,827	$8,564	$13,938
		% of total	20%	29%	47%
	Rebates	$ (Millions)	$392	$590	$935
		% of total premiums	1%	2%	3%
		% of premiums below	7%	7%	7%
		Rebates per life year below	$167	$177	$172
2013	Licensed entities	N	235	270	310
		% of total	16%	19%	22%
	Life years	N (Millions)	2.4	3.4	5.4
		% of total	23%	32%	51%
	Premiums	$ (Millions)	$6,250	$9,076	$14,563
		% of total	21%	31%	49%
	Rebates	$ (Millions)	$435	$646	$1,009
		% of total premiums	1%	2%	3%
		% of premiums below	7%	7%	7%
		Rebates per life year below	$179	$190	$185

Source: 2009 NAIC Health and Life annual statements and A&H Policy Experience Exhibit data.

Notes: Level estimates are for insurers that are subject to rebate requirements in a given year. "Percent of total" figures, however, reflect the percent of the entire market that is below the minimum MLR threshold for that market. The low, medium, and high estimates reflect assumptions for the adjusted MLRs that will give a low to high range of rebate esitmates. Additionally, premium and rebate totals estimated using 2009 data were inflated to 2011-2013 levels by applying the projected growth in private health insurance premiums from the National Health Expenditure Accounts. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. Dollar values represent projected amounts for each year.

Table VI.8. Small Group Market - Percent of market below minimum MLR threshold and total rebate amounts using unadjusted and adjusted MLR values, by market and year (2011-2013)

Year	Measure		Adjusted MLRs		
			Low rebate estimate	Medium rebate estimate	High rebate estimate
2011	Licensed entities	N	32	54	91
		% of total	3%	6%	9%
	Life years	N (Millions)	0.3	0.7	1.7
		% of total	1%	3%	7%
	Premiums	$ (Millions)	$891	$2,876	$6,526
		% of total	1%	3%	7%
	Rebates	$ (Millions)	$166	$226	$359
		% of total premiums	0%	0%	0%
		% of premiums below	19%	8%	5%
		Rebates per life year below	$587	$312	$216
2012	Licensed entities	N	55	80	129
		% of total	6%	8%	13%
	Life years	N (Millions)	0.3	0.8	1.8
		% of total	1%	3%	7%
	Premiums	$ (Millions)	$1,043	$3,221	$7,112
		% of total	1%	3%	7%
	Rebates	$ (Millions)	$188	$260	$411
		% of total premiums	0%	0%	0%
		% of premiums below	18%	8%	6%
		Rebates per life year below	$595	$333	$232
2013	Licensed entities	N	70	95	147
		% of total	7%	10%	15%
	Life years	N (Millions)	0.3	0.8	1.9
		% of total	1%	3%	8%
	Premiums	$ (Millions)	$1,236	$3,597	$7,799
		% of total	1%	4%	8%
	Rebates	$ (Millions)	$201	$281	$444
		% of total premiums	0%	0%	0%
		% of premiums below	16%	8%	6%
		Rebates per life year below	$580	$335	$236

Source: 2009 NAIC Health and Life annual statements and A&H Policy Experience Exhibit data.

Notes: Level estimates are for issuers that are subject to rebate requirements in a given year. "Percent of total" figures, however, reflect the percent of the entire market that is below the minimum MLR threshold for that market. The low, medium, and high estimates reflect assumptions for the adjusted MLRs that will give a low to high range of rebate esitmates. Additionally, premium and rebate totals estimated using 2009 data were inflated to 2011-2013 levels by applying the projected growth in private health insurance premiums from the National Health Expenditure Accounts. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. Dollar values represent projected amounts for each year.

Table VI.9. Large Group Market - Percent of market below minimum MLR threshold and total rebate amounts using unadjusted and adjusted MLR values, by market and year (2011-2013)

Year	Measure		Adjusted MLRs		
			Low rebate estimate	Medium rebate estimate	High rebate estimate
2011	Licensed entities	N	31	48	94
		% of total	3%	5%	10%
	Life years	N (Millions)	0.3	0.7	2.0
		% of total	1%	2%	5%
	Premiums	$ (Millions)	$831	$2,274	$6,765
		% of total	1%	1%	4%
	Rebates	$ (Millions)	$84	$121	$258
		% of total premiums	0%	0%	0%
		% of premiums below	10%	5%	4%
		Rebates per life year below	$312	$166	$127
2012	Licensed entities	N	41	72	116
		% of total	4%	8%	13%
	Life years	N (Millions)	0.3	1.0	2.2
		% of total	1%	2%	5%
	Premiums	$ (Millions)	$1,005	$3,176	$7,593
		% of total	1%	2%	4%
	Rebates	$ (Millions)	$100	$150	$309
		% of total premiums	0%	0%	0%
		% of premiums below	10%	5%	4%
		Rebates per life year below	$302	$156	$141
2013	Licensed entities	N	50	82	131
		% of total	5%	9%	14%
	Life years	N (Millions)	0.3	1.0	2.3
		% of total	1%	3%	6%
	Premiums	$ (Millions)	$1,096	$3,599	$8,257
		% of total	1%	2%	5%
	Rebates	$ (Millions)	$110	$165	$337
		% of total premiums	0%	0%	0%
		% of premiums below	10%	5%	4%
		Rebates per life year below	$321	$160	$148

Source: 2009 NAIC Health and Life annual statements and A&H Policy Experience Exhibit data.

Notes: Level estimates are for insurers that are subject to rebate requirements in a given year. "Percent of total" figures, however, reflect the percent of the entire market that is below the minimum MLR threshold for that market. The low, medium, and high estimates reflect assumptions for the adjusted MLRs that will give a low to high range of rebate esitmates. Additionally, premium and rebate totals estimated using 2009 data were inflated to 2011-2013 levels by applying the projected growth in private health insurance premiums from the National Health Expenditure Accounts. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. Dollar values represent projected amounts for each year.

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In the low-rebate estimate, total rebates in the individual market are estimated at $337 million, with 21 percent of enrollees in the individual market estimated to receive a rebate, and in the high-rebate scenario, $839 million, with 50 percent of enrollees.[22]

Estimated rebates in the small group market range from $166 million to $359 million, with a mid-range estimate of $226 million (Table VI.8), and from $84 million to $258 million in the large group market, with a mid-range estimate of $121 million. In both the small group and large group (Table VI.9) markets a small fraction of enrollees are estimated to receive rebates—in the mid-range scenario, 3 percent in the small group market and 2 percent in large group.

f. Potential Impact of State Destabilization Adjustment Requests on MLR Rebates

Section 2718(b)(1)(A)(ii) provides that the Secretary may adjust the 80 percent level with respect to the individual market of a State "if the Secretary determines that the application of such 80 percent may destabilize the individual market in such State." Subpart C of this interim final regulation implements this provision by setting forth who may apply, how to apply, the criteria used in assessing an application, and how the adjustment would be made. It proposes that States apply for a specific adjustment to the individual market threshold that would be approved only if, according to information provided to the Secretary and assessed by the proposed criteria, there is a reasonable likelihood that market destabilization would occur in the absence of such an adjustment.

Prior to the publication of this interim final regulation, several States have indicated their interest in an adjustment to the MLR threshold for their individual markets. However, this interest was expressed before the NAIC recommendations and proposed rules that may lessen the need for such an adjustment. For example, the credibility adjustments, newer plan adjustments, and treatment of Federal taxes may lessen what they had projected would be the impact of the MLR rules. In addition, as described earlier, the behavioral response of issuers to the proposed rules is uncertain. As such, the Department has not produced quantitative estimates of the potential impact of this authority.

However, if this authority is exercised, by definition, there would be fewer issuers and enrollees to whom rebates in the individual market apply. There would also be fewer benefits as well as costs than previously described. While the benefit of transparency would persist regardless of whether a rebate is made, issuers may have less of an incentive to improve quality or benefits if the MLR threshold were lower than 80 percent. At the same time, the goal of the adjustment is prevent disruption, so individuals in States whose MLR threshold has been adjusted would have more health insurance options than they otherwise would.

7. Estimated Administrative Costs Related to MLR Provisions

As stated earlier in this preamble, this interim final regulation implements the reporting requirements of section 2718(a), describing the type of information that is to be included in the report to the Secretary and made available to consumers, as well as the rebate calculation, payment and enforcement provisions of section 2718(b). The Department has quantified the primary sources of start-up costs that issuers in the individual and group markets will incur to bring themselves into compliance with this interim final regulation, as well as the ongoing annual costs that they will incur related to these requirements. These costs and the methodology used to estimate them are discussed below and in the Technical Appendix available at *http://www.hhs.gov/ociio/regulations/index.html.* Additional detail on these estimates can be found in the Paperwork Reduction Act section of this preamble and we welcome comment on them.

a. Methodology and Assumptions for Estimating Administrative Costs

The Affordable Care Act MLR reporting requirements will affect health insurance issuers offering coverage in the individual and group markets, including both the small group and large group markets. As discussed earlier, most of the affected issuers currently report similar data to the NAIC as part of their annual financial statements. However, this interim final regulation includes requirements related to calculating some additional data elements, and allocating data by company, State and market.

As discussed earlier in this impact analysis, in order to assess the potential administrative burden relating to the requirements in this interim final regulation, the Department consulted with the NAIC and an industry expert to gain insight into the tasks and level of effort required. Based on these discussions, the Department estimates that issuers will incur one-time start-up costs associated with developing teams to review the requirements in this interim final regulation, and developing processes for capturing the necessary data (*e.g.*, automating systems; writing new policies for tracking expenses in the general ledger; developing methodologies for allocating expenses by State, company and market; etc.). The Department estimates that issuers will also incur ongoing annual costs relating to data collection, populating the MLR reporting forms, conducting a final internal review, submitting the reports to the Secretary, internal audit, record retention, and preparing and mailing rebate notifications/payments (where appropriate).

The Department anticipates that the level of effort relating to these activities will vary depending on the scope of an issuer's operations. Each issuer's estimated reporting burden is likely to be affected by a variety of factors that will affect the level of complexity of its filing—including the number of markets in which it operates (*e.g.,* individual, small group, large group), the number of States and licensed entities through which it offers coverage, the degree to which it currently captures relevant data at the State/company/market level, firm size (*e.g.*, claims, premiums, covered lives), whether it offers other types of A&H coverage, whether it is a Health Blank or Life Blank filer, and whether it is a subsidiary of a larger carrier. The assumptions used by the Department to estimate the administrative burden of reporting data needed to calculate MLRs, and information about the uncertainties associated with these assumptions is provided in the Technical Appendix, available at *http://www.hhs.gov/ociio/regulations/index.html.*

b. Estimated Costs Related to MLR Reporting

For each MLR reporting year (defined as a calendar year for purposes of this interim final regulation), issuers offering coverage in the individual and group markets must submit a report to the Secretary by June 1 of the following year that complies with the requirements of this interim final rule on a form and in the manner prescribed by the Secretary. For purposes of these impact estimates, the Department assumes that there will be a single MLR data submission for purposes of both the NAIC annual report and reporting to the Secretary, and that this report would include data

[22] The average rebate per person receiving a rebate is slightly lower in the high rebate scenario than in the mid-range scenario because in the high rebate scenario there are a larger number of issuers and enrollees with MLRs that are close to the 80 percent threshold, and average rebates for these enrollees are relatively low.

relating to both the amounts expended on reimbursement for clinical services, activities that improve quality and other non-clinical costs, as well as information relating to rebates.

The estimated total number of MLR data reports that issuers subject to the MLR reporting requirements will be required to submit to the Secretary under the provisions of this interim final regulation is 3,317. This is an upper-bound estimate, assuming that all issuers offering coverage in both the individual and small group markets will be submitting separate reports to the Secretary for this coverage. However, as discussed elsewhere in this preamble, the provisions of this interim final regulation allow issuers offering coverage in States requiring that the individual and small group markets be combined to submit consolidated reports for these two markets.

Table VI.10 shows that the Department estimates that issuers will incur one-time costs relating to the MLR reporting requirements in this interim final rule of approximately $75,018 to $151,507 per issuer on average, and annual ongoing costs of about $17,261 to $32,259 per issuer annually thereafter.

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Table VI.10
Estimated Administrative Costs Related to Medical Loss Ratio (MLR) Reporting Requirements

Description	Total Number of Issuers	Total Number of Reports	Estimated Total Hours	Estimated Average Cost Per Hour	Estimated Total Cost	Estimated Average Cost Per Issuer	Estimated Average Cost Per Report
LOW RANGE ASSUMPTIONS							
One-Time Costs	442	3,317	501,640	$66.10	$33,157,861	$75,018	$9,996
Ongoing Costs	442	3,317	150,817	$50.59	$7,629,237	$17,261	$2,300
Total Year One Costs	442	3,317	652,457	$62.51	$40,787,097	$92,279	$12,296
MID RANGE ASSUMPTIONS							
One-Time Costs	442	3,317	725,497	$66.31	$48,109,870	$108,846	$14,504
Ongoing Costs	442	3,317	211,214	$50.59	$10,684,490	$24,173	$3,221
Total Year One Costs	442	3,317	936,711	$62.77	$58,794,360	$133,019	$17,725
HIGH RANGE ASSUMPTIONS							
One-Time Costs	442	3,317	1,007,078	$66.50	$66,965,900	$151,507	$20,189
Ongoing Costs	442	3,317	281,863	$50.59	$14,258,342	$32,259	$4,299
Total Year One Costs	442	3,317	1,288,940	$63.02	$81,224,242	$183,765	$24,487

Notes: Issuers represents companies (e.g., NAIC company codes). Total number of reports represents the estimated total number of MLR reports that will be submitted to the Secretary (e.g., company / State / market combinations). Total issuers represents 2009 NAIC Health and Life Blank filers with valid data. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. Total administrative cost includes estimated costs relating to the MLR reporting, record retention, and rebate payment requirements. Estimated costs are stated in 2010 dollars.
Sources: 2009 NAIC Health and Life Annual Statements and A&H Policy Experience Exhibit data.

c. Estimated Costs Related to MLR Record Retention Requirements

Consistent with the assumptions discussed above, MLR record retention costs are assumed to be relatively negligible, since issuers already retain similar data for State audits. Table VI.11 shows that the Department estimates that issuers will incur annual ongoing costs relating to the MLR reporting requirements in this interim final rule of approximately $17 to $29 per issuer on average.

Table VI.11
Estimated Administrative Costs Related to Medical Loss Ratio (MLR) Record Retention Requirements

Description	Total Number of Issuers	Total Number of Reports	Estimated Total Hours	Estimated Average Cost Per Hour	Estimated Total Cost	Estimated Average Cost Per Issuer	Estimated Average Cost Per Report
LOW RANGE ASSUMPTIONS							
Ongoing Costs	442	3,317	200	$38.34	$7,668	$17	$2
MID RANGE ASSUMPTIONS							
Ongoing Costs	442	3,317	200	$50.22	$10,045	$23	$3
HIGH RANGE ASSUMPTIONS							
Ongoing Costs	442	3,317	300	$42.45	$12,734	$29	$4

Notes: Issuers represents companies (e.g., NAIC company codes). Total number of reports represents the estimated total number of MLR reports that will be submitted to the Secretary (e.g., company / State / market combinations). Total issuers represents 2009 NAIC Health and Life Blank filers with valid data. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. Total administrative cost includes estimated costs relating to the MLR reporting, record retention, and rebate payment requirements. Estimated costs are stated in 2010 dollars.
Sources: 2009 NAIC Health and Life Annual Statements and A&H Policy Experience Exhibit data.

d. Estimated Costs Related to MLR Rebate Notifications and Payments

Consistent with the assumptions discussed above, rebate notification and payment costs are expected to be relatively negligible on a per-notification and per-check basis, in particular because issuers have the option of paying rebates through premium withholds. However, the estimated total costs relating to rebate notifications and payments reflect the relatively large numbers of enrollees that could potentially receive rebates during any given year, and will be sensitive to annual fluctuations in the number of licensed entities that owe rebates for a given State and market.

Table VI.12 shows that the Department estimates that in 2011, approximately 60 to 119 issuers (companies) will pay rebates for at least one licensed entity/State/market combination, and that annual ongoing costs relating to the MLR rebate payment and notification requirements in this interim final rule will be approximately $58,010 to $122,891 per affected issuer during that year on average. This number will be sensitive to annual fluctuations in the number of licensed entities that owe rebates for a given State and market.

Table VI.12
Estimated Administrative Costs Related to Medical Loss Ratio (MLR) Rebate Notification and Payment Requirements

Description		Estimated Total Number of Affected Issuers	Estimated Total Number of Notifi-cations or Checks	Estimated Total Hours	Estimated Average Labor Cost Per Hour	Estimated Mailing and Supplies Cost Per Notifi-cation or Check	Estimated Total Cost	Estimated Average Cost Per Affected Issuer	Estimated Average Cost Per Notifi-cation or Check
LOW RANGE ASSUMPTIONS									
	Notifi-cations	60	2,796,623	46,610	$28.30	$0.49	$2,689,296	$44,822	$1
	Checks	18	838,987	20,975	$35.73	$0.05	$791,311	$43,962	$1
	Total Ongoing Costs	60	2,796,623	67,585	$30.60	$0.51	$3,480,606	$58,010	$1
MID RANGE ASSUMPTIONS									
	Notifi-cations	92	4,634,379	77,240	$28.30	$0.49	$4,456,523	$48,440	$1
	Checks	46	2,317,189	57,930	$35.73	$0.05	$2,185,512	$47,511	$1
	Total Ongoing Costs	92	4,634,379	135,169	$31.48	$0.51	$6,642,035	$72,196	$1
HIGH RANGE ASSUMPTIONS									
	Notifi-cations	119	9,016,911	150,282	$28.30	$0.49	$8,670,865	$72,864	$1
	Checks	83	6,311,838	157,796	$35.73	$0.05	$5,953,160	$71,467	$1
	Total Ongoing Costs	119	9,016,911	308,078	$32.10	$0.53	$14,624,026	$122,891	$2

Notes: Affected issuers = the estimated total number of companies (e.g., NAIC company codes) paying rebates or mailing rebate checks for at least one licensed entity / State / market in 2011. Total issuers represents 2009 NAIC Health and Life Blank filers with valid data. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. Estimated costs are stated in 2010 dollars.
Sources: 2009 NAIC Health and Life Annual Statements and A&H Policy Experience Exhibit data.

C. Regulatory Alternatives

Under the Executive Order, the Department is required to consider alternatives to issuing regulations and alternative regulatory approaches. The Department considers a variety of regulatory alternative below.

1. Credibility Adjustment

Section 2718(c) requires the NAIC to develop uniform definitions and calculation methodologies subject to certification by the Secretary. This section directs the NAIC to take into account the special circumstances of smaller plans. In response to this direction, the NAIC recommended a credibility adjustment for smaller plans. After considering the NAIC's recommendation on credibility adjustments, HHS has decided to certify and adopt it in full.

One alternative to the credibility adjustment in this interim final regulation would be to not make any adjustment for credibility, and to require smaller plans to make rebate payments on the same terms as larger plans. If the Department had not adopted a credibility adjustment, the estimated mid-range rebate in the individual market in 2011 would be approximately $682 million, or approximately $161 million larger than the estimate shown in Table VI.7 including the credibility adjustment. The mid-range estimated rebate in the small group market would be $292 million, $66 million larger than the estimate in Table VI.8, and the mid-range estimate for the large group market would be $178 million, $57 million larger than the estimate in Table VI.9. As described elsewhere in this preamble, the Department has concluded that the credibility adjustment as proposed will best balance the goals of providing value to consumers assuring that issuers with relatively few subscribers will be able to function effectively.

2. Federal Taxes

As described elsewhere in this preamble, after considering the NAIC's recommendation on treatment of Federal taxes in the denominator of the MLR calculation, HHS has decided to certify and adopt it in full. An alternative would have been to adopt a narrower definition of the Federal taxes to be excluded. If the Department had decided that payroll and Social Security taxes should be included in the denominator, rather than excluded from the denominator as provided in this interim final regulation, the estimated rebate in the mid-range scenario in the individual market would have been $552 million, or $31 million higher than in the estimate shown in Table VI.7. Similarly, the effect of this regulatory alternative in the small group and large group markets would have been to increase the estimated rebate by $9 million in each of these two markets. As described elsewhere in this preamble, the Department has concluded that excluding payroll taxes and Social Security taxes from the denominator balances the legitimate needs of insurers with the needs of consumers.

3. Quality Improving Activities

Section 2718(a)(2) of the PHS Act requires health insurance issuers to submit an annual report to the Secretary concerning the percent of total premium revenue that is spent on activities that improve health care quality, and Section 2718(c) of the PHS Act directs the NAIC, subject to certification by the Secretary, to establish uniform definitions of activities that improve health care quality.

As discussed elsewhere in this preamble, the NAIC recommended definitions of quality improving activities that are consistent with the categories set forth in Section 2717 of the PHS Act. After considering the NAIC's recommendation on the definition of quality improving activities, HHS has decided to certify and adopt it in full. As discussed elsewhere in this preamble, potential alternatives would have been to adopt narrower or broader definitions of quality improving activities. These distinctions can be made based on the criteria for selecting quality improving activities and/or the specific types of activities included in the definition.

This interim final regulation defines quality-improving activities as being grounded in evidence-based medicine, designed to improve the quality of care received by an enrollee, and capable of being objectively measured and producing verifiable results and achievements. A narrower definition might include only evidence-based quality improving initiatives, while excluding activities that have not been demonstrated to improve quality. Similarly, a narrower definition would not allow for inclusion of future innovations before data are available demonstrating their effectiveness.

Conversely, a broader definition might allow additional types of administrative expenses to be counted as activities that improve quality—such as network fees associated with third party provider networks or costs associated with converting International Classification of Disease (ICD) code sets from ICD–9 to ICD–10. As discussed elsewhere in this preamble, while the Department agrees that certain administrative expenses should not be counted as quality improving, some traditional administrative activities can qualify as quality improving if they meet the criteria set forth in this interim final regulation.

The Department does not have data available to estimate the effects of alternative definitions of quality improving activities on MLRs, although it should be clear that if a broader definition of quality improving activities had been adopted that estimated rebates would be smaller, and if a narrowed definition had been adopted, estimated rebates would be larger.

4. Level of Aggregation

As discussed elsewhere in this preamble, the NAIC could have recommended that MLRs be aggregated to the national level for multi-State companies, rather than be calculated separately in each State. If MLRs were calculated at the national level for multi-State companies, estimated rebates in the individual market in the mid-range scenario would have been $461 in 2011, or $60 million less than the estimates provided in Table VI.7. The estimated effects of national-level aggregation on the small group and large group markets are proportionally larger: in the small group market, estimated rebates in the mid-range scenario fall from $226 million to $97 million in 2011, and in the large group market, from $121 to $42 million.

Requiring issuers to aggregate their individual, small group and large group experience at the national level, rather than by State could reduce the administrative burden associated with these requirements because nearly a third of the issuers that would be affected by the requirements of this interim final regulation offer coverage in multiple States. For example, under the Department's mid-range estimates, the estimated number of MLR reports to the Secretary would decrease by 29 percent (from 3,317 to 972), and the estimated one-time and annual ongoing costs associated with MLR reporting would decrease by approximately 49 percent compared with what is shown in Table VI.10.

Because insurance is regulated primarily at the State level, and because it is important for consumers in each State to receive value for their insurance premium, the Department has concluded that MLRs should be calculated at the issuer/market/State level, rather than aggregating results to

the national level. After considering the NAIC's recommendation on the level of aggregation for purposes of MLR reporting and rebate calculation, HHS has decided to certify and adopt it in full.

We welcome comments on the likely costs and benefits of this rule as presented, on alternatives that would improve the consumer and small business purchaser information to be provided, and on our quantitative estimates of burden.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies that issue a regulation to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The RFA generally defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a nonprofit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000 (States and individuals are not included in the definition of "small entity"). HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

The Regulatory Flexibility Act only requires an analysis to be conducted for those final rules for which a Notice of Proposed Rule Making was required. Accordingly, we have determined that a regulatory flexibility analysis is not required for this interim final rule. However, the Department has considered the likely impact of this interim final rule on small entities.

As discussed in the Web Portal interim final rule (75 FR 24481), HHS examined the health insurance industry in depth in the Regulatory Impact Analysis we prepared for the proposed rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis the Department determined that there were few if any insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the size thresholds for "small" business established by the SBA (currently $7 million in annual receipts for health insurers).[23]

The Department has used the data set created from 2009 NAIC Health and Life Blank annual financial statement data to develop an updated estimate of the number of small entities that offer comprehensive major medical coverage in the individual and small group markets, and are therefore subject to the MLR reporting requirements. For purposes of this analysis, the Department is using total Accident and Health (A&H) earned premiums as a proxy for annual receipts. These estimates may overstate the actual number of small health insurance issuers that would be affected, since they do not include receipts from these companies' other lines of business.

The Department estimates that there are 28 small entities with less than $7 million in A&H earned premiums that offer individual or group comprehensive major medical coverage, and would therefore be subject to the requirements of this interim final regulation. These small entities account for 6 percent of the estimated 442 total issuers that the Department estimates will be affected by these requirements. The Department estimates that 86 percent of these small issuers are subsidiaries of larger carriers, 75 percent only offer coverage in a single State, 68 percent only offer individual or group comprehensive coverage in a single market, 46 percent also offer other types of A&H coverage, and 29 percent are Life Blank filers.

As discussed elsewhere in this preamble, Section 2718(c) of the PHS Act directed the NAIC to take the special circumstances of small plans into account in developing uniform definitions and calculation methodologies relating to the data being reported to the Secretary in Section 2718(a). This has been accomplished through the credibility adjustment, which provides that issuers with non-credible experience in a given market, based on definitions established by the NAIC, are not required to provide any rebate to enrollees in that State/market because the issuer does not insure a sufficiently large number of lives to yield a statistically valid MLR. Additionally, issuers with partially credible experience in a given State/market are allowed to make a credibility adjustment to their MLR during that year.

The Department estimates that the 28 small issuers that are subject to the requirements of this interim final regulation offer individual and group coverage through 73 licensed entities (company/State combinations). For example, the Department estimates that all of the total 85 company/State/market combinations offered by small entities will be either non-credible (92 percent) or partially credible (8 percent) in 2011.

The Department estimates that small entities will owe approximately $435,000 to $656,000 in rebates in 2011, accounting for 0.5 to 0.7 percent of their total A&H premiums during that year. By comparison, the Department estimates that small entities will owe approximately $1.8 to $3.0 million in rebates in 2013, accounting for 1.9 to 2.9 percent of their total A&H premiums during that year.

Additionally, the Department estimates that small entities will spend $44,656 to $62,518 per issuer in one-time costs (accounting for 1.3 to 1.9 percent of their total A&H premiums), and $10,240 to $14,031 per issuer in annual ongoing costs (accounting for 0.3 to 0.4 percent of their total A&H premiums) related to the MLR reporting, record retention, and rebate payment and notification requirements.

BILLING CODE 4150–03–P

[23] "Table of Size Standards Matched To North American Industry Classification System Codes," effective November 5, 2010, U.S. Small Business Administration, available at *http://www.sba.gov.*

BILLING CODE 4150–03–C

Table VI.13
Estimated Administrative Costs Related to Medical Loss Ratio (MLR) Rebate Notification and Payment Requirements By Firm Size, 2011

Firm Size		Total Number of Issuers	Total Number of Licensed Entities	Total Number of Reports	Number of Issuers Paying Rebates	Estimated Average Total Administrative Cost Per Issuer	
						One-Time	Ongoing
LOW RANGE ASSUMPTIONS							
	Small Entities (<$7 million in A&H Premiums)	28	73	85	1	$44,656	$10,240
	All Other Issuers	414	1,929	3,232	59	$77,071	$30,910
	Estimated Total Number of Issuers Subject to the MLR Reporting Requirements	442	2,002	3,317	60	$75,018	$29,601
MID RANGE ASSUMPTIONS							
	Small Entities (<$7 million in A&H Premiums)	28	73	85	1	$53,145	$12,135
	All Other Issuers	100	1,929	3,232	91	$112,613	$41,055
	Estimated Total Number of Issuers Subject to the MLR Reporting Requirements	442	2,002	3,317	92	$108,846	$39,223
HIGH RANGE ASSUMPTIONS							
	Small Entities (<$7 million in A&H Premiums)	28	73	85	1	$62,518	$14,031
	All Other Issuers	100	1,929	3,232	118	$157,525	$52,828
	Estimated Total Number of Issuers Subject to the MLR Reporting Requirements	442	2,002	3,317	119	$151,507	$50,370

Notes: Issuers represents companies (e.g., NAIC company codes). Licensed Entities represents company / State combinations. Total issuers represents 2009 NAIC Health and Life Blank filers with valid data. Excludes data for companies that are regulated by the California Department of Managed Health Care and other non-Health and Life Blank filers. Total administrative cost includes estimated costs relating to the MLR reporting, record retention, and rebate payment requirements. Estimate costs are stated in 2010 dollars.

Sources: 2009 NAIC Health and Life Annual Statements and A&H Policy Experience Exhibit data.

As discussed earlier, the Department believes that these estimates overstate the number of small entities that will be affected by the requirements in this interim final regulation, as well as the relative impact of these requirements on these entities because the Department has based its analysis on issuers' total A&H earned premiums (rather than their total annual receipts). Therefore, the Secretary certifies that these interim final regulations will not have significant impact on a substantial number of small entities. In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. This interim final rule would not affect small rural hospitals. Therefore, the Secretary has determined that this rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

E. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that includes a Federal mandate that could result in expenditure in any one year by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2010, that threshold level is approximately $135 million.

UMRA does not address the total cost of a rule. Rather, it focuses on certain categories of cost, mainly those "Federal mandate" costs resulting from: (1) Imposing enforceable duties on State, local, or tribal governments, or on the private sector; or (2) increasing the stringency of conditions in, or decreasing the funding of, State, local, or tribal governments under entitlement programs.

This interim final regulation is not subject to the Unfunded Mandates Reform Act, because it is being issued as an interim final regulation. However, consistent with policy embodied in UMRA, this interim final regulation has been designed to be the least burdensome alternative for State, local and tribal governments, and the private sector while achieving the objectives of the Affordable Care Act.

This interim final regulation contains MLR reporting, data retention and rebate notification and payment requirements for private sector firms (for example, health insurance issuers offering coverage in the individual and group markets), but these will not cost more than the approximately $32 million to $68 million in one-time administrative costs, and $11 million to $29 million in annual ongoing administrative costs related to complying with the requirements of this interim final regulation that we have estimated. This interim final rule also contains requirements related to rebates paid by issuers to enrollees for coverage offered in the individual, small group, and large group markets that does not meet the minimum MLR standards. The Department's estimates that approximately 2.8 million to 9.6 million enrollees could receive $0.6 to $1.8 billion in rebates during any individual year between 2011 and 2013. It includes no mandates on State, local, or tribal governments. Under Section 2718 of the Affordable Care Act, issuers are required to submit MLR data reports directly to the Secretary. States may voluntarily choose to review the MLR data that issuers submit through the NAIC supplemental blank; develop or modify their regulations relating to MLR definitions and calculation methodologies, reporting and rebates; request adjustments of the 80 percent individual market minimum MLR threshold under the destabilization policy; or modify their audit methodologies to include a more comprehensive review of MLR data reported under Section 2718. However, if they choose not to do so, the Secretary has direct enforcement authority relating to this provision. Thus, the law and this regulation do not impose an unfunded mandate on States.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. In the Department's view, while this interim final rule does not impose substantial direct requirement costs on State and local governments, this interim final regulation has Federalism implications due to direct effects on the distribution of power and responsibilities among the State and Federal governments relating to determining and enforcing minimum MLR standards, reporting and rebate requirements relating to coverage that State-licensed health insurance issuers offer in the individual and group markets.

However, the Department anticipates that the Federalism implications (if any) are substantially mitigated because the Affordable Care Act does not provide any role for the States in terms of receiving or analyzing the data or enforcing the requirements of Section 2718 of the PHS Act. The enforcement provisions of this interim final rule state that the Secretary has enforcement authority and does not require the States to do anything. The States already require issuers to report the NAIC Annual Statement (Blanks) and audit those data. The regulation does contemplate that if a State includes MLR in its audit of issuers, the Secretary has the discretion to accept that audit. But, again, the regulation does not require the States to do anything and, in fact, it is not clear that we even have statutory authority to require them to do anything with respect to the MLR. It is HHS' responsibility to do the audits and enforce the statutory requirements.

States may continue to apply State law requirements except to the extent that such requirements prevent the application of the Affordable Care Act requirements that are the subject of this rulemaking. State insurance laws that are more stringent than the Federal requirements are unlikely to "prevent the application of" the Affordable Care Act, and be preempted. Additionally, States have an opportunity to request adjustments of the 80 percent individual market minimum MLR threshold under the destabilization policy, subject to the Secretary's approval. Accordingly, States have significant latitude to impose requirements on health with respect to health insurance issuers, insurance issuers that are more restrictive than the Federal law.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have Federalism implications or limit the policy making discretion of the States, the Department has engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners, and consulting with State insurance officials on an individual basis.

Throughout the process of developing this interim final regulation, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Department has attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every State.

By doing so, it is the Department's view that we have complied with the requirements of Executive Order 13132. Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, the Department certifies that the Office of Consumer Information and Insurance Oversight has complied with the requirements of Executive Order 13132 for the attached interim final regulation in a meaningful and timely manner.

G. Congressional Review Act

This interim final regulation is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and have been transmitted to Congress and the Comptroller General for review.

In accordance with the provisions of Executive Order 12866, this interim final rule was reviewed by the Office of Management and Budget.

List of Subjects in 45 CFR Part 158

Administrative practice and procedure, Claims, Health care, Health insurance, Health plans, Penalties, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR subtitle A, subchapter B, by adding a new part 158 to read as follows:

PART 158—ISSUER USE OF PREMIUM REVENUE: REPORTING AND REBATE REQUIREMENTS

Sec.

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158.102 Applicability.
158.103 Definitions.

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Authority: Section 2718 of the Public Health Service Act (42 U.S.C. 300gg–18, as amended.)

§ 158.101 Basis and scope.

(a) *Basis.* This Part implements section 2718 of the Public Health Service Act (PHS Act).

(b) *Scope.* Subpart A of this Part establishes the requirements for health insurance issuers ("issuers") offering group or individual health insurance coverage to report information concerning premium revenues and the use of such premium revenues for clinical services provided to enrollees, activities that improve health care quality, and all other non-claims costs. Subpart B describes how this information will be used to determine, with respect to each medical loss ratio (MLR) reporting year, whether the ratio of the amount of adjusted premium revenue expended by the issuer on permitted costs to the total amount of adjusted premium revenue (MLR) meets or exceeds the percentages established by section 2718(b)(1) of the PHS Act. Subpart B also addresses requirements for calculating any rebate amounts that may be due in the event an issuer does not meet the applicable MLR standard. Subpart C implements the provision of section 2718(b)(A)(ii) of the PHS Act allowing the Secretary to adjust the MLR standard for the individual market in a State if requiring issuers to meet that standard may destabilize the individual market. Subparts D through F provide for enforcement of this part, including requirements for issuers to maintain records and civil monetary penalties that may be assessed against issuers who violate the requirements of this Part.

§ 158.102 Applicability.

General requirements. The requirements of this Part apply to issuers offering group or individual health insurance coverage, including a grandfathered health plan as defined in § 147.140 of this subpart.

§ 158.103 Definitions.

For the purposes of this Part, the following definitions apply unless specified otherwise.

Contract reserves means reserves that are established by an issuer which, due

to the gross premium pricing structure at issue, account for the value of the future benefits that at any time exceeds the value of any appropriate future valuation of net premiums at that time. Contract reserves must not include premium deficiency reserves. Contract reserves must not include reserves for expected MLR rebates.

Direct paid claims means claim payments before ceded reinsurance and excluding assumed reinsurance except as otherwise provided in this Part.

Enrollee means an individual who is enrolled, within the meaning of § 144.103 of this title, in group health insurance coverage, or an individual who is covered by individual insurance coverage, at any time during an MLR reporting year.

Experience rating refund means the return of a portion of premiums pursuant to a retrospectively rated funding arrangement when the sum of incurred losses, retention and margin are less than earned premium.

Group conversion charges means the portion of earned premium allocated to providing the privilege for a certificate holder terminated from a group health plan to purchase individual health insurance without providing evidence of insurability.

Health Plan means health insurance coverage offered through either individual coverage or a group health plan.

Individual market has the meaning given the term in section 2791(e)(1) of the PHS Act and section 1304(a)(2) of the Affordable Care Act.

Large Employer has the meaning given the term in section 2791(e)(2) of the PHS Act and section 1304(b)(1) of the Affordable Care Act, except that as provided by section 1304(b)(3) of the Affordable Care Act, until 2016 a State may substitute "51" employees for "101" employees in the definition.

Large group market has the meaning given the term in section 2791(e)(3) of the PHS Act and section 1304(a)(3) of the Affordable Care Act.

MLR reporting year means a calendar year during which group or individual health insurance coverage is provided by an issuer.

Multi-State blended rate means a single rate charged for health insurance coverage provided to a single employer through two or more of an issuer's affiliated companies for employees in two or more States.

Policyholder means any entity that has entered into a contract with an issuer to receive health insurance coverage as defined in section 2791(b) of the PHS Act.

Situs of the contract means the jurisdiction in which the contract is issued or delivered as stated in the contract.

Small Employer has the meaning given the term in section 2791(e)(4) of the PHS Act and section 1304(b)(2) of the Affordable Care Act, except that as provided by section 1304(b)(3) of the Affordable Care Act, until 2016 a State may substitute "50" employees for "100" employees in the definition.

Small group market has the meaning in section 2791(e)(5) of the PHS Act and section 1304(a)(3) of the Affordable Care Act.

Subscriber refers to both the group market and the individual market. In the group market, subscriber means the individual, generally the employee, whose eligibility is the basis for the enrollment in the group health plan and who is responsible for the payment of premiums. In the individual market, subscriber means the individual who purchases an individual policy and who is responsible for the payment of premiums.

Unearned premium means that portion of the premium paid in the MLR reporting year that is intended to provide coverage during a period which extends beyond the MLR reporting year.

Unpaid Claim Reserves means reserves and liabilities established to account for claims that were incurred during the MLR reporting year but had not been paid within 3 months of the end of the MLR reporting year.

Subpart A—Disclosure and Reporting

§ 158.110 Reporting requirements related to premiums and expenditures.

(a) *General requirements.* For each MLR reporting year, an issuer must submit to the Secretary a report which complies with the requirements of this Part, concerning premium revenue and expenses related to the group and individual health insurance coverage that it issued.

(b) *Timing and form of report.* (1) Except as provided in paragraph (b)(2) of this section, the report for each MLR reporting year must be submitted to the Secretary by June 1 of the year following the end of an MLR reporting year, on a form and in the manner prescribed by the Secretary.

(2) An issuer that reports its experience separately under § 158.120(d)(3) or (4) of this subpart must submit a report for each quarter of the 2011 MLR reporting year, on the same form and in the same manner as described in paragraph (b)(1) of this section, as follows:

(i) By May 1 for the quarter ending March 31;

(ii) By August 1 for the quarter ending June 30; and

(ii) By November 1 for the quarter ending September 30.

(c) *Transfer of Business.* Issuers that purchase a line or block of business from another issuer during an MLR reporting year are responsible for submitting the information and reports required by this Part for the assumed business, including for that part of the MLR reporting year that was prior to the purchase.

§ 158.120 Aggregate reporting.

(a) *General requirements.* For purposes of submitting the report required in § 158.110 of this subpart, the issuer must submit a report for each State in which it is licensed to issue health insurance coverage that includes the experience of all policies issued in the State during the MLR reporting year covered by the report. The report must aggregate data for each entity licensed within a State, aggregated separately for the large group market, the small group market and the individual market. Experience with respect to each policy must be included on the report submitted with respect to the State where the contract was issued, except as specified in § 158.120(d) of this subpart.

(b) *Group Health Insurance Coverage in Multiple States.* Group coverage issued by a single issuer that covers employees in multiple States must be attributed to the applicable State based on the situs of the contract. Group coverage issued by multiple affiliated issuers that covers employees in multiple States must be attributed by each issuer to each State based on the situs of the contract.

(c) *Group Health Insurance Coverage With Dual Contracts.* Where a group health plan involves health insurance coverage obtained from two affiliated issuers, one providing in-network coverage only and the second providing out-of-network coverage only, solely for the purpose of providing a group health plan that offers both in-network and out-of-network benefits, experience may be treated as if it were all related to the contract provided by the in-network issuer. However, if the issuer chooses this method of aggregation, it must apply it for a minimum of 3 MLR reporting years.

(d) *Exceptions.* (1) For individual market business sold through an association, the experience of the issuer must be included in the State report for the State that has jurisdiction over the certificate of coverage.

(2) For employer business issued through a group trust or multiple employer welfare association, the

experience of the issuer must be included in the State report for the State where the employer or the association has its principal place of business.

(3) For the 2011 MLR reporting year, an issuer with policies that have a total annual limit of $250,000 or less must report the experience from such policies separately from other policies.

(4) For the 2011 MLR reporting year, an issuer with group policies that provide coverage for employees working outside their country of citizenship, employees working outside of their country of citizenship and outside the employer's country of domicile, and citizens working in their home country, must aggregate the experience from these policies but report the experience from such policies separately from other policies.

§ 158.121 Newer experience.

If, for any aggregation as defined in § 158.120, 50 percent or more of the total earned premium for an MLR reporting year is attributable to policies newly issued and with less than 12 months of experience in that MLR reporting year, then the experience of these policies may be excluded from the report required under § 158.110 of this subpart for that same MLR reporting year. If an issuer chooses to defer reporting of newer business as provided in this section, then the excluded experience must be added to the experience reported in the following MLR reporting year.

§ 158.130 Premium revenue.

(a) *General requirements.* An issuer must report to the Secretary earned premium for each MLR reporting year. Earned premium means all monies paid by a policyholder or subscriber as a condition of receiving coverage from the issuer, including any fees or other contributions associated with the health plan.

(1) Earned premium is to be reported on a direct basis except as provided in paragraph (b) of this section.

(2) All earned premium for policies issued by one issuer and later assumed by another issuer must be reported by the assuming issuer for the entire MLR reporting year during which the policies were assumed and no earned premium for that MLR reporting year must be reported by the ceding issuer.

(3) Reinsured earned premium for a block of business that was subject to indemnity reinsurance and administrative agreements effective prior to March 23, 2010, for which the assuming entity is responsible for 100 percent of the ceding entity's financial risk and takes on all of the administration of the block, must be reported by the assuming issuer and must not be reported by the ceding issuer.

(b) *Adjustments.* Earned premium must include adjustments to:

(1) Account for assessments paid to or subsidies received from Federal and State high risk pools.

(2) Account for portions of premiums associated with group conversion charges.

(3) Account for any experience rating refunds paid or received, excluding any rebate paid based upon an issuer's MLR.

(4) Account for unearned premium.

§ 158.140 Reimbursement for clinical services provided to enrollees.

(a) *General requirements.* The report required in § 158.110 of this subpart must include direct claims paid to or received by providers, including under capitation contracts with physicians, whose services are covered by the policy for clinical services or supplies covered by the policy. In addition, the report must include claim reserves associated with claims incurred during the MLR reporting year, the change in contract reserves, reserves for contingent benefits and the claim portion of lawsuits, and any experience rating refunds paid or received. Reimbursement for clinical services as defined in this section are referred to as "incurred claims."

(1) If there are any group conversion charges for a health plan, the conversion charges must be subtracted from the incurred claims for the aggregation that includes the conversion policies and this same amount must be added to the incurred claims for the aggregation that provides coverage that is intended to be replaced by the conversion policies.

(2) Incurred claims must include changes in unpaid claims between the prior year's and the current year's unpaid claims reserves, including claims reported in the process of adjustment, percentage withholds from payments made to contracted providers, claims that are recoverable for anticipated coordination of benefits (COB), and claim recoveries received as a result of subrogation.

(3) Incurred claims must include the change in claims incurred but not reported from the prior year to the current year. Except where inapplicable, the reserve should be based on past experience, and modified to reflect current conditions such as changes in exposure, claim frequency or severity.

(4) Incurred claims must include changes in other claims-related reserves.

(5) Incurred claims must include experience rating refunds and exclude rebates paid as required by § 158.240 based upon prior MLR reporting year experience.

(b) *Adjustments to incurred claims.* (1) Adjustments that must be deducted from incurred claims:

(i) Prescription drug rebates received by the issuer.

(ii) Overpayment recoveries received from providers.

(2) Adjustments that may be included in incurred claims:

(i) Market stabilization payments or receipts by issuers that are directly tied to claims incurred and other claims based or census based assessments.

(ii) State subsidies based on a stop-loss payment methodology.

(iii) The amount of incentive and bonus payments made to providers.

(3) Adjustments that must not be included in incurred claims:

(i) Amounts paid to third party vendors for secondary network savings.

(ii) Amounts paid to third party vendors for network development, administrative fees, claims processing, and utilization management. For example, if an issuer contracts with a behavioral health, chiropractic network, or high technology radiology vendor, or a pharmacy benefit manager, and the vendor reimburses the provider at one amount but bills the issuer a higher amount to cover its network development, utilization management costs, and profits, then the amount that exceeds the reimbursement to the provider must not be included in incurred claims.

(iii) Amounts paid, including amounts paid to a provider, for professional or administrative services that do not represent compensation or reimbursement for covered services provided to an enrollee. For example, medical record copying costs, attorneys' fees, subrogation vendor fees, compensation to paraprofessionals, janitors, quality assurance analysts, administrative supervisors, secretaries to medical personnel and medical record clerks must not be included in incurred claims.

(4) Adjustments that can be either included in or deducted from incurred claims:

(i) Payment to and from unsubsidized State programs designed to address distribution of health risks across issuers via charges to low risk issuers that are distributed to high risk issuers must be included in or deducted from incurred claims, as applicable.

(ii) [Reserved]

(5) Other adjustments to incurred claims:

(i) Affiliated issuers that offer group coverage at a blended rate may choose

whether to make an adjustment to each affiliate's incurred claims and activities to improve health care quality, to reflect the experience of the issuer with respect to the employer as a whole, according to an objective formula that will be defined prior to January 1, 2011, so as to result in each affiliate having the same ratio of incurred claims to earned premium for that employer group for the MLR reporting year as the ratio of incurred claims to earned premium calculated for the employer group in the aggregate.

(ii) [Reserved]

§ 158.150 Activities that improve health care quality.

(a) *General requirements.* The report required in § 158.110 of this subpart must include expenditures for activities that improve health care quality, as described in this section.

(b) *Activity requirements.* Activities conducted by an issuer to improve quality must meet the following requirements:

(1) The activity must be designed to:

(i) Improve health quality.

(ii) Increase the likelihood of desired health outcomes in ways that are capable of being objectively measured and of producing verifiable results and achievements.

(iii) Be directed toward individual enrollees or incurred for the benefit of specified segments of enrollees or provide health improvements to the population beyond those enrolled in coverage as long as no additional costs are incurred due to the non-enrollees.

(iv) Be grounded in evidence-based medicine, widely accepted best clinical practice, or criteria issued by recognized professional medical associations, accreditation bodies, government agencies or other nationally recognized health care quality organizations.

(2) The activity must be primarily designed to:

(i) Improve health outcomes including increasing the likelihood of desired outcomes compared to a baseline and reduce health disparities among specified populations.

(A) Examples include the direct interaction of the issuer (including those services delegated by contract for which the issuer retains ultimate responsibility under the insurance policy), providers and the enrollee or the enrollee's representative (for example, face-to-face, telephonic, web-based interactions or other means of communication) to improve health outcomes, including activities such as:

(*1*) Effective case management, care coordination, chronic disease management, and medication and care compliance initiatives including through the use of the medical homes model as defined in section 3606 of the Affordable Care Act.

(*2*) Identifying and addressing ethnic, cultural or racial disparities in effectiveness of identified best clinical practices and evidence based medicine.

(*3*) Quality reporting and documentation of care in non-electronic format.

(*4*) Health information technology to support these activities.

(*5*) Accreditation fees directly related to quality of care activities.

(B) [Reserved]

(ii) Prevent hospital readmissions through a comprehensive program for hospital discharge. Examples include:

(A) Comprehensive discharge planning (for example, arranging and managing transitions from one setting to another, such as hospital discharge to home or to a rehabilitation center) in order to help assure appropriate care that will, in all likelihood, avoid readmission to the hospital;

(B) Patient-centered education and counseling.

(C) Personalized post-discharge reinforcement and counseling by an appropriate health care professional.

(D) Any quality reporting and related documentation in non-electronic form for activities to prevent hospital readmission.

(E) Health information technology to support these activities.

(iii) Improve patient safety, reduce medical errors, and lower infection and mortality rates.

(A) Examples of activities primarily designed to improve patient safety, reduce medical errors, and lower infection and mortality rates include:

(*1*) The appropriate identification and use of best clinical practices to avoid harm.

(*2*) Activities to identify and encourage evidence-based medicine in addressing independently identified and documented clinical errors or safety concerns.

(*3*) Activities to lower the risk of facility-acquired infections.

(*4*) Prospective prescription drug Utilization Review aimed at identifying potential adverse drug interactions.

(*5*) Any quality reporting and related documentation in non-electronic form for activities that improve patient safety and reduce medical errors.

(*6*) Health information technology to support these activities.

(B) [Reserved]

(iv) Implement, promote, and increase wellness and health activities:

(A) Examples of activities primarily designed to implement, promote, and increase wellness and health activities, include—

(*1*) Wellness assessments;

(*2*) Wellness/lifestyle coaching programs designed to achieve specific and measurable improvements;

(*3*) Coaching programs designed to educate individuals on clinically effective methods for dealing with a specific chronic disease or condition;

(*4*) Public health education campaigns that are performed in conjunction with State or local health departments;

(*5*) Actual rewards, incentives, bonuses, reductions in copayments (excluding administration of such programs), that are not already reflected in premiums or claims should be allowed as a quality improvement activity for the group market to the extent permitted by section 2705 of the PHS Act;

(*6*) Any quality reporting and related documentation in non-electronic form for wellness and health promotion activities;

(*7*) Coaching or education programs and health promotion activities designed to change member behavior and conditions (for example, smoking or obesity); and

(*8*) Health information technology to support these activities.

(B) [Reserved]

(v) Enhance the use of health care data to improve quality, transparency, and outcomes and support meaningful use of health information technology consistent with § 158.151 of this subpart.

(c) *Exclusions.* Expenditures and activities that must not be included in quality improving activities are:

(1) Those that are designed primarily to control or contain costs;

(2) The pro rata share of expenses that are for lines of business or products other than those being reported, including but not limited to, those that are for or benefit self-funded plans;

(3) Those which otherwise meet the definitions for quality improvement activities but which were paid for with grant money or other funding separate from premium revenue;

(4) Those activities that can be billed or allocated by a provider for care delivery and which are, therefore, reimbursed as clinical services;

(5) Establishing or maintaining a claims adjudication system, including costs directly related to upgrades in health information technology that are designed primarily or solely to improve claims payment capabilities or to meet regulatory requirements for processing claims (for example, costs of implementing new administrative simplification standards and code sets

adopted pursuant to the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d–2, as amended, including the new ICD–10 requirements);

(6) That portion of the activities of health care professional hotlines that does not meet the definition of activities that improve health quality;

(7) All retrospective and concurrent utilization review;

(8) Fraud prevention activities, other than fraud detection/recovery expenses up to the amount recovered that reduces incurred claims;

(9) The cost of developing and executing provider contracts and fees associated with establishing or managing a provider network, including fees paid to a vendor for the same reason;

(10) Provider credentialing;

(11) Marketing expenses;

(12) Costs associated with calculating and administering individual enrollee or employee incentives;

(13) That portion of prospective utilization that does not meet the definition of activities that improve health quality; and

(14) Any function or activity not expressly included in paragraph (c) of this section, unless otherwise approved by and within the discretion of the Secretary, upon adequate showing by the issuer that the activity's costs support the definitions and purposes in this Part or otherwise support monitoring, measuring or reporting health care quality improvement.

§ 158.151 Expenditures related to Health Information Technology and meaningful use requirements.

(a) *General requirements.* An issuer may include as activities that improve health care quality such Health Information Technology (HIT) expenses as are required to accomplish the activities allowed in § 158.150 of this subpart and that are designed for use by health plans, health care providers, or enrollees for the electronic creation, maintenance, access, or exchange of health information, as well as those consistent with Medicare and/or Medicaid meaningful use requirements, and which may in whole or in part improve quality of care, or provide the technological infrastructure to enhance current quality improvement or make new quality improvement initiatives possible by doing one or more of the following:

(1) Making incentive payments to health care providers for the adoption of certified electronic health record technologies and their "meaningful use" as defined by HHS to the extent such payments are not included in reimbursement for clinical services as defined in § 158.140 of this subpart;

(2) Implementing systems to track and verify the adoption and meaningful use of certified electronic health records technologies by health care providers, including those not eligible for Medicare and Medicaid incentive payments;

(3) Providing technical assistance to support adoption and meaningful use of certified electronic health records technologies;

(4) Monitoring, measuring, or reporting clinical effectiveness including reporting and analysis of costs related to maintaining accreditation by nationally recognized accrediting organizations such as NCQA or URAC, or costs for public reporting of quality of care, including costs specifically required to make accurate determinations of defined measures (for example, CAHPS surveys or chart review of HEDIS measures and costs for public reporting mandated or encouraged by law.

(5) Tracking whether a specific class of medical interventions or a bundle of related services leads to better patient outcomes.

(6) Advancing the ability of enrollees, providers, issuers or other systems to communicate patient centered clinical or medical information rapidly, accurately and efficiently to determine patient status, avoid harmful drug interactions or direct appropriate care, which may include electronic Health Records accessible by enrollees and appropriate providers to monitor and document an individual patient's medical history and to support care management.

(7) Reformatting, transmitting or reporting data to national or international government-based health organizations for the purposes of identifying or treating specific conditions or controlling the spread of disease.

(8) Provision of electronic health records, patient portals, and tools to facilitate patient self-management.

(b) [Reserved]

§ 158.160 Other non-claims costs.

(a) *General requirements.* The report required in § 158.110 of this subpart must include non-claims costs described in paragraph (b) of this section and must provide an explanation of how premium revenue is used, other than to provide reimbursement for clinical services covered by the benefit plan, expenditures for activities that improve health care quality, and Federal and State taxes and licensing or regulatory fees as specified in this part.

(b) *Non-claims costs other than taxes and regulatory fees.* (1) The report required in § 158.110 of this subpart must include any expenses for administrative services that do not constitute adjustments to premium revenue as provided in § 158.130 of this subpart, reimbursement for clinical services to enrollees as defined in § 158.140 of this subpart, or expenditures on quality improvement activities as defined in §§ 158.150 and 158.151 of this subpart.

(2) Expenses for administrative services include the following:

(i) Cost-containment expenses not included as an expenditure related to an activity at § 158.150 of this subpart.

(ii) Loss adjustment expenses not classified as a cost containment expense.

(iii) Direct sales salaries, workforce salaries and benefits.

(iv) Agents and brokers fees and commissions.

(v) General and administrative expenses.

(vi) Community benefit expenditures.

§ 158.161 Reporting of Federal and State licensing and regulatory fees.

(a) *Federal taxes.* The report required in § 158.110 of this subpart must separately report:

(1) Federal taxes excluded from premium under subpart B which include all Federal taxes and assessments allocated to health insurance coverage reported under section 2718 of the PHS Act.

(2) Federal taxes not excluded from premium under subpart B which include Federal income taxes on investment income and capital gains as other non-claims costs.

(b) *State taxes and assessments.* The report required in § 158.110 of this subpart must separately report:

(1) State taxes and assessments excluded from premium under subpart B which include:

(i) Any industry-wide (or subset) assessments (other than surcharges on specific claims) paid to the State directly, or premium subsidies that are designed to cover the costs of providing indigent care or other access to health care throughout the State.

(ii) Guaranty fund assessments.

(iii) Assessments of State industrial boards or other boards for operating expenses or for benefits to sick employed persons in connection with disability benefit laws or similar taxes levied by States.

(iv) Advertising required by law, regulation or ruling, except advertising associated with investments.

(v) State income, excise, and business taxes other than premium taxes.

(vi) State premium taxes plus State taxes based on policy reserves, if in lieu of premium taxes.

(vii) One of the following types of payments:

(A) Payments to a State, by not-for-profit health plans, of premium tax exemption values in lieu of State premium taxes limited to the State premium tax rate applicable to for-profit entities subject to premium tax multiplied by the allocated premiums earned for individual, small group and large group;

(B) Payment by not-for-profit health plans for community benefit expenditures as described in paragraph (c) of this section limited to the State premium tax rate applicable to for-profit entities subject to premium tax multiplied by the allocated premiums earned for individual, small group and large group. These payments must be State based requirement to qualify for inclusion in this line item; or

(C) Payments made by (Federal income) tax exempt health plans for community benefit expenditures as defined in paragraph (c) of this section limited to the State premium tax rate applicable to for-profit entities subject to premium tax multiplied by the allocated premiums earned for individual, small group, and large group.

(2) State taxes and assessments not excluded from premium under subpart B which include:

(i) State sales taxes if the issuer does not exercise options of including such taxes with the cost of goods and services purchased.

(ii) Any portion of commissions or allowances on reinsurance assumed that represent specific reimbursement of premium taxes.

(iii) Any portion of commissions or allowances on reinsurance ceded that represents specific reimbursement of premium taxes.

(c) *Community benefit expenditures.* (1) A not-for-profit issuer exempt from Federal or State taxes and assessments, but required to make community benefit expenditures in lieu of taxes, must report to the Secretary such community benefit expenditures, multiplied by the allocated premiums earned for individual, small group and large group, but not to exceed the amount of the taxes they would otherwise be required to pay. Each expenditure must not be reported more than once, but may be split between Federal and State taxes as applicable.

(2) Community benefit expenditures means expenditures for activities or programs that seek to achieve the objectives of improving access to health services, enhancing public health and relief of government burden. This includes any of the following activities that:

(i) Are available broadly to the public and serve low-income consumers;

(ii) Reduce geographic, financial, or cultural barriers to accessing health services, and if ceased to exist would result in access problems (for example, longer wait times or increased travel distances);

(iii) Address Federal, State or local public health priorities such as advancing health care knowledge through education or research that benefits the public;

(iv) Leverage or enhance public health department activities such as childhood immunization efforts; and

(v) Otherwise would become the responsibility of government or another tax-exempt organization.

§ 158.170 Allocation of expenses.

(a) *General requirements.* Each expense must be reported under only one type of expense, unless a portion of the expense fits under the definition of or criteria for one type of expense and the remainder fits into a different type of expense, in which case the expense must be pro-rated between types of expenses. Expenditures that benefit lines of business or products other than those being reported, including but not limited to those that are for or benefit self-funded plans, must be reported on a pro rata share.

(b) *Description of the methods used to allocate expenses.* The report required in § 158.110 of this subpart must include a detailed description of the methods used to allocate expenses, including incurred claims, quality improvement expenses, Federal and State taxes and licensing or regulatory fees, and other non-claims costs, to each health insurance market in each State. A detailed description of each expense element must be provided, including how each specific expense meets the criteria for the type of expense in which it is categorized, as well as the method by which it was aggregated.

(1) Allocation to each category should be based on a generally accepted accounting method that is expected to yield the most accurate results. Specific identification of an expense with an activity that is represented by one of the categories above will generally be the most accurate method. If a specific identification is not feasible, the issuer should provide an explanation of why it believes the more accurate result will be gained from allocation of expenses based upon pertinent factors or ratios such as studies of employee activities, salary ratios or similar analyses.

(2) Many entities operate within a group where personnel and facilities are shared. Shared expenses, including expenses under the terms of a management contract, must be apportioned pro rata to the entities incurring the expense.

(3) Any basis adopted to apportion expenses must be that which is expected to yield the most accurate results and may result from special studies of employee activities, salary ratios, premium ratios or similar analyses. Expenses that relate solely to the operations of a reporting entity, such as personnel costs associated with the adjusting and paying of claims, must be borne solely by the reporting entity and are not to be apportioned to other entities within a group.

(c) *Disclosure of allocation methods.* The issuer must identify in the report required in § 158.110 of this subpart the specific basis used to allocate expenses reported under this Part to States and, within States, to lines of business including the individual market, small group market, large group market, supplemental health insurance coverage, health insurance coverage offered to beneficiaries of public programs (such as Medicare and Medicaid), and group health plans as defined in § 145.103 of this chapter and administered by the issuer.

(d) *Maintenance of records.* The issuer must maintain and make available to the Secretary upon request the data used to allocate expenses reported under this Part together with all supporting information required to determine that the methods identified and reported as required under paragraph (b) of this section were accurately implemented in preparing the report required in § 158.110 of this subpart.

Subpart B—Calculating and Providing the Rebate

§ 158.210 Minimum medical loss ratio.

Subject to the provisions of § 158.211 of this subpart:

(a) *Large group market.* For all policies issued in the large group market in a State during the MLR reporting year, an issuer must provide a rebate to enrollees if the issuer has an MLR of less than 85 percent, as determined in accordance with this part.

(b) *Small group market.* For all policies issued in the small group market in a State during the MLR reporting year, an issuer must provide a rebate to enrollees if the issuer has an

MLR of less than 80 percent, as determined in accordance with this part.

(c) *Individual market.* For all policies issued in the individual market in a State during the MLR reporting year, an issuer must provide a rebate to enrollees if the issuer has an MLR of less than 80 percent, as determined in accordance with this Part.

(d) *Adjustment by the Secretary.* If the Secretary has adjusted the percentage that issuers in the individual market in a specific State must meet, then the adjusted percentage determined by the Secretary in accordance with § 158.301 of this part *et seq.* must be substituted for 80 percent in paragraph (c) of this section.

§ 158.211 Requirement in States with a higher medical loss ratio.

(a) *State option to set higher minimum loss ratio.* For coverage offered in a State whose law provides that issuers in the State must meet a higher MLR than that set forth in § 158.210, the State's higher percentage must be substituted for the percentage stated in § 158.210 of this subpart.

(b) *Considerations in setting a higher minimum loss ratio.* In adopting a higher minimum loss ratio than that set forth in § 158.210, a State must seek to ensure adequate participation by health insurance issuers, competition in the health insurance market in the State, and value for consumers so that premiums are used for clinical services and quality improvements.

§ 158.220 Aggregation of data in calculating an issuer's medical loss ratio.

(a) *Aggregation by State and by market.* In general, an issuer's MLR must be calculated separately for the large group market, small group market and individual market within each State. However, if, pursuant to section 1312(c)(3) of the Affordable Care Act, a State requires the small group market and individual market to be merged, then the data reported separately under subpart A for the small group and individual market in that State may be merged for purposes of calculating an issuer's MLR and any rebates owing.

(b) *Years of data to include in calculating MLR.* Subject to paragraph (c) of this section, an issuer's MLR for an MLR reporting year is calculated according to the formula in § 158.221 of this subpart and aggregating the data reported under this Part for the following 3-year period:

(1) The data for the MLR reporting year whose MLR is being calculated; and

(2) The data for the two prior MLR reporting years.

(c) *Requirements for MLR reporting years 2011 and 2012.* (1) For the 2011 MLR reporting year, an issuer's MLR is calculated using the data reported under this Part for the 2011 MLR reporting year only.

(2) For the 2012 MLR reporting year—

(i) If an issuer's experience for the 2012 MLR reporting year is fully credible, as defined in § 158.230 of this subpart, an issuer's MLR is calculated using the data reported under this Part for the 2012 MLR reporting year.

(ii) If an issuer's experience for the 2012 MLR reporting year is partially credible or non-credible, as defined in § 158.230 of this subpart, an issuer's MLR is calculated using the data reported under this part for the 2011 MLR reporting year and the 2012 MLR reporting year.

§ 158.221 Formula for calculating an issuer's medical loss ratio.

(a) *Medical loss ratio.* (1) An issuer's MLR is the ratio of the numerator, as defined in paragraph (b) of this section, to the denominator, as defined in paragraph (c) of this section, subject to the applicable credibility adjustment, if any, as provided in § 158.232 of this subpart.

(2) An issuer's MLR shall be rounded to three decimal places. For example, if an MLR is 0.7988, it shall be rounded to 0.799 or 79.9 percent. If an MLR is 0.8253 or 82.53 percent, it shall be rounded to 0.825 or 82.5 percent.

(b) *Numerator.* The numerator of an issuer's MLR for an MLR reporting year must be the issuer's incurred claims, as defined in § 158.140 of this part, plus the issuer's expenditures for activities that improve health care quality, as defined in § 158.150 and § 158.151 of this part, that are reported for the years specified in § 158.220 of this subpart.

(1) The numerator of the MLR for the 2012 MLR reporting year may include any rebate paid under § 158.240 of this subpart for the 2011 MLR reporting year if the 2012 MLR reporting year experience is not fully credible as defined in § 158.230 of this subpart.

(2) The numerator of the MLR for the 2013 MLR reporting year may include any rebate paid under § 158.240 for the 2011 MLR reporting year or the 2012 MLR reporting year.

(3) The numerator of the MLR for policies that are reported separately under § 158.120(d)(3) of this part must be the amount specified in paragraph (b) of this section, except that for the 2011 MLR reporting year the total of the incurred claims and expenditures for activities that improve health care quality are then multiplied by a factor of two.

(4) The numerator of the MLR for policies that are reported separately under § 158.120(d)(4) of this part must be the amount specified in paragraph (b) of this section, except that for the 2011 MLR reporting year the total of the incurred claims and expenditures for activities that improve health care quality are then multiplied by a factor of two.

(c) *Denominator.* The denominator of an issuer's MLR must equal the issuer's premium revenue, as defined in § 158.130, minus the issuer's Federal and State taxes and licensing and regulatory fees, described in §§ 158.161(a) and 158.162(a)(1) and (b)(1) of this part.

§ 158.230 Credibility adjustment.

(a) *General rule.* An issuer may add to the MLR calculated under § 158.221(a) of this subpart the credibility adjustment specified by § 158.232 of this section, if such MLR is based on partially credible experience as defined in paragraph (c)(2) of this section. An issuer may not apply the credibility adjustment if the issuer's experience is fully credible, as defined in paragraph (c)(1) of this section, or non-credible, as defined in paragraph (c)(3) of this section.

(b) *Life-years.* The credibility of an issuer's experience is based upon the number of life-years covered by the issuer. Life-years means the total number of months of coverage for enrollees whose premiums and claims experience is included in the report to the Secretary required by § 158.110 of this part, divided by 12.

(c) *Credible experience.* (1) An MLR calculated under § 158.221(a) through (c) of this subpart is fully credible if it is based on the experience of 75,000 or more life-years.

(2) An MLR calculated under § 158.221(a) through (c) of this subpart is partially credible if it is based on the experience of at least 1,000 life-years and fewer than 75,000 life-years.

(3) An MLR calculated under § 158.221(a) through (c) of this subpart is non-credible if it is based on the experience of less than 1,000 life-years.

(d) If an issuer's MLR is non-credible, it is presumed to meet or exceed the minimum percentage required by § 158.210 or § 158.211 of this subpart.

§ 158.231 Life-years used to determine credible experience.

(a) The life-years used to determine the credibility of an issuer's experience are the life-years for the MLR reporting year plus the life-years for the two prior MLR reporting years.

(b) For the 2011 MLR reporting year, the life-years used to determine

credibility are the life-years for the 2011 MLR reporting year only.

(c) For the 2012 MLR reporting year-

(1) If an issuer's experience for the 2012 MLR reporting year is fully credible, the life-years used to determine credibility are the life-years for the 2012 MLR reporting year only;

(2) If an issuer's experience for the 2012 MLR reporting year only is partially credible, the life-years used to determine credibility are the life-years for the 2011 MLR reporting year plus the life-years for the 2012 MLR reporting year.

§ 158.232 Calculating the credibility adjustment.

(a) *Formula.* An issuer's credibility adjustment, if any, is the product of the base credibility factor, as determined under paragraph (b) of this section, multiplied by the deductible factor, as determined under paragraph (c) of this section.

(b) *Base credibility factor.* (1) The base credibility factor for fully credible experience or for non-credible experience is zero.

(2) The base credibility factor for partially credible experience is determined based on the number of life-years included in the aggregation, as determined under § 158.231 of this subpart, and the factors shown in Table 1. When the number of life-years used to determine credibility exactly matches a life-year category listed in Table 1, the value associated with that number of life-years is the base credibility factor. The base credibility factor for a number of life-years between the values shown in Table 1 is determined by linear interpolation.

TABLE 1 TO § 158.232: BASE CREDIBILITY FACTORS

Life-years	Base credibility factor
< 1,000	No Credibility.
1,000	8.3%.
2,500	5.2%.
5,000	3.7%.
10,000	2.6%.
25,000	1.6%.
50,000	1.2%.
≥ 75,000	0.0% (Full Credibility).

(c) *Deductible factor.* (1) The deductible factor is based on the average per person deductible of policies whose experience is included in the aggregation, as determined under § 158.231 of this subpart. When the weighted average deductible, as determined in accordance with this section, exactly matches a deductible category listed in Table 2, the value associated with that deductible is the deductible factor. The deductible factor for an average weighted deductible between the values shown in Table 2 is determined by linear interpolation.

(i) The per person deductible for a policy that covers a subscriber and the subscriber's dependents shall be calculated as follows: The lesser of the sum of the individual family members' deductibles or the overall family deductible for the subscriber and subscriber's family, shall be divided by the total number of individuals covered through the subscriber (including the subscriber).

(ii) The average deductible for an aggregation is calculated weighted by the life-years of experience for each deductible level of policies included in the aggregation.

(2) An issuer may choose to use a deductible factor of 1.0 in lieu of calculating a deductible factor based on the average of policies included in the aggregation.

TABLE 2 TO § 158.232: DEDUCTIBLE FACTOR

Health plan deductible	Deductible factor
$2,500	1.000
$2,500	1.164
$5,000	1.402
≥ $10,000	1.736

(d) *No credibility adjustment.* For the 2013 MLR reporting year, the credibility adjustment for an MLR based on partially credible experience is zero if both of the following conditions are met:

(1) The current MLR reporting year and each of the two previous MLR reporting years included experience of at least 1,000 life-years; and

(2) Without applying any credibility adjustment, the issuer's MLR for the current MLR reporting year and each of the two previous MLR reporting years were below the applicable MLR standard for each year as established under § 158.210 in this subpart.

§ 158.240 Rebating premium if the applicable medical loss ratio standard is not met.

(a) *General requirement.* For each MLR reporting year, an issuer must provide a rebate to each enrollee if the issuer's MLR does not meet or exceed the minimum percentage required by §§ 158.210 and 158.211 of this subpart.

(b) *Definition of enrollee for purposes of rebate.* For the sole purpose of determining whom is entitled to receive a rebate pursuant to this part, the term "enrollee" means the subscriber, policyholder, and/or government entity that paid the premium for health care coverage received by an individual during the respective MLR reporting year.

(c) *Amount of rebate to each enrollee.* (1) For each MLR reporting year, an issuer must rebate to the enrollee the total amount of premium revenue received by the issuer from the enrollee after subtracting Federal and State taxes and licensing and regulatory fees as provided in § 158.161(a), § 158.162(a)(1) and § 158.162(b)(1) of this part, multiplied by the difference between the MLR required by § 158.210 or § 158.211 of this subpart, and the issuer's MLR as calculated under § 158.221 of this subpart.

(2) For example, an issuer must rebate a pro rata portion of premium revenue if it does not meet an 80 percent MLR for the small group market in a State that has not set a higher MLR. If an issuer has a 75 percent MLR for the coverage it offers in the small group market in a State that has not set a higher MLR, the issuer must rebate 5 percent of the premium paid by or on behalf of the enrollee for the MLR reporting year after subtracting premium and subtracting taxes and fees as provided in paragraph (c) of this section. In this example, an enrollee may have paid $2,000 in premiums for the MLR reporting year. If the Federal and State taxes and licensing and regulatory fees that may be excluded from premium revenue as described in § 158.161(a), § 158.161(a)(1) and § 158.162(b)(1) of this subpart are $150 for a premium of $2,000, then the issuer would subtract $150 from premium revenue, for a base of $1,850 in premium. The enrollee would be entitled to a rebate of 5 percent of $1,850, or $92.50.

(d) *Timing of rebate.* An issuer must provide any rebate owing to an enrollee no later than August 1 following the end of the MLR reporting year.

(e) *Late payment interest.* An issuer that fails to pay any rebate owing to an enrollee or subscriber in accordance with paragraph (d) of this section or to take other required action within the time periods set forth in this Part must, in addition to providing the required rebate to the enrollee, pay the enrollee interest at the current Federal Reserve Board lending rate or ten percent annually, whichever is higher, on the total amount of the rebate, accruing from the date payment was due under paragraph (d) of this section.

§ 158.241 Form of rebate.

(a) *Current enrollees.* (1) An issuer may choose to provide any rebates owing to current enrollees in the form

of a premium credit, lump-sum check, or, if an enrollee paid the premium using a credit card or direct debit, by lump-sum reimbursement to the account used to pay the premium.

(2) Any rebate provided in the form of a premium credit must be provided by applying the full amount due to the first month's premium that is due on or after August 1 following the MLR Reporting year. If the amount of the rebate exceeds the premium due for August, then any overage shall be applied to succeeding premium payments until the full amount of the rebate has been credited.

(b) *Former enrollees.* Rebates owing to former enrollees must be paid in the form of lump-sum check or lump-sum reimbursement using the same method that was used for payment, such as credit card or direct debit.

§ 158.242 Recipients of rebates.

(a) *Individual market.* An issuer must meet its obligation to provide any rebate due to an enrollee in the individual market by providing it to the enrollee. For individual policies that cover more than one person, one lump-sum rebate may be provided to the subscriber on behalf of all enrollees covered by the policy.

(b) *Large group and small group markets.* An issuer must meet its obligation to provide any rebate to persons covered under a group health plan by providing it to the enrollee, in amounts proportionate to the amount of premium the policyholder and each subscriber paid.

(1) *Arrangement with policyholder to distribute rebates.* An issuer may meet its obligation to provide any rebate owing to a large group or small group enrollee by entering into an agreement with the group policyholder to distribute the rebate on behalf of the issuer, subject to all of the following conditions:

(i) The issuer must remain liable for complying with all of its obligations under this part.

(ii) The issuer must obtain and retain records and documentation evidencing accurate distribution of any rebate owing, sufficient to demonstrate compliance with its obligations under this subpart, subpart D, and subpart E. Such records and documentation include:

(A) The amount of the premium paid by each subscriber;

(B) The amount of the premium paid by the group policyholder;

(C) The amount of the rebate provided to each subscriber;

(D) The amount of the rebate retained by the group policyholder; and

(E) The amount of any unclaimed rebate and how and when it was distributed.

(2) [Reserved]

§ 158.243 *De minimis* rebates.

(a) *Minimum threshold.* An issuer is not required to provide a rebate to an enrollee based upon the premium that enrollee paid, under the following circumstances:

(1) For a group policy, if the total rebate owed to the policyholder and the subscribers is less than $5 per subscriber covered by the policy for a given MLR reporting year.

(2) In the individual market, if the total rebated owed to the subscriber is less than $5.

(b) *Distribution.* (1) An issuer must aggregate and distribute any rebates not provided because they did not meet the minimum threshold set forth in paragraph (a) of this section by aggregating the unpaid rebates by individual market, small group market and large group market in a State and use them to increase the rebates provided to enrollees who receive rebates based upon the same MLR reporting year as the aggregated unpaid rebates. An issuer must distribute such aggregated rebates by providing additional premium credit or payment divided evenly among enrollees who are being provided a rebate.

(2) For example, an issuer in the individual market has aggregated unpaid rebates totaling $2,000, and the issuer has 10,000 enrollees who are entitled to be provided a rebate above the minimum threshold for the applicable MLR reporting year. The $2,000 must be redistributed to the 10,000 and added on to their existing rebate amounts. The $2,000 is divided evenly among the 10,000 enrollees, so the issuer increases each enrollee's rebate by $0.20.

§ 158.244 Unclaimed rebates.

An issuer must make a good faith effort to locate and deliver to an enrollee any rebate required under this Part. If, after making a good faith effort, an issuer is unable to locate a former enrollee, the issuer must comply with any applicable State law.

§ 158.250 Notice of rebates.

For each MLR reporting year, at the time any rebate of premium is provided in accordance with this Part, an issuer must provide each enrollee who receives a rebate the following information in a form prescribed by the Secretary:

(a) A general description of the concept of an MLR;

(b) The purpose of setting a MLR standard;

(c) The applicable MLR standard;

(d) The issuer's MLR, adjusted in accordance with the provisions of this subpart;

(e) The issuer's aggregate premium revenue as reported in accordance with § 158.130, minus any Federal and State taxes and licensing and regulatory fees that may be excluded from premium revenue as described in §§ 158.161(a) and 158.162(a)(1) and (b)(1); and

(f) The rebate percentage and amount owed to enrollees based upon the difference between the issuer's MLR and the applicable MLR standard.

§ 158.260 Reporting of rebates.

(a) *General requirement.* For each MLR reporting year, an issuer must submit to the Secretary a report concerning the rebates provided to and on behalf of enrollees pursuant to this subpart.

(b) *Aggregation of information in the report.* The information in the report must be aggregated in the same manner as required by § 158.120.

(c) *Information to report.* The report required by this section must include the total:

(1) Number and percentage of enrollees who received a rebate;

(2) Number and amount of rebates provided:

(i) As premium credit; and

(ii) As lump sum check or lump-sum reimbursement to a subscriber's credit card or direct payment to a subscriber's bank account;

(3) Amount of rebates that were provided to enrollees, including a breakdown of the amounts provided based upon the portion of premiums paid by group policyholders and amounts provided based upon the portion of premium paid by subscribers;

(4) Amount of rebates that were *de minimis,* as provided in § 158.243, and a detailed description of how these rebates were disbursed; and

(5) Amount of unclaimed rebates, a description of the methods used to locate the applicable enrollees, and a detailed description of how the unclaimed rebates were disbursed.

(d) *Timing and form of report.* The data required by paragraphs (c)(1) through (4) of this section must be submitted with the report under § 158.110, on a form and in the manner prescribed by the Secretary. The data required by paragraph (c)(5) of this section must be submitted with the report under § 158.110 for the subsequent MLR reporting year.

§ 158.270 Effect of rebate payments on solvency.

(a) If a State's insurance commissioner, superintendent, or other responsible official determines that the payment of rebates by a domestic issuer in that State will cause the issuer's risk based capital (RBC) level to fall below the Company Action Level RBC, as defined in the NAIC's Risk Based Capital (RBC) for Insurers Model Act, the commissioner, superintendent, or other responsible official must notify the Secretary. In such a circumstance, the commissioner, superintendent, or other responsible official may request that the Secretary defer all or a portion of the rebate payments owed by the issuer.

(b) In the event an insurance commissioner, superintendent, or other responsible official makes the request set forth in paragraph (a) of this section, the following should be provided to the Secretary along with the notification:

(1) The domestic issuer's RBC reports for the current calendar year and the 2 preceding calendar years; and

(2) A calculation of the amount of rebates that would be owed by the domestic issuer pursuant to this Part.

(c) Upon receipt of the notification under paragraph (a), the Secretary will examine the information provided by the insurance commissioner, superintendent, or other responsible official along with any other information the Secretary may request from the issuer, and determine whether the payment of rebates by the issuer will cause its RBC level to fall below the Company Action Level RBC.

(d) When the Secretary determines that the payment of rebates by an issuer will cause its RBC level to fall below the Company Action Level RBC, the Secretary may permit a deferral of all or a portion of the rebates owed, but only for a period determined by the Secretary in consultation with the State. The Secretary will require that the issuer must pay these rebates with interest in a future year in which payment of the rebates would not cause the issuer's RBC level to fall below the Company Action Level RBC.

Subpart C—Potential Adjustment to the MLR for a State's Individual Market

§ 158.301 Standard for adjustment to the medical loss ratio.

The Secretary may adjust the MLR standard that must be met by issuers offering coverage in the individual market in a State, as defined in section 2791 of the PHS Act, for a given MLR reporting year if, in her discretion, she determines that application of the 80 percent MLR standard of section 2718(b)(1)(A)(ii) of the Public Health Service Act may destabilize the individual market in that State. Application of the 80 percent MLR standard may destabilize the individual market in a State only if there is a reasonable likelihood that application of the requirement will do so.

§ 158.310 Who may request adjustment to the medical loss ratio.

A request for an adjustment to the MLR standard for a State must be submitted by the State's insurance commissioner, superintendent, or comparable official of that State in order to be considered by the Secretary.

§ 158.311 Duration of adjustment to the medical loss ratio.

A State may request that an adjustment to the MLR standard be for up to three MLR reporting years.

§ 158.320 Information supporting a request for adjustment to the medical loss ratio.

A State must submit in electronic format the information required by §§ 158.321 through 158.323 of this subpart in order for the request for adjustment to the MLR standard for the State to be considered by the Secretary. A State may submit to the Secretary any additional information it determines would support its request. In the event that certain data are unavailable or that the collection of certain data is unduly burdensome, a State may provide written notice to the Secretary and the Secretary may, at her discretion, request alternative supporting data or move forward with her determination.

§ 158.321 Information regarding the State's individual health insurance market.

(a) *State MLR standard.* The State must describe its current MLR standard for the individual market, if any, and the formula used to assess compliance with such standard.

(b) *State market withdrawal requirements.* The State must describe any requirements it has with respect to withdrawals from the State's individual health insurance market. Such requirements include, but are not limited to, any notice that must be provided and any authority the State regulator may have to approve a withdrawal plan or ensure that enrollees of the exiting issuer have continuing coverage, as well as any penalties or sanctions that may be levied upon exit or limitations on re-entry.

(c) *Mechanisms to provide options to consumers.* The State must describe the mechanisms available to the State to provide consumers with options in the event an issuer withdraws from the individual market. Such mechanisms include, but are not limited to, a guaranteed issue requirement, limits on health status rating, an issuer of last resort, or a State-operated high risk pool. A description of each mechanism should include detail on the issuers participating in and products available under such mechanism, as well as any limitations with respect to eligibility, enrollment period, total enrollment, and coverage for pre-existing conditions.

(d) *Issuers in the State's individual market.* Subject to § 158.320 of this subpart, the State must provide:

(1) For each issuer who offers coverage in the individual market in the State its number of individual enrollees by product, available individual premium data by product, and individual health insurance market share within the State; and

(2) For each issuer who offers coverage in the individual market in the State to more than 1,000 enrollees, the following additional information:

(i) Total earned premium on individual market health insurance products in the State;

(ii) Reported MLR pursuant to State law for the individual market business in the State;

(iii) Estimated MLR for the individual market business in the State, as determined in accordance with § 158.221 of this part;

(iv) Total agents' and brokers' commission expenses on individual health insurance products;

(v) Estimated rebate for the individual market business in the State, as determined in accordance with § 158.221 and § 158.240 of this part;

(vi) Net underwriting profit for the individual market business and consolidated business in the State;

(vii) After-tax profit and profit margin for the individual market business and consolidated business in the State;

(viii) Risk-based capital level; and

(ix) Whether the issuer has provided notice of exit to the State's insurance commissioner, superintendent, or comparable State authority.

§ 158.322 Proposal for adjusted medical loss ratio.

A State must provide its own proposal as to the adjustment it seeks to the MLR standard. This proposal must include:

(a) An explanation and justification of how the proposed adjustment to the MLR was determined;

(b) An explanation of how an adjustment to the MLR standard for the State's individual market will permit issuers to adjust current business models and practices in order to meet

an 80 percent MLR as soon as is practicable;

(c) An estimate of the rebates that would be paid if the issuers offering coverage in the individual market in the State must meet an 80 percent MLR for the applicable MLR reporting years; and

(d) An estimate of the rebates that would be paid if the issuers offering coverage in the individual market in the State must meet the adjusted MLR proposed by the State for the applicable MLR reporting years.

§ 158.323 State contact information.

A State must provide the name, telephone number, e-mail address, and mailing address of the person the Secretary may contact regarding the request for an adjustment to the MLR standard.

§ 158.330 Criteria for assessing request for adjustment to the medical loss ratio.

The Secretary may consider the following criteria in assessing whether application of an 80 percent MLR, as calculated in accordance with this subpart, may destabilize the individual market in a State that has requested an adjustment to the 80 percent MLR:

(a) The number of issuers reasonably likely to exit the State or to cease offering coverage in the State absent an adjustment to the 80 percent MLR and the resulting impact on competition in the State. In making this determination the Secretary may consider as to each issuer that is reasonably likely to exit the State:

(1) Each issuer's MLR relative to an 80 percent MLR;

(2) Each issuer's solvency and profitability, as measured by factors such as surplus level, risked-based capital ratio, net income, and operating or underwriting gain;

(3) The requirements and limitations within the State with respect to market withdrawals; and

(4) Whether each issuer covers less than 1,000 life-years in the State's individual insurance market.

(b) The number of individual market enrollees covered by issuers that are reasonably likely to exit the State absent an adjustment to the 80 percent MLR.

(c) Whether absent an adjustment to the 80 percent MLR standard consumers may be unable to access agents and brokers.

(d) The alternate coverage options within the State available to individual market enrollees in the event an issuer exits the market, including:

(1) Any requirement that issuers who exit the State's individual market must have their block(s) of business assumed by another issuer;

(2) The issuers that may remain in the State subsequent to the implementation of the 80 percent MLR, as calculated in accordance with this Part, and the nature, terms, and price of the products offered by such issuers;

(3) The capacity of remaining issuers to write additional business, as measured by their risk based capital ratios;

(4) The mechanisms, such as guaranteed issue products, an issuer of last resort, or a State high risk pool, available to the State to provide coverage to consumers in the event of an issuer withdrawing from the market, and the affordability of these options compared to the coverage provided by exiting or potentially exiting issuers; and

(5) Any authority the State's insurance commissioner, superintendent, or comparable official may exercise with respect to stabilization of the individual insurance market.

(e) The impact on premiums charged, and on benefits and cost-sharing provided, to consumers by issuers remaining in the market in the event one or more issuers were to withdraw from the market.

(f) Any other relevant information submitted by the State's insurance commissioner, superintendent, or comparable official in the State's request.

§ 158.340 Process for submitting request for adjustment to the medical loss ratio.

(a) *Electronic submission.* A State must submit electronically, to an address and in a format prescribed by the Secretary, all of the information required by this subpart in order for its request for an adjustment to the MLR standard for its individual market to be considered by the Secretary.

(b) *Submission by mail.* A State may also submit by overnight delivery service or by U.S mail, return receipt requested, to an address and in a format prescribed by the Secretary, its request for an adjustment to the MLR standard for its individual market.

§ 158.341 Treatment as a public document.

A State's request for an adjustment to the MLR standard, and all information submitted as part of its request, will be treated as a public document and will be posted promptly on the Secretary's Internet Web site devoted to health care coverage.

§ 158.342 Invitation for public comments.

The Secretary will invite public comment regarding a State's request for an adjustment to the MLR standard. All public comments must be submitted in writing within 10 days of the posting of the request, and must be submitted in the manner prescribed by the Secretary. The Secretary will consider timely public comments in assessing a State's request for an adjustment to the MLR standard.

§ 158.343 Optional State hearing.

Any State that submits a request for adjustment to the MLR standard may, at its option, hold a public hearing and create an evidentiary record with respect to its application. If a State does so, the Secretary will take the evidentiary record of the hearing into consideration in making her determination.

§ 158.344 Secretary's discretion to hold a hearing.

The Secretary may, at her discretion, conduct a public hearing with respect to a State's request for an adjustment to the MLR standard. All testimony and materials received in connection with any public hearing will be made part of the public record, and shall be considered by the Secretary in assessing a State's request for an adjustment to the MLR standard.

§ 158.345 Determination on a State's request for adjustment to the medical loss ratio.

(a) *General time frame.* The Secretary will make a determination as to whether to grant a State's request for an adjustment to the MLR standard within 30 days after determining that the information required by this subpart has been received.

(b) *Extension at the discretion of the Secretary.* The Secretary may, in her discretion, extend the 30 day time period in paragraph (a) of this section for as long a time as necessary not to exceed 30 days.

§ 158.346 Request for reconsideration.

(a) *Requesting reconsideration.* A State whose request for adjustment to the MLR standard has been denied by the Secretary may request reconsideration of that determination. A request for reconsideration must be submitted in writing to the Secretary within 10 days of her decision to deny the State's request for an adjustment, and may include any additional information in support of its request.

(b) *Reconsideration determination.* The Secretary will issue her determination on a State's request for reconsideration within 20 days of receiving the reconsideration request.

§ 158.350 Subsequent requests for adjustment to the medical loss ratio.

A State that has made a previous request for an adjustment to the MLR standard must, in addition to the other information required by this subpart, submit information as to what steps the State has taken since its initial and other prior requests, if any, to increase the likelihood that enrollees who have health coverage through issuers that are considered likely to exit the State's individual market will receive coverage at a comparable price and with comparable benefits if the issuer does exit the market.

Subpart D—HHS Enforcement

§ 158.401 HHS enforcement.

HHS enforces the reporting and rebate requirements described in subparts A and B, including but not limited to:

(a) The requirement that such reports be submitted timely.

(b) The requirement that the data reported complies with the definitions and criteria set forth in this part.

(c) The requirement that rebates be paid timely and accurately.

§ 158.402 Audits.

(a) *Notice of Audit.* HHS will provide 30 days advance notice of its intent to conduct an audit of an issuer.

(b) *Conferences.* All audits will include an entrance conference at which the scope of the audit will be presented and an exit conference at which the initial audit findings will be discussed.

(c) *Preliminary Audit Findings.* HHS will share its preliminary audit findings with the issuer, which will then have 30 days to respond to such findings. HHS may extend, for good cause, the time for an issuer to submit such a response.

(d) *Final Audit Findings.* If the issuer does not dispute the preliminary findings, the audit findings will become final. Alternatively, if the issuer responds to the preliminary findings, HHS will review and consider such response and finalize the audit findings.

(e) *Corrective actions.* HHS will send a copy of the final audit findings to the issuer as well as any corrective actions that issuer must undertake as a result of the audit findings.

(f) *Order to pay rebates.* If HHS determines as the result of an audit that an issuer has failed to pay rebates it is obligated to pay pursuant to this part, it may order the issuer to pay those rebates, together with interest from the date the rebates were due, in accordance with § 158.240(d) of this part.

§ 158.403 Circumstances in which a State is conducting audits of issuers.

(a) If a State conducts an audit of an issuer's MLR reporting and rebate obligations, HHS may, in the exercise of its discretion, accept the findings of that audit if HHS determines the following:

(1) The laws of the State permit public release of the findings of audits of issuers;

(2) The State's audit reports on the validity of the data regarding expenses and premiums that the issuer reported to the Secretary, including the appropriateness of the allocations of expenses used in such reporting and whether the activities associated with the issuer's reported expenditures for quality improving activities meet the definition of such activities;

(3) The State's audit reports on the accuracy of rebate calculations and the timeliness and accuracy of rebate payments;

(4) The State submits final audit reports to HHS within 30 days of finalization; and

(5) The State submits preliminary or draft audit reports to HHS within 6 months of the completion of audit field work unless they have already been finalized and reported under paragraph (a)(4) of this section.

(b) If HHS accepts an audit conducted by a State, and if the issuer makes additional rebate payments as a result of the audit, then HHS shall accept those payments as satisfying the issuer's obligation to pay rebates pursuant to this part.

Subpart E—Additional Requirements on Issuers

§ 158.501 Access to facilities and records.

(a) Each issuer subject to the reporting requirement of this part must allow access and entry to its premises, facilities and records, including computer and other electronic systems, to HHS, the Comptroller General, or their designees to evaluate, through inspection, audit, or other means, compliance with the requirements for reporting and calculation of data submitted to HHS, and the timeliness and accuracy of rebate payments made under this part.

(b) Each issuer must also allow access and entry to the facilities and records, including computer and other electronic systems, of its parent organization, subsidiaries, related entities, contractors, subcontractors, agents, or a transferee that pertain to any aspect of the data reported to HHS or to rebate payments calculated and made under this part. To the extent that the issuer does not control access to the facilities and records of its parent organization, related entities, or third parties, it will be the responsibility of the issuer to contractually obligate any such parent organization, related entities, or third parties to grant said access.

(c) The Comptroller General, HHS, or their designees may inspect, evaluate, and audit through 6 years from the date of the filing of a report required by this part or through 3 years after the completion of the audit and for such longer period set forth below provided that any of the following occur:

(1) HHS determines there is a special need to retain a particular record or group of records for a longer period and notifies the issuer at least 30 days before the disposition date.

(2) There has been a dispute, or allegation of fraud or similar fault by the issuer, in which case the retention may be extended to 6 years from the date of any resulting final resolution of the dispute, fraud, or similar fault.

(3) HHS determines that there is a reasonable possibility of fraud or similar fault, in which case HHS may inspect, evaluate, and audit the issuer at any time.

§ 158.502 Maintenance of records.

(a) *Basic rule.* Each issuer subject to the requirements of this part must maintain all documents and other evidence necessary to enable HHS to verify that the data required to be submitted in accordance with this part comply with the definitions and criteria set forth in this part, and that the MLR is calculated and any rebates owing are calculated and provided in accordance with this part. This includes but is not limited to all administrative and financial books and records used in compiling data reported and rebates provided under this part and in determining what data to report and rebates to provide under this part, electronically stored information, and evidence of accounting procedures and practices. This also includes all administrative and financial books and records used by others in assisting an issuer with its obligations under this part.

(b) *Length of time information must be maintained.* All of the documents and other evidence required by this part must be maintained for the current year and six prior years, unless a longer time is required under § 158.501 of this subpart.

Subpart F—Federal Civil Penalties

§ 158.601 General rule regarding the imposition of civil penalties.

If any issuer fails to comply with the requirements of this part, civil penalties,

as described in this subpart, may be imposed.

§ 158.602 Basis for imposing civil penalties.

Civil penalties. For the violations listed in this paragraph, HHS may impose civil penalties in the amounts specified in § 158.606 of this subpart on any issuer who fails to do the following:

(a) Submit to HHS a report concerning the data required under this part by the deadline established by HHS.

(b) Submit to HHS a substantially complete or accurate report concerning the data required under this part.

(c) Timely and accurately pay rebates owing pursuant to this part.

(d) Respond to HHS inquiries as part of an investigation of issuer non-compliance.

(e) Maintain records as required under this part for the periodic auditing of books and records used in compiling data reported to HHS and in calculating and paying rebates pursuant to this Part.

(f) Allow access and entry to premises, facilities and records that pertain to any aspect of the data reported to HHS or to rebates calculated and paid pursuant to this part.

(g) Comply with corrective actions resulting from audit findings.

(h) Accurately and truthfully represent data, reports or other information that it furnishes to a State or HHS.

§ 158.603 Notice to responsible entities.

If HHS learns of a potential violation described in § 158.602 of this subpart or if a State informs HHS of a potential violation prior to imposing any civil monetary penalty HHS must provide written notice to the issuer, to include the following:

(a) Describe the potential violation.

(b) Provide 30 days from the date of the notice for the responsible entity to respond and to provide additional information to refute an alleged violation.

(c) State that a civil monetary penalty may be assessed if the allegations are not, as determined by HHS, refuted.

§ 158.604 Request for extension.

In circumstances in which an entity cannot prepare a response to HHS within the 30 days provided in the notice, the entity may make a written request for an extension from HHS detailing the reason for the extension request and showing good cause. If HHS grants the extension, the responsible entity must respond to the notice within the time frame specified in HHS's letter granting the extension of time. Failure to respond within 30 days, or within the extended time frame, may result in HHS's imposition of a civil monetary penalty based upon its determination of a potential violation described in § 158.602 of this subpart.

§ 158.605 Responses to allegations of noncompliance.

In determining whether to impose a civil monetary penalty, HHS may review and consider documentation provided in any complaint or other information, as well as any additional information provided by the responsible entity to demonstrate that it has complied with Affordable Care Act requirements. The following are examples of documentation that a potential responsible entity may submit for HHS's consideration in determining whether a civil monetary penalty should be assessed and the amount of any civil monetary penalty:

(a) Any evidence that refutes an alleged noncompliance.

(b) Evidence that the entity did not know, and exercising due diligence could not have known, of the violation.

(c) Evidence documenting the development and implementation of internal policies and procedures by an issuer to ensure compliance with the Affordable Care Act requirements regarding MLR. Those policies and procedures may include or consist of a voluntary compliance program. Any such program should do the following:

(1) Effectively articulate and demonstrate the fundamental mission of compliance and the issuer's commitment to the compliance process.

(2) Include the name of the individual in the organization responsible for compliance.

(3) Include an effective monitoring system to identify practices that do not comply with Affordable Care Act requirements regarding MLRs and to provide reasonable assurance that fraud, abuse, and systemic errors are detected in a timely manner.

(4) Address procedures to improve internal policies when noncompliant practices are identified.

(d) Evidence documenting the entity's record of previous compliance with Affordable Care Act requirements regarding MLRs.

§ 158.606 Amount of penalty—general.

A civil monetary penalty for each violation of § 158.602 of this subpart may not exceed $100 for each day, for each responsible entity, for each individual affected by the violation. Penalties imposed under this Part are in addition to any other penalties prescribed or allowed by law.

§ 158.607 Factors HHS uses to determine the amount of penalty.

In determining the amount of any penalty, HHS may take into account the following:

(a) *The entity's previous record of compliance.* This may include any of the following:

(1) Any history of prior violations by the responsible entity, including whether, at any time before determination of the current violation(s), HHS or any State found the responsible entity liable for civil or administrative sanctions in connection with a violation of Affordable Care Act requirements regarding minimum loss ratios.

(2) Evidence that the responsible entity has never had a complaint for noncompliance with Affordable Care Act requirements regarding MLRs filed with a State or HHS.

(3) Such other factors as justice may require.

(b) *The gravity of the violation.* This may include any of the following:

(1) The frequency of the violation, taking into consideration whether any violation is an isolated occurrence, represents a pattern, or is widespread.

(2) The level of financial and other impacts on affected individuals.

(3) Other factors as justice may require.

§ 158.608 Determining the amount of the penalty—mitigating circumstances.

For every violation subject to a civil monetary penalty, if there are substantial or several mitigating circumstances, the aggregate amount of the penalty is set at an amount sufficiently below the maximum permitted by § 158.606 of this subpart to reflect that fact. As guidelines for taking into account the factors listed in § 158.607 of this subpart, HHS considers the following:

(a) *Record of prior compliance.* It should be considered a mitigating circumstance if the responsible entity has done any of the following:

(1) Before receipt of the notice issued under § 158.603 of this subpart, implemented and followed a compliance plan as described in § 158.605(c) of this subpart.

(2) Had no previous complaints against it for noncompliance.

(b) *Gravity of the violation(s).* It should be considered a mitigating circumstance if the responsible entity has done any of the following:

(1) Made adjustments to its business practices to come into compliance with the requirements of this Part so that the following occur:

(i) Each enrollee adversely affected by the violation has been paid any amount

of rebate owed so that, to the extent practicable, that enrollee is in the same position that he, she, or it would have been in had the violation not occurred.

(ii) The rebate payments are completed in a timely manner.

(2) Discovered areas of noncompliance without notice from HHS and voluntarily reported that noncompliance, provided that the responsible entity submits the following:

(i) Documentation verifying that the rights and protections of all individuals adversely affected by the noncompliance have been restored; and

(ii) A plan of correction to prevent future similar violations.

(3) Demonstrated that the violation is an isolated occurrence.

(4) Demonstrated that the financial and other impacts on affected individuals is negligible or nonexistent.

(5) Demonstrated that the noncompliance is correctable and that a high percentage of the violations were corrected.

§ 158.609 Determining the amount of penalty—aggravating circumstances.

For every violation subject to a civil monetary penalty, if there are substantial or several aggravating circumstances, HHS may set the aggregate amount of the penalty at an amount sufficiently close to or at the maximum permitted by § 158.606 of this subpart to reflect that fact. HHS considers the following circumstances to be aggravating circumstances:

(a) The frequency of violation indicates a pattern of widespread occurrence.

(b) The violation(s) resulted in significant financial and other impacts on the average affected individual.

(c) The entity does not provide documentation showing that substantially all of the violations were corrected.

§ 158.610 Determining the amount of penalty—other matters as justice may require.

HHS may take into account other circumstances of an aggravating or mitigating nature if, in the interests of justice, they require either a reduction or an increase of the penalty in order to assure the achievement of the purposes of this Part, and if those circumstances relate to the entity's previous record of compliance or the gravity of the violation.

§ 158.611 Settlement authority.

Nothing in § 158.606 through § 158.610 of this subpart limits the authority of HHS to settle any issue or case described in the notice furnished in accordance with § 158.603 of this subpart or to compromise on any penalty provided for in §§ 158.606 through 158.610 of this subpart.

§ 158.612 Limitations on penalties.

(a) *Circumstances under which a civil monetary penalty is not imposed.* HHS does not impose any civil monetary penalty on any failure for the period of time during which none of the responsible entities knew, or exercising reasonable diligence would have known, of the failure. HHS also may not impose a civil monetary penalty for the period of time after any of the responsible entities knew, or exercising reasonable diligence would have known of the failure, if the failure was due to reasonable cause and not due to willful neglect and the failure was corrected within 30 days of the first day that any of the entities against whom the penalty would be imposed knew, or exercising reasonable diligence would have known, that the failure existed.

(b) *Burden of establishing knowledge.* The burden is on the responsible entity or entities to establish to HHS's satisfaction that no responsible entity knew, or exercising reasonable diligence would have known, that the failure existed.

§ 158.613 Notice of proposed penalty.

(a) *Contents of notice.* If HHS proposes to assess a penalty in accordance with this Part, it must provide the issuer written notice of its intent to assess a penalty, which includes the following:

(1) A description of the requirements under this Part that HHS has determined the issuer violated.

(2) A description of the information upon which HHS based its determination, including the basis for determining the number of affected individuals and the number of days or weeks for which the violations occurred.

(3) The amount of the proposed penalty as of the date of the notice.

(4) Any considerations described in § 158.607 through § 158.610 of this subpart that were taken into account in determining the amount of the proposed penalty.

(5) A specific statement of the issuer's right to a hearing.

(6) A statement that failure to request a hearing within 30 days after the date of the notice permits the assessment of the proposed penalty without right of appeal in accordance with § 158.615 of this subpart.

(b) *Delivery of Notice.* This notice must be either hand delivered, sent by certified mail, return receipt requested, or sent by overnight delivery service with signature upon delivery required.

§ 158.614 Appeal of proposed penalty.

Any issuer against which HHS has assessed a penalty under this Part may appeal that penalty in accordance with § 150.400 *et seq.*

§ 158.615 Failure to request a hearing.

If the issuer does not request a hearing within 30 days of the issuance of the notice described in § 158.613 of this subpart, HHS may assess the proposed civil monetary penalty indicated in such notice and may impose additional penalties as described in § 158.606 of this subpart. HHS must notify the issuer in writing of any penalty that has been assessed and of the means by which the issuer may satisfy the penalty. The issuer has no right to appeal a penalty with respect to which it has not requested a hearing in accordance with § 150.405 of this subchapter, unless the responsible entity can show good cause, as determined at § 150.405(b) of this subchapter, for failing to timely exercise its right to a hearing.

Dated: November 18, 2010.

Jay Angoff,

Director, Office of Consumer Information and Insurance Oversight.

Dated: November 18, 2010.

Kathleen Sebelius,

Secretary.

[FR Doc. 2010–29596 Filed 11–22–10; 8:45 am]

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Part IV

Department of Labor

Office of Labor-Management Standards

29 CFR Part 403

Rescission of Form T–1, Trust Annual Report; Requiring Subsidiary Organization Reporting on the Form LM–2, Labor Organization Annual Report; Modifying Subsidiary Organization Reporting on the Form LM–3, Labor Organization Annual Report; LMRDA Coverage of Intermediate Labor Organizations; Final Rule

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Part 403

RIN 1215–AB75; 1245–AA02

Rescission of Form T–1, Trust Annual Report; Requiring Subsidiary Organization Reporting on the Form LM–2, Labor Organization Annual Report; Modifying Subsidiary Organization Reporting on the Form LM–3, Labor Organization Annual Report; LMRDA Coverage of Intermediate Labor Organizations; Final Rule

AGENCY: Office of Labor-Management Standards, Department of Labor.

ACTION: Final rule.

SUMMARY: This rule rescinds the Form T–1, Trust Annual Report, and rescinds its implementing regulations by removing them from the CFR. This form was promulgated by the final rule published in the **Federal Register** on October 2, 2008 (2008 Form T–1 rule). The Form T–1 was required to be filed by labor organizations about certain trusts in which they are interested pursuant to the Labor-Management Reporting and Disclosure Act of 1959. Upon further review of the 2008 Form T–1 rule, including the pertinent facts and legally relevant policy considerations surrounding that rulemaking, as well as the comments received from the February 2, 2010, notice of proposed rulemaking (NPRM) to rescind the Form T–1, the Department of Labor (Department) rescinds the rule implementing the Form T–1 because it considers the trust reporting required under the rule to be overly broad and, as structured, is not necessary to prevent circumvention and evasion of the Title II reporting requirements. Additionally, this rule returns "subsidiary organization" reporting to the Form LM–2 (Labor Organization Annual Report), which the Department considers to be necessary to satisfy the purposes of the LMRDA, and it clarifies the scope of such reporting in response to comments received in the NPRM. Finally, in interpreting the definition of "labor organization" under the LMRDA, the Department returns to its long held view that the statute's coverage does not encompass intermediate bodies that are wholly composed of public sector organizations. In so doing, the Department has reconsidered a definitional interpretation that it adopted in 2003.

DATES: This rule will be effective January 3, 2011. The changes made to the Form LM–2 and Form LM–3 reporting requirements will apply to reports required by labor organizations with fiscal years beginning on or after January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Denise M. Boucher, Director, Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–5609, Washington, DC 20210, (202) 693–0123 (this is not a toll-free number), (800) 877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The Regulatory Information Number (RIN) identified for this rulemaking changed with publication of the Spring Regulatory Agenda due to an organizational restructuring. The old RIN was assigned to the Employment Standards Administration, which no longer exists; a new RIN has been assigned to the Office of Labor-Management Standards

I. Authority

A. Legal Authority

This rescission of the 2008 Form T–1 rule, the union reporting requirements concerning subsidiary organizations, and the revised interpretation relating to the coverage of public sector intermediate body labor unions under LRMDA section 3(j), 29 U.S.C. 402, are made pursuant to section 201 and section 208 of the LMRDA, 29 U.S.C. 431, 438. Section 208 authorizes the Secretary of Labor to issue, amend, and rescind rules and regulations to implement the LMRDA's reporting provisions, and also includes authority to issue such rules "prescribing reports concerning trusts in which a labor organization is interested" as she may "find necessary to prevent the circumvention or evasion of [the LMRDA's] reporting requirements." 29 U.S.C. 438.

B. Departmental Authorization

Secretary's Order 08–2009, issued November 6, 2009, contains the delegation of authority and assignment of responsibility for the Secretary's functions under the LMRDA to the Director of the Office of Labor-Management Standards and permits re-delegation of such authority. *See* 74 FR 58835 (Nov. 13, 2009).

II. Background

In enacting the LMRDA in 1959, Congress sought to protect the rights and interests of employees, labor organizations and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers, employees, and representatives. The LMRDA was the direct outgrowth of a congressional investigation conducted by the Select Committee on Improper Activities in the Labor or Management Field, commonly known as the McClellan Committee. The LMRDA addressed various ills through a set of integrated provisions aimed at labor-management relations governance and management. These provisions include LMRDA Title II financial reporting and disclosure requirements for labor organizations, their officers and employees, employers, labor relations consultants, and surety companies. *See* 29 U.S.C. 431–36, 441.

The Department has developed several forms to implement the union annual reporting requirements of the LMRDA. The reporting detail required of labor organizations, as the Secretary has established by rule, varies depending on the amount of the labor organization's annual receipts. The labor organization annual financial reports required by section 201(b) of the Act, 29 U.S.C. 431(b) (Form LM–2, Form LM–3, and Form LM–4), are to contain information about a labor organization's assets, liabilities, receipts, and disbursements in such detail "as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year." The Form LM–2 Annual Report, the most detailed of the annual labor organization reports and that required to be filed by labor organizations with $250,000 or more in annual receipts, must include reporting of loans to officers, employees and business enterprises; payments to each officer; and payments to each employee of the labor organization paid more than $10,000 during the fiscal year, in addition to other information.

In addition to prescribing the form and publication of the LMRDA reports, the Secretary is authorized to issue regulations that prevent labor unions and others from avoiding their reporting responsibilities. Section 208 authorizes the Secretary of Labor to issue, amend, and rescind rules and regulations to implement the LMRDA's reporting provisions, including such rules "prescribing reports concerning trusts in which a labor organization is interested" as she may "find necessary to prevent the circumvention or evasion of [the LMRDA's] reporting requirements." 29 U.S.C. 438.

Historically, the Department's LMRDA reporting program had not provided for separate trust reporting by unions. However, there is a long history

of reporting on "subsidiary organization[s]." Part VIII of the 1962 Instructions for Form LM–2 provided for reporting concerning these entities, which were defined in the Form LM–2 instructions as "any separate organization in which the ownership is wholly vested in the labor organization or its officers or its membership, which is governed or controlled by the officers, employees or members of the labor organization, and which is wholly financed by the labor organization."

III. Rescission of the October 2, 2008, Final Rule Establishing the Form T–1 and Return of Subsidiary Reporting to the Form LM–2

A. History of the Form T–1

The Form T–1 report was first proposed on December 27, 2002, as one part of a proposal to extensively change the Form LM–2. 67 FR 79279 (Dec. 27, 2002). The rule was proposed under the authority of Section 208, which permits the Secretary to issue such rules "prescribing reports concerning trusts in which a labor organization is interested" as she may "find necessary to prevent the circumvention or evasion of [the LMRDA's] reporting requirements." 29 U.S.C. 438. Following consideration of public comments, on October 9, 2003, the Department published a final rule enacting extensive changes to the Form LM–2 and establishing a Form T–1. 68 FR 58374 (Oct. 9, 2003) (2003 Form T–1 rule). The 2003 Form T–1 rule eliminated the requirement that unions report on subsidiary organizations on the Form LM–2, but it mandated that each labor organization filing a Form LM–2 report also file a separate report to "disclose assets, liabilities, receipts, and disbursements of a significant trust in which the labor organization is interested." 68 FR at 58477. The reporting labor organization would make this disclosure by filing a separate Form T–1 for each significant trust in which it was interested. *Id.* at 58524.

The 2003 Form T–1 rule defined the phrase "significant trust in which the labor organization is interested" by utilizing the section 3(l) statutory definition of "a trust in which a labor organization is interested" and an administrative determination of when a trust is deemed "significant." 68 FR at 58477–78. The LMRDA defines a "trust in which a labor organization is interested" as:

> A trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

Id. (quoting 29 U.S.C. 402(l)).

The 2003 Form T–1 rule set forth an administrative determination that stated that a "trust will be considered significant" and therefore subject to the Form T–1 reporting requirement under the following conditions:

> (1) The labor organization had annual receipts of $250,000 or more during its most recent fiscal year, and (2) the labor organization's financial contribution to the trust or the contribution made on the labor organization's behalf, or as a result of a negotiated agreement to which the labor organization is a party, is $10,000 or more annually.

Id. at 58478.

The portions of the 2003 rule relating to the Form T–1 were vacated by the U.S. Court of Appeals for the District of Columbia Circuit in *AFL–CIO* v. *Chao,* 409 F.3d 377, 389–391 (DC Cir. 2005). The court held that the form "reaches information unrelated to union reporting requirements and mandates reporting on trusts even where there is no appearance that the union's contribution of funds to an independent organization could circumvent or evade reporting requirements by, for example, permitting a union to maintain control of funds." *Id.* at 389. The court also vacated the Form T–1 portions of the 2003 rule because its test failed to establish reporting based on domination or managerial control of assets subject to LMRDA Title II jurisdiction. The court reasoned that the Department failed to explain how the test promulgated—selection of one member of a board and a $10,000 contribution to a trust with $250,000 in receipts—could result in union domination and control sufficient to give rise to circumvention or evasion of Title II reporting requirements. *Id.* at 390. In so holding, the court emphasized that Section 208 authority is the only basis for LMRDA trust reporting, that this authority is limited to preventing circumvention or evasion of Title II reporting, and that "the statute doesn't provide general authority to require trusts to demonstrate that they operate in a manner beneficial to union members." *Id.* at 390.

Following the 2003 vacatur of the provision of the final rule relating to the Form T–1, the Department issued a revised Form T–1 final rule on September 9, 2006. 71 FR 57716 (Sept. 9, 2006) (2006 Form T–1 rule). The U.S. District Court for the District of Columbia vacated this rule due to a failure to provide a new notice and comment period. *AFL–CIO* v. *Chao,* 496 F.Supp. 76 (DC 2007). The district court did not engage in a substantive review of the 2006 rule, but the court noted that the AFL–CIO demonstrated that "the absence of a fresh comment period constituted prejudicial error" and that the AFL–CIO objected with "reasonable specificity" to warrant relief vacating the rule. *Id.* at 90–92.

The Department issued a proposed rule for a revised Form T–1 on March 4, 2008. 73 FR 11754 (Mar. 4, 2008). After notice and comment, the 2008 Form T–1 final rule was issued on October 2, 2008. 73 FR 57412. This rule attempted to remedy the failings of the Department's 2003 and 2006 efforts in implementing a Form T–1. 73 FR at 57413. The 2008 Form T–1 rule became effective on December 31, 2008. Under this rule, Form T–1 reports would be filed no earlier than March 31, 2010, for fiscal years that began no earlier than January 1, 2009.

The 2008 Form T–1 rule states that labor organizations with total annual receipts of $250,000 or more must file a Form T–1 for those section 3(l) trusts in which the labor organization, either alone or in combination with other labor organizations, had management control or financial dominance. 73 FR at 57411. For purposes of the rule, a labor organization has management control if the labor organization alone, or in combination with other labor organizations, selects or appoints the majority of the members of the trust's governing board. Further, for purposes of the rule, a labor organization has financial dominance if the labor organization alone, or in combination with other labor organizations, contributed more than 50 percent of the trust's receipts during the annual reporting period. Significantly, the rule treats contributions made to a trust by an employer pursuant to a collective bargaining agreement as constituting contributions by the labor organization that was party to the agreement.

Additionally, the 2008 Form T–1 rule provides exceptions to the Form T–1 filing requirements. No Form T–1 is required for a trust: Established as a political action committee (PAC) fund if publicly available reports on the PAC fund are filed with Federal or state agencies; established as a political organization for which reports are filed with the IRS under section 527 of the IRS code; required to file a Form 5500 under the Employee Retirement Income Security Act of 1974 (ERISA); or constituting a federal employee health benefit plan that is subject to the provisions of the Federal Employees Health Benefits Act (FEHBA). Similarly, the rule clarifies that no Form T–1 is required for any trust that meets the

statutory definition of a labor organization and files a Form LM–2, Form LM–3, or Form LM–4 or trust that the LMRDA exempts from reporting, such as an organization composed entirely of state or local government employees or a state or local central body.

On July 21, 2009, the Department held a public meeting to solicit comments from representatives of the community that would be affected by a proposal to rescind the Form T–1, return subsidiary organization reporting to the Form LM–2, and revise the interpretation regarding wholly public sector intermediate bodies.

On December 30, 2009, following notice and comment, the Department published a rule extending for one year the filing due date of all Form T–1 reports required to be filed during calendar year 2010 (74 FR 69023). In response to the notice, the Department received 128 timely comments from labor organizations, public interest groups, and employer or trade associations. The extension does not affect those reports due during calendar year 2011 or beyond. This extension prevented unions from incurring costly reporting burdens pending a rulemaking to rescind the Form T–1 regulation.

Subsequently, on February 2, 2010, the Department published the NPRM proposing to rescind the Form T–1, to return reporting on a union's wholly owned, financed, and controlled subsidiary organizations to the Form LM–2, and to revise the interpretation regarding wholly public sector intermediate bodies (75 FR 5456).

B. Reasons for the Proposal To Rescind the October 2, 2008 Form T–1 Final Rule

The Department proposed to rescind the 2008 Form T–1 rule because on review it considered the trust reporting required under the rule to be overly broad in requiring union reporting concerning many entities, including trusts funded by employers pursuant to collective bargaining agreements, without an adequate showing that such reporting is required to prevent circumvention and evasion of the Title II reporting requirements. Moreover, the Department stated that it had reviewed the 2008 rulemaking record and no longer viewed the separate reporting requirements as set forth in the 2008 Form T–1 rule as justified in light of the burden they imposed.

Under the Act, the Secretary has the authority to "issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this title and such other reasonable rules and regulations (including rules concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. 438. The Secretary's regulatory authority thus includes the reporting mandated by the Act and discretionary authority to require reporting on trusts falling within the statutory definition of a trust "in which a labor organization is interested." 29 U.S.C. 402(l). The Secretary's discretion to require separate trust reporting applies to trusts if: (1) The union has an interest in a trust as defined by 29 U.S.C. 402(l) and (2) reporting is determined to be necessary to prevent the circumvention or evasion of Title II reporting requirements. 29 U.S.C. 438. As both the Department and the court have recognized, this is a two-part requirement. *See AFL–CIO* v. *Chao,* 409 F.3d 377, 386–87 (DC Cir. 2005) (discussion of two-part test).

As such, a key feature of the Secretary's discretionary authority to require trust reporting is the requirement that the Secretary conclude that such reporting is "necessary" to prevent circumvention or evasion of a labor organization's requirement to report on its finances under the LMRDA. The Department has concluded that the 2008 Form T–1 rule is overly broad in requiring financial reporting concerning many trusts, including trusts funded by employers pursuant to collective bargaining agreements, without the required showing that the rule is necessary to prevent circumvention or evasion of Title II reporting requirements.

In particular, the 2008 Form T–1 rule provides that, for purposes of evaluating whether payments to a trust indicate that the union is financially dominant over the trust, payments made by employers to trusts under section 302(c) of the LMRA, 29 U.S.C. 186(c) (Taft-Hartley funds), should be treated as funds of the union. Taft-Hartley funds are created and maintained through employer contributions paid to a trust fund, pursuant to a collective bargaining agreement, and must have equal numbers of union and management trustees, who owe a duty of loyalty to the trust. Taft-Hartley funds are established for the "sole and exclusive benefit of the employees" and are excepted from the statutory prohibition against an employer paying money to employees, representatives, or labor organizations. *See* 29 U.S.C. 186(a) and (c)(5).

The Department recognizes that its authority under section 3(l) to require reporting of trusts in which a union "has an interest" is sufficiently broad to encompass Taft-Hartley plans funded by employer contributions. However, as explained above, this is only the first part of the section 208 analysis. The second part of the analysis requires that the Secretary determine that the reporting is necessary to prevent circumvention or evasion of the reporting of union money subject to Title II.

As explained in the 2008 Form T–1 rule, section 201 of Title II of the LMRDA requires that unions "file annual, public reports with the Department, detailing the labor organization's financial condition and operations during the reporting period, and, as implemented, identifying its assets and liabilities, receipts, salaries and other direct or indirect disbursements to each officer and all employees receiving $10,000 or more in aggregate from the labor organization, direct or indirect loans (in excess of $250 aggregate) to any officer, employee, or member, any loans (of any amount) to any business enterprise, and other disbursements." 73 FR at 57413 (citing 29 U.S.C. 431(b)). Further, section 201 requires that such information shall be filed "in such detail as may be necessary to disclose [a labor organization's] financial condition and operations." 73 FR at 57414 (citing *Id.*). Significantly, each listed reportable financial transactions to be reported is one that reflects upon the union's financial condition and operations, not the financial condition and operations of another entity.

In sum, the Department proposed to rescind the rule implementing the Form T–1 because it considers the breadth of trust reporting required under the rule to be overly broad and not necessary to prevent the circumvention and evasion of the Title II reporting requirements. Moreover, the Department reviewed the 2008 Form T–1 rulemaking record and no longer views the Form T–1 separate reporting requirements as justified in light of the burden they impose.

C. Reasons for the Proposal To Reinstate Subsidiary Reporting on the Form LM–2

Prior to the 2003 Form LM–2 changes that first required separate Form T–1 trust reporting, labor organizations were required to report concerning their subsidiary organizations on the Form LM–2.[1] Subsidiary organizations were defined in the Form LM–2 instructions

[1] The 2003 changes retained the requirement for labor organizations to include the receipts of their subsidiaries when determining if they have met the $250,000 filing threshold. Yet, the transactions of the subsidiaries were not themselves on the form. See Form LM–2 Instructions, Part II.

as "any separate organization of which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization." *See* pre-2003 Form LM–2 Instructions, Section X.[2] This requirement was dropped in the October 2003 modifications to the Form LM–2. *See* 68 FR at 58414. While not made explicit in the final regulation, the Department's assumption at that time was that the prior subsidiary organization reporting would be captured by the new requirement for trust reporting on the Form T–1, which was also introduced in that final rule. This result is implied by the Department's comment in the 2008 Form T–1 rule that "the Form T–1 closes a reporting gap under the Department's former rule whereby labor organizations were required to report on 'subsidiary organizations,' " and not more broadly on any other trusts in which they have an interest. 73 FR at 57412.

The NPRM set out the Department's understanding that a substantial number of the Form T–1 reports it would receive would be for these subsidiary organizations. During the 2004 reporting year, the last year in which unions filed annual reports on the old Form LM–2, approximately 1,087 filers indicated that they had at least one subsidiary organization. Additionally, in the Department's experience approximately 50 of the largest labor organizations have two additional subsidiaries. Thus, the Department estimates approximately 1,187 subsidiaries for Form LM–2 filers (the 1,087 filers with subsidiaries plus an additional 100 for the 50 unions with two subsidiaries). The Form T–1 final rule estimated that an average of 3,131 Form T–1 reports would be filed in each fiscal year (the 2008 Form T–1 rule referenced "3,130.54" Form T–1 reports, but this rule rounds this figure up to 3,131 reports). 73 FR at 57441. Therefore, the Department estimates that more than one third of Form T–1 reports would be for subsidiary organizations. *See* Paperwork Reduction Act Analysis.

The return of subsidiary organizations to the Form LM–2 reporting requirements will restore the prior status quo concerning the financial disclosure of such entities, which was that a union must disclose the financial information of its subsidiary to the same level of detail as other assets of the union. *See* pre-2003 Form LM–2 Instructions, Section X.

Under the pre-2003 Form LM–2 reporting regime a labor organization could report on its subsidiary organizations in one of three ways. The filer could (1) consolidate the financial information for the subsidiary and the labor organization in a single Form LM–2; (2) file a separate Form LM–2 report for the subsidiary organization, along with the Form LM–2 for the union; or (3) file a regular annual report of the financial condition and operations of the subsidiary organization along with the Form LM–2 for the union.

In the NPRM, the Department proposed to allow Form LM–2 filers only two options for reporting subsidiaries. The Department proposed that Form LM–2 filers can either (1) consolidate their subsidiaries' financial information on the union's Form LM–2, or (2) they can file, with their Form LM–2, a regular annual report of the financial condition and operations of each subsidiary organization, accompanied by a statement signed by an independent public accountant certifying, for each subsidiary, that the financial report presents fairly the financial condition and operations of the subsidiary organization and was prepared in accordance with generally accepted accounting principles. The NPRM also proposed to revise the Form LM–3 subsidiary organization instructions to conform with these proposed revisions of the Form LM–2 subsidiary organization instructions.

D. Review of Comments Received in Response to the NPRM's Proposal To Rescind the Form T–1 and Return Subsidiary Organization Reporting Requirement to the Form LM–2

The Department received 20 comments in response to its February 2, 2010 NPRM. Of these comments, two employer associations and two public policy groups expressed opposition to the Department's proposal to rescind the Form T–1 and return subsidiary organization reporting to the Form LM–2 reporting requirements, while 14 comments, from labor organizations, supported the proposal. Another comment, from a public policy group, acknowledged that some of the Form T–1 requirements would have been "unduly burdensome for unions and of little value to members," but nevertheless recommended a "fine-tune" of the requirements rather than rescinding them entirely.[3]

1. Proposal To Rescind the Form T–1

a. Trust Reporting Requirements of the Form T–1 Are Not Justified in Light of the Burden Imposed Upon Reporting Labor Organizations

Numerous union comments that supported the proposed rescission asserted that the separate trust reporting requirements in the 2008 Form T–1 are not justified in light of the burden they impose. Specifically, two unions asserted that separate reporting on the Form T–1 is particularly burdensome because it establishes the reporting threshold for an individual union based on the contributions or appointments of all unions to a particular trust in the aggregate, without any consideration of a *de minimis* threshold to reduce the reporting burden on unions with only nominal involvement in a trust. For example, one union comment argued that the "[Form T–1] aggregation threshold mandates that by virtue of giving even $1 to a trust, an individual LM–2 filer could be required to file its own T–1 report on the trust if at the end of its fiscal year the trust realizes that more than half of its funds were provided by labor organizations in the aggregate." Further, one union comment stated that by aggregating all union appointments or contributions to a particular fund, the Department assumes affiliations between these unions where none may exist. Moreover, one union comment contended that the burden placed upon unions to complete Form T–1 reports must be considered in light of the fact that many of the trustees of these independent trusts require regular audits, and the trusts likely file a publicly available Form 990 with the Internal Revenue Service (IRS), which the IRS redesigned in 2008 to include much greater detailed reporting on a non-profit trust's key financial, compensation, governance, and operational information.[4]

Related to the burden imposed upon unions required to file Form T–1 reports, several union comments supported the Department's proposal to rescind the Form T–1 by explaining that the Form T–1 reporting regime is both unworkable and fundamentally unfair because "the trusts for which unions must file reports are separate and independent legal entities." One union expressed concern that under the 2008 Form T–1 rule, trusts have no legal obligation to provide unions with the financial information necessary to properly file a Form T–1 report. This

[2] The pre-2003 Form LM–2 Instructions can be viewed at *http://www.regulations.gov.*

[3] One comment from a union only addressed the intermediate body issue, and not the Form T–1 or subsidiary reporting.

[4] *See http://www.irs.gov/charities/article/0,,id=218938,00.html.*

union comment further explained, that in fact, "trustees may believe or be advised by legal counsel that providing the necessary information is a breach of the trust's fiduciary duties owed to participants and beneficiaries [as well as a violation of] individual privacy rights and other legal obligations." Finally, this union comment concluded that "trustees also may believe they have a duty not to incur costs to maintain records unique to the Form T–1 reporting requirements." Several union comments supported the Department's proposal to rescind the Form T–1 because they were concerned that if a trust should refuse to timely provide the necessary information, then the union may incur liability under the LMRDA, while the uncooperative trust avoids any liability. Union comments asserted that, as drafted, the 2008 Form T–1 rule has no "safe harbor" provision for unions that document a good faith effort to obtain and fully and accurately report all necessary information so as to avoid liability for failure to file a report.

Comments in opposition to rescission of the Form T–1, as discussed below, generally asserted that the Form T–1 trust reporting is necessary to prevent circumvention or evasion of Title II reporting requirements. One public policy group argued that the Department's proposal to rescind the 2008 Form T–1 rule is unsupported. However, none of the comments opposing the proposed rescission of the Form T–1 included specific information or an argument showing that separate trust reporting is justified in light of the burden it imposes on labor organizations. Nor did any comments dispute the issues raised by unions regarding the burden associated with gaining trusts' cooperation with providing the necessary information to complete Form T–1 reports.

The Department agrees with comments that support the rescission by asserting that multiple T–1 filings would be required on a single trust entity and there is no *de minimis* threshold for reporting. Further, while the 2008 Form T–1 Final Rule explained the Department's view that it would not violate the fiduciary duties of a trust for it to cooperate with a labor organization by providing information necessary for the preparation of the Form T–1, 72 FR 57424, this would not eliminate the logistical and practical burdens identified by the unions concerning this information gathering requirement. Accordingly, the Department concludes that the Form T–1 should be rescinded given the burden imposed by separate trust reporting.

b. The 2008 Form T–1 Is Not Necessary To Prevent the Circumvention or Evasion of Title II Reporting Requirements

Of the comments offered in support of the Department's proposal to rescind the Form T–1, many comments asserted that the Form T–1 is overbroad in the inclusion of Taft-Hartley funds, requiring burdensome reporting on trusts over which a union neither has managerial control nor financial dominance. A federation of labor organizations stated that the Form T–1 is not in compliance with *AFL–CIO* v. *Chao,* as it treats payments made by employers pursuant to a collective bargaining agreement as establishing "financial domination" by a labor organization, without any "empirical evidence" of such domination, as the comment asserts the *AFL–CIO* v. *Chao* decision required. Further, in countering the premise that unions dominate Taft-Hartley trusts by controlling the allocation of labor costs between wages and benefits, the commenter concurred with the Department's statement in the NPRM that there was no indication of any relationship between employer-financed trusts and the Title II reporting requirements, much less circumvention or evasion. Several other comments submitted by unions similarly rejected the use of employer contributions to infer union dominance.

Three comments that opposed the proposal to rescind asserted that the Form T–1 trust reporting is necessary to prevent circumvention or evasion of Title II reporting requirements, and that unions should not be permitted to avoid reporting these funds by transferring funds to a trust. One comment asserted that within the 2008 Form T–1 rule-making record the Department acknowledged that transfers of money from a labor organization to a trust may constitute circumvention of the union's reporting requirement. Finally, one public policy group specifically argued that the Department's proposal that the 2008 Form T–1 rule is overbroad is unsupported.

As explained above, under section 208 of the Act, the Secretary may require trust reporting only when she concludes it is necessary to prevent the circumvention or evasion of a labor organization's Title II reporting requirements. *See* 29 U.S.C. 208. The Title II reporting requirements for a labor organization require it "to disclose *its* financial condition and operations." 29 U.S.C. 201(b) (emphasis added). Consequently, trust reporting is permissible to prevent a labor organization from using a trust to circumvent reporting of the *labor union's* finances. The 2008 Form T–1 NPRM asserted that money paid into Taft-Hartley trusts "reflects payments that otherwise could be made directly to employees as wages, benefits, or both, but for their assignment to the trusts." 73 FR 11761 (NPRM); 73 FR 57417 (final rule). Nevertheless, as many union comments contend and as the Department stated in its NPRM, these underlying wages and benefits would not have been reported on a Form LM–2. Therefore, it is not apparent that these payments to a Taft-Hartley trust give rise to circumvention or evasion of Title II reporting. Moreover, although the Department has recognized that it is possible for a union to contribute its funds to a Taft-Hartley trust in order to circumvent Title II reporting requirements, no evidence has been presented to demonstrate that this is in fact occurring.

The Department now concludes that the scope of the 2008 Form T–1 rule was overbroad because it covered many trusts, such as those funded by employer contributions, without an adequate showing that reporting for such trusts is necessary to prevent the circumvention or evasion of the Title II reporting requirements. In this regard, the Department agrees with multiple union comments asserting that money contributed by the employer to a Taft-Hartley fund is not generally the property of the union, and thus its disclosure by a union would not "disclose *its* financial condition and operations." 29 U.S.C. 201(b) (emphasis added). Conversely, the Department concludes that a union's nondisclosure of such funds would not be an evasion of the union's reporting requirement.

In reaching this conclusion, the Department notes that in *AFL–CIO* v. *Chao,* the Court of Appeals for the DC Circuit held that the first "Form T–1 reaches information unrelated to union reporting requirements and mandates reporting on trusts even where there is no appearance that the union's contribution of funds to an independent organization could circumvent or evade union reporting requirements." *AFL–CIO* v. *Chao,* 409 F.3d at 389. In agreement with numerous union comments, the Department finds that the 2008 Form T–1 rule may be overly broad in the same manner because of its inclusion of certain Taft-Hartley plans. Consequently, the Department agrees with numerous comments received from unions and concludes that the 2008 Form T–1 rule is overly broad, requiring reporting in instances where the failure to report the funds at issue would not

circumvent or evade a union's reporting requirement. Further, none of the comments presented any evidence of unions contributing funds to Taft-Hartley funds, nor did any comments provide any other arguments that counter the Department's proposal that the Form T–1 is overbroad in respect to its inclusion of Taft-Hartley funds.

In the NPRM, the Department acknowledged that the 2008 Form T–1 rule was premised upon public disclosure policies in addition to preventing circumvention of Title II reporting. The 2008 final rule stated that, "by requiring that labor organizations file the Form T–1 for specific section 3(l) trusts, labor organization members and the public will receive some of the same benefit of transparency regarding the trust that they now receive under the Form LM–2, thereby preventing a labor organization from using the trust to circumvent or evade reporting requirements." 73 FR 57413. In this regard, the 2008 final rule provided for more general reporting than would be "necessary to prevent" the circumvention of Title II reporting requirements. As stated above both by the Department and numerous union comments, the breadth of the 2008 final rule required reporting in instances where a union is not in a position to use a trust to circumvent or evade its Title II reporting requirements. Accordingly, with respect to these trusts, it is not clear how the Form T–1 "provides transparency of *labor organization finances* and effectuates the goals of the LMRDA." (emphasis added) 73 FR 57414.

In addition to comments relating to the Form T–1 burden and Taft- Hartley funds, the Department received three comments generally opposing its proposed rescission of the Form T–1 on the ground that Form T–1 reporting would increase transparency, which would advance the union's interests in operating as "a democratic institution," by providing financial information to union members, employers, and the general public. One public policy group viewed aspects of the Form T–1 requirements as beneficial in providing union members with an understanding about union finances and potential conflicts of interest by officials that could lead to improper use of union funds; however, this comment acknowledged that aspects of the Form T–1 reporting requirements were "unduly burdensome for unions and of little value to members." Thus, this comment called for a "fine tuning" of the Form T–1 reporting requirement rather than the proposed rescission.

The Department acknowledges the benefits of labor-management transparency, and it continues to support effective, meaningful, and appropriate reporting and disclosure requirements for unions and their officials, employers, and labor relations consultants. While the Department acknowledges its authority to establish trust reporting under section 208, when determined necessary to prevent the circumvention or evasion of the Title II reporting requirements, the Form T–1 rulemaking record is insufficient to justify the scope of the separate trust reporting requirements in the 2008 Form T–1 rule, especially in light of the Department's proposal to reinstate subsidiary reporting for many funds that would have filed the Form T–1, discussed below, and the burden imposed by the Form T–1 reporting requirements. Indeed, the comments in opposition did not provide any new examples of union contributed plans or entities that would evade reporting and disclosure requirements.[5] Nor did they provide other evidence or arguments to alter the rulemaking record in favor of retaining the Form T–1, although they did reference potential entities that are not wholly owned, controlled, and financed by a single union, which are dealt with later in the section addressing the return of subsidiary reporting to the Form LM–2. After careful consideration, the Department does not find the comments in opposition to the NPRM to be persuasive, and will rescind the Form T–1 and its implementing regulations.

2. Proposal To Reinstate Subsidiary Reporting to the Form LM–2

a. Requiring Subsidiary Reporting on the Form LM–2 Will Increase Transparency and Provide More Detailed Itemization of Subsidiaries

The Department received numerous union comments in support of returning subsidiary reporting to the Form LM–2 reporting requirements. A federation of labor organizations affirmed the Department's proposal in the NPRM that subsidiary reporting will provide greater detail than the Form T–1 for such closely related entities to the union, and would do so in a more "convenient format" than the Form T–1. Specifically, the comment stressed that the Form LM–2 requires more detailed information on union assets and liabilities. Numerous unions offered general support for the return of subsidiary reporting, as furthering transparency and limiting burden, with several concurring with the comments offered by the federation of labor unions. None of the comments received in response to the NPRM provided any evidence or arguments to refute the Department's assertion that subsidiary reporting on the Form LM–2 will increase disclosure concerning these entities in comparison with what is required on the Form T–1.

The Department received four comments that generally opposed its proposal to reinstate subsidiary reporting to the Form LM–2. Two of these comments made non-specific arguments that requiring unions to report only on funds that are wholly owned, controlled, and financed reduced transparency and is contrary to the purposes of the LMRDA. One of these comments asserted that reinstating subsidiary reporting would permit unions to transfer "billions of dollars in contract negotiated funds and union dues" to entities not covered by the Form LM–2 subsidiary reporting requirements.

The Department concludes that subsidiary reporting on the Form LM–2 increases the level of disclosure of union core financial activities. First, the Form T–1 reduced the level of reporting detail regarding the reporting of assets and liabilities of subsidiary organizations. The Form LM–2 includes Schedules 1 through 10, which require detailed itemization of the union's assets and liabilities. The Form T–1 required that unions report their assets and liabilities only in the aggregate at Items 21 and 22. Thus, a report on a subsidiary's assets and liabilities will have more information when the filer uses a Form LM–2, rather than a Form T–1. Second, the Form T–1 reduced the level of transparency and disclosure of these entities because it has a higher reporting threshold for receipts and disbursements. The Form LM–2 requires that all union assets, liabilities, receipts and disbursements exceeding $5,000 in value be itemized and reported. The Form T–1 had a reporting threshold of $10,000. A union, therefore, reporting on a subsidiary's financial transaction would disclose a greater number of transactions using the Form LM–2, as compared to the Form T–1.

[5] A public policy group cited a payment received by an international union officer from a "union vendor." This example is not within the scope of the reporting requirements for labor organizations, but rather would be reportable by the officer on the Form LM–30, Labor Organization Officer and Employee Report, and by the vendor on the Form LM–10, Employer Report, as a payment to a union officer by a business that deals with the officer's union.

b. Subsidiaries Are Wholly Owned Assets of the Union and Should Be Reported Using the Same Reporting Threshold and Itemization Requirement That Apply to Other Union Assets

In support of the Department's proposal to reinstate subsidiary reporting on the Form LM–2, one international union stressed that subsidiary funds are union funds and that the Form LM–2 is incomplete without the inclusion of subsidiaries. It also stated that subsidiary reporting on the Form LM–2 creates uniform reporting of all union assets. Another national union offered similar support for the need for subsidiary reporting to make the Form LM–2 complete. In addition, a national union comment supported the return of subsidiary reporting as fulfilling the purposes of the LMRDA as well as providing union members with a "reliable source" for understanding how their dues were being spent.

The Department concludes that union reporting on subsidiary organizations is more appropriate on the Form LM–2 than on the Form T–1 because subsidiaries are wholly owned properties of labor organizations, similar to any other account, fund, or asset.[6] As a result, for a union's Form LM–2 to be complete, the Department concludes that the report should include its subsidiaries, as this will result in a reporting scheme that treats all assets of the union uniformly, *i.e.,* with the same reporting threshold and level of itemization. By including subsidiaries on the Form LM–2 and treating all union assets uniformly, the Form LM–2 will produce a more comprehensive and accurate report of a union's financial condition.

In addition, the Department received several comments asserting that the inclusion of union subsidiaries on the Form LM–2 will reduce confusion among members who seek financial information about their union. The Department agrees with these comments, and concludes that the inclusion of subsidiaries on the Form LM–2 will alleviate potential misunderstandings relating to the reporting of a union's total annual receipts. In the NPRM, the Department explained that for purposes of determining whether a particular union must file a Form LM–2 (receipts of $250,000 or more) receipts of subsidiaries must be counted, even though, under the From T–1 reporting regime these receipts are to be reported on the Form T–1, and not on the Form LM–2. Thus, some unions with a subsidiary are required to file an LM–2, even though they may have reported receipts of less than $250,000. This anomaly can lead to confusion on the part of union members and the public. For these reasons, the Department concludes that incorporating subsidiaries on the Form LM–2 provides more information about the subsidiaries and a more accurate report of the union as a whole, reducing the potential for misunderstandings by union members and the public.

c. Comments Opposing the Rescission Contend That a Reporting Gap Will Exist Notwithstanding the Reinstatement of Subsidiary Reporting on the Form LM–2

The Department received two comments that acknowledged the need for subsidiary organization reporting but specifically asserted that there also is a need for reporting on trusts that are not wholly owned, controlled, and financed by a single union, such as where a union may have a majority of a trust's board as members or contribute more than half of the trust's funds. One of these comments contended that relying upon "complete ownership" as the trigger for reporting rather than union control or financial dominance, creates a reporting gap by removing from the trust reporting requirement approximately two thirds of the trusts that the Department estimated would file the Form T–1. In support of its position, that a significant reporting gap will exist, the comment cited the four examples that have been utilized throughout the Form T–1 rulemaking history: A joint training fund; a statewide strike fund; a building fund financed partly with union members' pension funds; and a credit union funded 97% by the funds of one local union, as funds not covered by the Department's proposed subsidiary reporting. Although specifying only these four examples, the comment asserts that "countless" examples exist.

The Department does not agree with this commenter's contention that the proposed rule will lead to a significant loss of relevant information for union members on multiple-union owned funds, as opposed to subsidiaries. Initially, the commenter did not take into account the Department's conclusion that reporting from Taft-Hartley trusts is not necessary to prevent the circumvention or evasion of the Title II reporting requirements. In this regard, the Department considers that such Taft-Hartley trusts, in particular joint apprenticeship and training funds, constitute a large portion of the Form T–1 reports that the Department would have received. Indeed, one of the four examples from the rulemaking record cited by the comments is a joint training fund.

Furthermore, none of the three examples of multiple-union contributed funds cited by the comments are recent, and two date back forty or more years.[7] No comments offered any recent examples of multi-union entities that illustrate methods in which unions circumvent or evade their reporting requirements. While it appears that rescission of the Form T–1 will eliminate LMRDA reporting requirements for certain multiple-union entities that are not Taft-Hartley funds, the Department is unaware of any source of data from which to estimate, much less identify such entities. Thus, the rulemaking record does not indicate that there are presently significant numbers of entities and funds that are evading necessary disclosure, such that a separate trust reporting regime is presently warranted in addition to subsidiary reporting on the Form LM–2. Nevertheless, as stated above, the Department retains authority pursuant to section 208 to establish trust-related reporting requirements for unions, if necessary and appropriate.

In addition, the Department considers the proposed subsidiary reporting on Form LM–2 to be more expansive than some of the comments objecting to the proposal contend, as demonstrated in the Department's long-standing LMRDA Interpretive Manual. Initially, a subsidiary organization must be "wholly owned" and "controlled by a single union," but such ownership and control can be vested in or exercised by a single reporting labor organization *or its officers or its membership.* The *members* of a union include individuals and can also include constituent organizations, such as local unions. Thus, where a District Council, for example, holds a portion of the equity ownership (*i.e.,* common stock) of a corporation that owns the building that

[6] Indeed, in *U.S.* v. *Hartsel,* the Sixth Circuit held that a charitable organization with a separate not-for-profit tax status constituted a fund of a labor organization for purposes of section 501(c) of the Act, as the union in question created the fund, financed it by soliciting contributions from the members, and managed and controlled it by appointing its officers. *U.S.* v. *Hartsel,* 199 F.3d 812, 819–820 (6th Cir. 1999); *see also U.S.* v. *LaBarbara,* 129 F.3d 81 (2d Cir. 1987) (holding that assets of a not-for-profit building corporation controlled by a union comprise the assets of a labor organization under section 501).

[7] These examples were presented first in 2002 NPRM proposing the Form T–1. 72 FR 79283. The Department also notes that federal credit unions are regulated by the National Credit Union Administration (NCUA). See *http://www.ncua.gov.* The NCUA provides financial information concerning Federal credit unions.

is used to house the District Council, and where the balance of the outstanding common stock is held by local labor organizations that are members of the Council, the Building Corporation in question comes within the definition of a subsidiary organization, provided that the initial financing came from the Council and/or its members, and that the corporation is governed or controlled by the Council and/or its members. The "members" of the District Council would include its constituent body local unions. *See* LMRDA Interpretative Manual (IM) entry 215.200. Similarly, a development corporation is a subsidiary organization if it was formed to hold title to a building in which various locals of a Joint Council maintain their offices, and all of the stock in the corporation is held by the constituent locals of the Joint Council, the latter of which controls and finances the corporation. *See* IM entry 215.300.

Further, a subsidiary organization is considered to be wholly financed if the *initial* financing was provided by the reporting labor organization even if the subsidiary organization is currently wholly or partially self-sustaining. See the pre-2003 Form LM–2 Instructions; the Form LM–3 Instructions; and the Form LM–2 Instructions, as revised by this rule. *See* IM entry 215.700.

The comments opposing the reinstatement of subsidiary reporting on the Form LM–2 rely upon the same four examples that appear throughout the Form T–1 rulemaking record as support for their position that a reporting gap exists for multi-union entities. The Department is not persuaded by these comments because no commenter has provided further examples, and the Department is unaware of any source of data from which to estimate, much less identify such entities. Given the advantages of greater accessibility of information to members and the public, as well as greater transparency with more detailed financial information, the Department will reinstate subsidiary organization reporting to the Form LM–2 as proposed.

d. Consolidating Reporting on One Form LM–2 Report or With an Attached Audit Report, Filed With the Union's Form LM–2 Is More Convenient and Less Misleading for Members

Related to the Department's reinstatement of subsidiary reporting on the Form LM–2, the Department also proposed that the instructions for subsidiary reporting on the Form LM–2 be changed to permit LM–2 filers only two options for reporting subsidiary information. The Department proposed that reporting labor organizations can either (1) consolidate their subsidiary's financial information on their Form LM–2 report, or (2) they can file, with their Form LM–2 report, a regular annual report of the financial condition and operations of each subsidiary, accompanied by a statement signed by an independent public accountant certifying, for each subsidiary, that the financial report presents fairly the financial condition and operations of the subsidiary and was prepared in accordance with generally accepted accounting principles. While permitting labor organizations these two options for reporting on subsidiary organizations, the Department also proposed to rescind one option previously available to reporting labor organizations—that of filing a separate LM–2 report with only the subsidiary's financial information.

In the NPRM, the Department reasoned that permitting a labor organization to file multiple LM–2 reports for any single fiscal year may create confusion for union members and the public. First, because there is only one version of the Form LM–2, it may be difficult to tell whether a filed LM–2 report is for the labor organization or for its subsidiary. Second, having an entity that is not a labor organization reporting on a form for labor organizations also may create confusion for the Department in processing the reports for public disclosure. The Department relies upon the database of Form LM–2 filers for informational, policy, and enforcement purposes. Third, where a union changes its reporting practices—one year including the subsidiary and filing a separate form the next—conducting a year-to-year comparison becomes difficult, which also affects the Department's ability to effectively use the Form LM–2 filer database for policy and enforcement decisions. Finally, in some cases, transparency may be increased when the union and the subsidiary share certain expenses that standing alone fall below the itemization threshold, but when combined in a single report, will then be itemized. In sum, consolidation has the virtue of including all financial information (that of the union and the subsidiary) on one report, which eliminates potential confusion among union members, presents the Department with a more reliable database of Form LM–2 filers, and increases overall transparency.

Having received numerous union comments in support of this proposal and no comments in opposition to these two reporting options, the Department is implementing its proposal to permit a union to consolidate on its Form LM–2 the financial information of the union with the financial information of the subsidiary, as well as the option to file a separate financial statement certified by a public accountant. In addition, this rule implements the Department's proposal to revise the Form LM–3 subsidiary organization instructions to conform to the above-mentioned changes proposed for the Form LM–2.

e. Request To Modify the Department's Proposal With Respect to Reporting on Health Plans and Submitting Audit Reports With a Fiscal Year for a Subsidiary That Differs From That of the Reporting Labor Organization

The Department also received one union comment that, while offering support for the proposed reinstatement of subsidiary reporting on the Form LM–2 with the two proposed options available to filers, also suggested two modifications of the Department's proposal. First, it recommended that the Department exclude health plans that participate in the Federal Employees Health Benefit Program under the Federal Employees Health Benefit Act (FEHBA), 5 U.S.C. 8901, *et seq.* The union cited the treatment of Political Action Committees ("PACs") under Form LM–2 subsidiary reporting, and the Form T–1 exclusion for FEHBA plans. The Department concludes that exclusion is not necessary, as such plans established under the FEHBA are financed by employer funds rather than union funds and are not controlled exclusively by unions. Thus, these FEHBA plans generally do not constitute subsidiary organizations, and would not be included on a labor organization's Form LM–2.

Second, this union recommended subsidiary reporting instructions that permitted unions to submit audit reports for trusts that do not match the fiscal year end of the reporting union. The Department is not altering its proposal in the NPRM to require that audit reports for subsidiaries cover the same fiscal year as the union. The Department's previous Form LM–2 subsidiary reporting regime required this synchronization of fiscal years and the Department will continue that regime in this final rule. A viewer cannot reconcile the Form LM–2 with the attached audit report if the two filings cover different fiscal years. The result of such a reporting scheme would run counter to the Department's goal of establishing meaningful transparency for all of a union's assets, including subsidiaries.

Based on the Department's careful consideration of the comments

submitted, the Department will rescind the Form T–1 and its implementing regulations and will reinstate subsidiary organization reporting on the Form LM–2. Further, the Department will implement the proposed revisions to the Form LM–2 and Form LM–3 instructions for reporting on subsidiary organizations.

IV. Revised Interpretation Regarding Public Sector Intermediate Bodies

A. The Proposed Return to the Long-Standing Policy Regarding Intermediate Bodies That Contain No Subordinate Covered Labor Organizations

The NPRM proposed a return to the Department's long-standing, pre-2003 policy that the LMRDA does not cover intermediate bodies that are wholly composed of public sector organizations. In returning to this position, the Department has reconsidered the 2003 determination that extended LMRDA coverage over intermediate bodies that are wholly composed of public sector organizations when the LMRDA covered national or international labor organization to which the intermediate body is subordinate includes a private sector labor organization.

This coverage issue is controlled by the definition of "labor organization" found in Section 3(i) and (j) of the LMRDA, 29 U.S.C. 402(i) and (j).[8] For the forty years before 2003, the Department's policy in applying these sections was to exclude intermediate bodies that represented no private sector employees and that contained no local unions that represented private sector employees. In 2003, the Department altered its policy regarding the exclusion of such wholly public sector intermediate bodies, by interpreting the "which includes" condition found in Section 3(j)(5) of the statute, 29 U.S.C. 402(j)(5), as modifying the phrase "national or international labor organization" in that subsection, rather than the statutory list of intermediate bodies.[9] This interpretation resulted in capturing within the definition previously excluded "intermediate" labor organizations, *i.e.,* those that had no constituent members representing employees in the private sector. Previously, the Department's policy extended coverage over only those intermediate bodies that are subordinate to an LMRDA-covered national or international labor organization and that themselves include one or more private sector local labor organizations.

Court decisions that followed the 2003 interpretation concluded that because of the lack of clarity regarding the effect of the "which includes" condition, the statute's definition of "labor organization" is ambiguous and susceptible to two legally permissible interpretations.[10] Accordingly, the Department possesses the administrative discretion to implement a policy alternative based on the statute so long as the selected alternative is reasoned. *See F.C.C.* v. *Fox Television Stations, Inc.,* 129 S.Ct. 1800, 1811 (2009). Relying on this discretion, the Department proposed in the NPRM a return to its pre-2003 policy, which views the statute as excluding from coverage, rather than including, intermediate labor organizations that contain no local labor organization members representing employees in the private sector.

The Department's NPRM provided a rationale that both affirmatively supported the long-standing approach, and also suggested that the policy justifications made in support of the 2003 revision were, upon reconsideration, less persuasive than those favoring the forty-year view. First, the NPRM noted that support for the long-standing, pre-2003 policy stems in large part from the overall thrust of the LMRDA, and judicial decisions interpreting it, which underscore the statute's primary purpose to promote democracy, transparency and accountability in labor organizations that act on behalf of employees employed in the private sector, not the public sector. 29 U.S.C. 401(b), (c). *See Alabama Education,* 455 F.3d at 394–95; *see also Thompson* v. *McCombe,* 99 F.3d 352, 353 (9th Cir. 1996) ("A labor organization composed entirely of public sector employees is not a labor organization for purposes of the LMRDA."). Thus, excluding from coverage unions representing exclusively public sector employees is fundamental to the framework of the statute.

As discussed in the NPRM, the Department had justified its 2003 policy shift in part by suggesting that reading the statute's coverage provisions as broadly as possible offered increased transparency and accountability. 72 FR at 3738. Transparency and accountability of labor organizations are indeed valued goals, but they are not the sole, overriding purpose of the statute, and LMRDA coverage for the purpose of reporting and disclosure also exposes covered labor organizations to the full scope of Federal regulation under the Act. Taken as a whole, the NPRM stated, the Department's 2003 policy shift lacks consistency and coherence. For example, the Department's 2003 policy shift resulted in the coverage of wholly public sector intermediate bodies, although not wholly public sector international or local unions. Upon reconsideration, the NPRM asserted that the proper balance between the goals of robust union transparency and limited regulation of public sector unions should not result in an illogical dichotomy between types of public sector labor unions or reporting burdens that hinge solely on the particular tier a public sector union is placed. The NPRM concluded that when enlarged coverage for more expansive transparency is balanced with the emphasis on minimizing regulatory burdens on unions representing exclusively public sector employees, it is not the better policy alternative.

Second, the NPRM reconsidered a justification in support of its 2003 policy shift, 72 FR 3735, 3738 (January 26, 2007), which argued that labor organizations' structural and financial complexity had increased in recent decades, and this complexity supported the expansion of coverage. The district court reviewing the Department's policy rationales described this explanation as "entirely a make-weight." 539 F.Supp.

[8] Section 3(i) of the LMRDA, 29 U.S.C. 402(i), defines a "labor organization" as (1) any organization "engaged in an industry affecting commerce * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment," or (2) "any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization other than a State or local central body." The first clause of Section 3(i) applies to entities that exist, at least in part, to deal with employers concerning terms and conditions of employment. Although "employer" is defined broadly in the Act, the United States, States and local governments are expressly excluded from this definition. 29 U.S.C. 402(e). Thus, an organization is not covered under the first clause of Section 3(i), which requires that the organization deal with a statutory "employer," if it deals only with federal, state or local governments. The second clause of the definition applies to conferences, general committees, joint or system boards or joint councils—entities that are known as "intermediate" labor organizations. *See* 29 CFR 451.4(f).

[9] Section 3(j)(5) of the LMRDA, 29 U.S.C. 402(j)(5) states that, "A labor organization shall be deemed to be engaged in an industry affecting commerce if it * * * is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body."

[10] *See Alabama Education Ass'n* v. *Chao,* 2005 WL 736535 (D.D.C. Mar. 31, 2005) (holding new interpretation invalid); 455 F.3d 386 (2006) (reversing lower court and remanding to Department for further explanation of policy justifications for new interpretation); 539 F.Supp 2d 378 (D.D.C. 2008) (upholding Department's policy justification for interpretive change), 595 F.Supp. 2d (D.D.C. 2009) (denial of reconsideration).

2d at 384. Indeed, upon reexamination, the NPRM concluded that the Department's theory that a local union member not only needs to, but wants to, "ascertain[ ] the endpoint of his or her dues cast into the stream of affiliate expenditures" in order to assure financial regularity, *id.,* overstates the ends to which one must go to sustain labor organization transparency and accountability. As the NPRM stated, there has been no clear indication that such meticulous tracing of individual membership dues "in the stream of expenditures" is required to understand a labor organization's financial state.

Third, the NPRM reconsidered the empirical analysis used to support the 2003 interpretation, which traced "to the endpoint" dues of local union members employed in the private sector to their locals' national affiliate and back to the newly covered public-sector intermediate affiliates. The "dues-endpoint" analysis was used to justify the 2003 interpretation, in part to address the congressional concern that wholly public sector unions be excluded from the Act. The Department had considered that the data analyzed demonstrated a link between undisputedly covered labor organizations representing employees in the private sector and public sector intermediate affiliates of the shared national union. Based on this analysis, the Department had argued that a "public sector" intermediate body loses that attribute to a great extent (despite its composition) when it is subordinate to, and accepts contributions from, covered national and international labor organizations whose funds are derived, in part, from employees in the private sector. *See* 72 FR at 3737.

The NPRM concluded that the analysis in support of the 2003 interpretation utilized data from only two national unions, with one depicting only a remote and tenuous link between the union's private sector funds and the financial operations of its public sector intermediate bodies based on one example of a *de minimis* transfer, and the other union example being obsolete, as that union now segregates all private sector dues money, preventing it from reaching such state affiliates.[11] Thus, the NPRM concluded that any purported link established was insufficient to justify the application of statutory coverage to wholly public sector intermediate bodies. Indeed, contrary to the rationale supporting the 2003 interpretation, the Department no longer considers that intermediate bodies that do not themselves include one or more private sector local labor organizations lose their wholly public sector status as a result of such relatively inconsequential transactions. Further, as concluded in the NPRM, the 2003 interpretation was overbroad in its reach, because it would have imposed coverage on many wholly public sector intermediate bodies that in fact receive no financial support from their national or international affiliates derived from dues paid at the local level by employees working in the private sector. Based on these considerations, the Department proposed in the NPRM to return to its pre-2003 view of the statute, which establishes coverage over only those intermediate bodies that are subordinate to a national or international labor organization and that themselves include one or more private sector local labor organizations.

B. Comments Received by the Public on the Proposed Return to the Long-Standing Policy

The Department received two comments that disagreed with its proposed return to the long-standing policy regarding coverage of wholly public sector intermediate labor organizations. The first negative comment, from a public policy group, asserted that the Department should maintain "meaningful reporting" for labor organizations and reconsider the benefits of transparency created by the 2003 interpretation, while enforcing the union financial safeguard provisions of the LMRDA. Further, the comment suggests that labor organizations newly covered by the 2003 interpretation would naturally resist that coverage. The comment also argues that the two examples used in empirical analysis to justify the 2003 interpretation were "illustrative not exhaustive," and that the citation of any further examples would have been unnecessary.

The second negative comment, also from a public policy group, argued that the Department's proposal would conceal transactions of various national unions from the public. The comment also asserted that funds from private-sector unions will continue to be commingled with the funds of public sector intermediate bodies, and thus concealed from public reporting. The comment argues that the Department's position is at odds with the federal appellate decision that sustained the 2003 interpretation on statutory construction grounds, and would deny financial transparency and other LMRDA protections to members of the newly covered labor organizations and their affiliates, who are state and local public employees. Additionally, the comment offered an analysis of the FY 2009 Form LM–2 report submitted by one of the national unions subject to the 2007 Policy Statement, which presented a figure that it believed represented the national union's disbursements to its intermediate state bodies, and stated that this money derived in part from dues money paid by both public and private sector union members. The comment stressed that most state bodies of this national union do not file LM reports with the Department.

Neither of these comments significantly challenges the Department's decision to resume its pre-2003 construction of the statute. Despite the insistence of the critiques, the Department notes that it continues to maintain a robust reporting and disclosure program that requires the submission of annual financial disclosure on Forms LM–2, LM–3, and LM–4 from LMRDA-covered unions representing private sector employees, as well as from unions covered by the Civil Service Reform Act. The Department's enforcement program is similarly robust, and the union financial safeguard provisions of the Act are well guarded. The Department's goal was not to reduce the importance of union financial transparency, but rather to better conform coverage decisions to the framework of the statute, which generally excludes wholly public sector unions from its reach. As stated in the NPRM, key goals of the statute include both private sector union financial disclosure and the exclusion of wholly public sector unions from the statute's coverage.

Thus, the Department is not discounting the benefits of transparency, nor is it exaggerating the burdens, but concludes that on balance the preferred policy should exclude wholly public sector intermediate bodies from LMRDA coverage. To do otherwise would lead to an illogical dichotomy in which certain wholly public sector unions were included while others were not, based primarily on the position of the labor organization in the overall union hierarchy. The Department has accurately assessed the burdens associated with complying with not only the reporting requirements of the LMRDA but the other obligations of the statute to which a covered union is subject, and found wanting sufficient policy justification to extend coverage under the LMRDA to wholly public sector intermediate bodies.

Regarding the support in one comment for the empirical analysis that bolstered the 2003 interpretation, the

[11] As stated in the NPRM, however, the Department would not base its rule on the current (and perhaps temporary) practices of a single union.

Department concurs with the NPRM's conclusion that, upon closer scrutiny, that analysis was not sufficient to justify the changed policy, as one of the examples provided is plainly trivial and the other is obsolete. The Department received no specific comments that evidenced reasons to reconsider its current view of that analysis.[12] Neither the analysis nor the rulemaking record sufficiently demonstrates that significant sums of money from employees working in the private-sector are flowing to wholly public sector intermediate bodies.

Of course, the Department's change in interpretation has no impact on the federal appellate decision that held that section 3(j)(5) is subject to two permissible interpretations. *See Alabama Education Ass'n* v. *Chao,* 455 F.3d 386 (2006). This rule simply adopts the better policy, and one that comports with the statute's framework that excludes wholly public sector unions. In any event, both the regulated community and the courts expressed concern about the insufficient policy justification provided for the 2003 revisions. Indeed, as noted in the NPRM, the district court concluded that the state affiliates' challenges to the Department's policy justifications raised "serious issues" that "might convince the Court, were it the [policy] decisionmaker" and not limited by a narrow standard of review, to reject the Department's rationales for the new interpretation. *Alabama Education Ass'n* v. *Chao,* 539 F.Supp 2d 378, 379 (D.D.C. 2008). The limited nature of the court's review also caused the district court to overlook the "multitude of practical objections" to the new policy. *Id.* at 380 n. 2.

The Department received 11 comments in support of the interpretative change. Most commenters noted that the proposed return to the Department's long-standing policy excluding wholly public sector intermediate bodies was more logical and far more compatible with the overall purpose of the statute, which imposes reporting obligations on labor organizations representing employees primarily in the private sector. Five commenters also concurred with the NPRM's conclusion that the 2003 revised interpretation resulted in the inconsistent application of the statute to some but not all wholly public sector labor organizations. Two unions (AFSCME, NEA) supported the NPRM, stressing that the 2003 interpretation brought wholly public sector intermediate bodies within the coverage of not just the Title II reporting requirements, but the other provisions of the statute as well.

Further, four commenters agreed with the Department that both the "dues endpoint" theory, and the data used to support it, were impractical and overstated, and some went so far as to label the theory and the supporting data "absurd" and "distorted." Both national unions that were subjects of the empirical analysis supporting the 2003 revised interpretation submitted data in their comments that fully refuted both the Department's analysis itself as well as the coverage conclusions that were derived therefrom. One of the two national unions also observed that the 2003 interpretation would: Cover pure public sector bodies that receive no private sector money; include all of the state affiliates' disbursements, not just those derived from private sector dues; and bring the state affiliates under the purview of all the requirements of the LMRDA, not just Title II. This union also noted that section 201(b) of the LMRDA only requires unions to report financial information in such detail as "is necessary accurately to disclose [a union's] financial conditions and operations." The second national union submitted that most of its revenue from "private sector" locals derives from "mixed locals," consisting of private and public sector members, most of whom are public sector members. Thus, it contended, most of this revenue from these private/mixed locals actually derives from public sector members.

Three commenters suggested that union members, whether they are represented by public-sector or private-sector unions, have sufficient means by which to assess their union's financial transactions, including reporting by affiliates that may be required by the LMRDA, reporting that may be required by the labor organizations' constitution and bylaws, and any agency fee reporting that may be required. Several labor organizations referred to the excessive burdens associated with complying with the 2003 interpretation, which, they asserted, would be accompanied by little or no additional insight into the financial transactions of the newly covered labor organizations or their affiliates. Finally, several commenters, including the national affiliates of the plaintiff labor organizations that challenged the 2003 revised interpretation, suggest, for varying textual and historical reasons, that the Department's construction of the "which includes" clause in the 2003 rulemaking and ensuing litigation was fundamentally flawed.[13]

C. The Department's Policy Will Return to its Long-Standing View of the Statute

After full review and consideration of the comments on this issue, the Department will adopt the view of the statute that it held for the forty years that preceded the revised interpretation in 2003. For the reasons given here and in the NPRM, the Department concludes that the preferred implementation of the statute is one which comports with the LMRDA's primary regulatory focus on labor organizations that represent employees in the private sector, and is one which provides consistency and coherence to the Department's treatment of the statute's structure, purpose, goals, and history. In addition, we concur with those comments suggesting that the coverage of wholly public sector intermediate bodies would produce little or no incremental value to union members' understanding of the labor organization that represents them at the local level in collective bargaining or their affiliates. Although the courts have held that the statute's "which includes" clause is patently ambiguous, and thus the statute may textually permit the coverage of wholly public sector intermediate bodies, the Department now considers that there is little justification for that outcome. That the statute may permit the parsing of words in a new and different manner is not, in and of itself, enough to sustain the resulting inconsistencies in the statute's implementation or the policies underlying it, nor is it enough to sustain the abandonment of a forty-year policy. The statute's various provisions must work as a well-constructed whole, and

[12] As for one of the public policy group's analysis of the Fiscal Year 2009 Form LM–2 report for a particular national union (NEA), the Department is not clear as to how the comment reached its cited figure for the total disbursements to the union's wholly public sector intermediate bodies. This figure seems closer to the total figure for all itemized and non-itemized disbursements by the national union during the particular fiscal year. In this regard, it is understandable that most intermediate bodies, as well as locals, of this national union will not be required to file reports with the Department as a result of this rule: They do not represent any private sector employees. Indeed, the Department confirms that unions composed of exclusively "state and local public employees" will not be covered by the Department's reporting requirements, as they are not covered by the LMRDA or similar Federal labor-management statutes.

[13] One comment in particular invites the Department to conclude in this rulemaking that the pre-2003 interpretation is the only proper construction of the statute, and that court review following the 2003 revision failed to give proper weight to important parts of the statute's history that appear to foreclose the latter interpretation. As the DC Circuit held, the Department's 2003 interpretation was plausible based on both an examination of the statute's text and history, and thus, the Department declines to reconsider this issue. *See Alabama Education Ass'n* v. *Chao,* 455 F.3d 386, 394–395 (2006).

only a return to the pre-2003 policy will accomplish that goal. As a result, the Department's policy is to cover only those intermediate bodies that are subordinate to a national or international labor organization covered under the LMRDA and that themselves include one or more private sector local labor organizations.

In order to implement this interpretation, the instructions to the Forms LM–2, LM–3 and Form LM–4 will be revised to delete the reference in the "Who Must File" section to the coverage of intermediate bodies that are subordinate to covered national or international labor organization. With this deletion the instruction will simply state that "labor organizations that include or represent only state, county, or municipal government employees are not covered by these laws and, therefore, are not required to file."

V. Revisions to the Form LM–2 and Instructions

The text of the Form LM–2 and its Instructions pertaining to some sections and certain Schedules have been changed to address the requirement to report subsidiary organizations and the coverage of public sector intermediate unions. These include revisions to Sections I, II, VIII, X, and XI, and the header to the instructions describing the estimated reporting burden for filers. The complete, modified Form LM–2 instructions are included in an appendix to this rule, and the following is a section by section overview of the changes.

Section I. Who Must File: In order to implement the Department's revised interpretation concerning intermediate bodies, the instructions to the Forms LM–2 will be revised to delete the reference in the "Who Must File" section to the coverage of intermediate bodies that are subordinate to a covered national or international labor organization. The revised instructions will state that "[l]abor organizations that include or represent only state, county, or municipal government employees are not covered by these laws and, therefore, are not required to file."

Section II. What Form to File: The Department revises the instructions to indicate that all special funds and funds of subsidiary organizations should be included in the "total annual receipts" of the labor organization. Cites to revised Section VIII (Funds to be Reported) and Section X (Labor Organizations with Subsidiary Organizations) are included in the instructions. Additionally, the instructions specify that receipts of section 3(l) trusts are not to be included in "total annual receipts," unless such 3(l) trusts are subsidiary organizations of the union. Since the Department returns to the prior Form LM–2 reporting regime for subsidiaries, the instructions remove the current references to trusts that are "wholly owned, wholly controlled, and wholly financed by the labor organization," as such entities are now "subsidiary organizations."

Section VIII—Funds To Be Reported: The Department revises this section to remove any reference to the Form T–1, and to clarify that "special purpose funds" include those of subsidiary organizations (with a cite to revised Section X: Labor Organizations with Subsidiary Organizations).

Section X—Labor Organizations With Subsidiary Organizations: The Department eliminates the current Section X, which provides information on section 3(l) trusts and the Form T–1, replacing this section with information on subsidiary organizations, including the definition of a subsidiary organization and the requirement to include its financial information on the Form LM–2, and ways in which a labor organization can properly report on their Form LM–2 the necessary information about such subsidiaries. The instructions are similar to the pre-2003 instructions for subsidiaries, with the primary difference being that, as explained above, the Department provides unions with two options instead of three for filing information on subsidiaries: option one, a consolidated Form LM–2 report, or option two, the attachment of an audit report. Unions cannot file a separate Form LM–2 report for the subsidiary. Section X also includes information on what each option requires.

Section XI—Completing Form LM–2: The Department has changed the instructions to Items 10 and 11. The instructions for Item 10 no longer include any reference to the Form T–1, although basic information about the trust would still be required, as would a cite to any report filed for the trust with another government agency, such as the Department's Employee Benefits Security Administration (EBSA).

The Department splits Item 11 into two parts: Item 11(a), which is the former Item 11 referencing political action committees (PACs), and Item 11(b), which asks unions to indicate if they had a subsidiary organization during the reporting period. The instructions for Item 11 are now the instructions for Item 11(a), while the new instructions for Item 11(b) will simply state that unions must check this item if they have a subsidiary organization and must detail the name, address, and purpose of each of its subsidiary in Item 69 (Additional Information), including which filing method was chosen. The instructions also reference Section X of the instructions for more information on subsidiaries.

Schedules and Instructions for Schedules: The Department has also revised certain Form LM–2 Schedules and Instructions to reflect the rescission of Form T–1 trust reporting and the reinstatement of subsidiary organization reporting on the Form LM–2, as proposed in the NPRM. Specifically, these Schedules and Instructions include:

- Schedule 5—Investments Other Than U.S. Treasury Securities, Item 6
- Instructions for Schedules 2—Loans Receivable,
- Instructions for Schedule 5—Investments Other Than U.S. Treasury Securities,
- Instructions for Schedule 7—Other Assets
- Instructions for Schedule 12—Disbursements to Employees.

VI. Revisions to the Form LM–3, Form LM–4 and Instructions

The text of the Form LM–3 and Instructions pertaining to some sections has been changed to address the reporting of subsidiary organizations and the coverage of intermediate bodies. With respect to the Form LM–3, the Department removes Item 3(c), which currently requires a reporting labor organization to state whether the report is exclusively filed for a subsidiary organization, as the Department has removed this option, as described above. The revised Form LM–3 Instructions include changes to Sections I, VIII and X, and the revised form and instructions are included in the appendix to this rule. The revised Form LM–4 instructions include changes to Section I.

Regarding Section I (Who Must File), in order to implement the Department's interpretation of intermediate bodies, the instructions to the Form LM–3 and LM–4 will be revised to delete the reference in the "Who Must File" section to the coverage of intermediate bodies that are subordinate to a covered national or international labor organization. The revised instructions will state that "[l]abor organizations that represent or include only state, county, or municipal government employees are not covered by these laws and, therefore, are not required to file."

Regarding Section VIII, the only change is the clarification that filers have only two options for reporting subsidiaries, rather than the current

three: Either a consolidated Form LM–3 report or separate report, that of an audit by a certified public accountant. Filers can no longer attach a separate Form LM–3 for the subsidiary. Section VIII also now references Section X of the Form LM–3 instructions for more information on subsidiaries and subsidiary reporting.

The changes to Section X, Labor Organizations with Subsidiaries, are virtually identical to the changes made to the corresponding Section X of the Form LM–2. Specifically, revised Section X provides information on subsidiary organizations, including the definition of a subsidiary organization and the requirement to include its financial information on the Form LM–3, and ways in which a labor organization can properly report on their Form LM–3 the necessary information about such subsidiaries. The instructions are similar to the previous instructions for subsidiaries, with the primary difference being that, as explained above, the Department now permits unions only two options instead of three for filing information on subsidiaries: Option one, a consolidated Form LM–3 report, or option two, the attachment of an audit report. Unions no longer have the option of filing a separate Form LM–3 report for the subsidiary. The revised Section X also includes information on what each option requires.

VII. Regulatory Procedures

Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. In the Paperwork Reduction Act (PRA) analysis below, the Department estimates that the rule will result in a total burden on labor unions of less than $3 million. In addition, the elimination of the Form T–1 reporting requirements will significantly reduce compliance costs for labor organizations. In our 2008 final rule, for example, the Department estimated that the projected total cost on filers in the first year would be over $15 million in the first year and at least $8 million in subsequent years. This rule is a significant regulatory action and was reviewed by the Office of Management and Budget.

Unfunded Mandates Reform

This rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of $100 million or more, or in increased expenditures by the private sector of $100 million or more.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule 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 the United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism and has determined that the rule does not have federalism implications. Because the economic effects under the rule will not be substantial for the reasons noted above and because the rule has no direct effect on states or their relationship to the Federal government, the 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."

Analysis of Costs for Paperwork Reduction Act and Regulatory Flexibility Act

In order to meet the requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* Executive Order 13272, and the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* and the PRA's implementing regulations, 5 CFR part 1320, the Department, in proposing this rule, undertook an analysis of the financial burdens to covered labor organizations associated with complying with the requirements contained in this rule. *See* 75 FR at 5464–74. In light of the comments received on the merits of the proposal and the burdens associated with the Form T–1 rule that is being rescinded, as well as the lack of opposition to the proposed burden analyses for this rule, the Department has reviewed its earlier analyses and determined that they are sound. Thus, the Department restates below these analyses without any material changes. (However, as noted in more detail below, the Department did correct a calculation error included in the NPRM regarding the cost to Form LM–2 filers per subsidiary organization.) The Department also discusses below the general comments received in support of the PRA analysis, and the general comments associated with the 2008 rule. The focus of the RFA and Executive Order 13272 is to ensure that agencies "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." Executive Order 13272, Sec. 1. The more specific focus of the PRA is "to reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared and disseminated by or for the Federal government." 5 CFR 1320.1.

Compliance with the requirements of this rule involves essentially information recordkeeping and information reporting tasks. Therefore, the overall impact to covered labor organizations, and in particular, to small labor organizations that are the focus of the RFA, is essentially equivalent to the financial impact to labor organizations assessed for the purposes of the PRA. As a result, the Department's assessment of the compliance costs to covered labor organizations for the purposes of the PRA is used as a basis for the analysis of the impact of those compliance costs to small entities addressed by the RFA. The Department's analysis of PRA costs, and the quantitative methods employed to reach conclusions regarding costs, are presented here first. The conclusions regarding compliance costs in the PRA analysis are then employed to assess the impact on small entities for the purposes of the RFA analysis, which follows.

Paperwork Reduction Act

This statement has been prepared in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501. As discussed in the preamble, this rule would implement an information collection that meets the requirements of the PRA in that: (1) The information collection has practical utility to labor organizations, their members, other members of the public, and the Department; (2) the rule does not require the collection of information that is duplicative of other reasonably accessible information; (3) the provisions reduce to the extent practicable and appropriate the burden on labor organizations that must provide the information, including small labor organizations; (4) the form, instructions, and explanatory information in the preamble are written in plain language that will be understandable by reporting labor organizations; (5) the disclosure

requirements are implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of labor organizations that must comply with them; (6) this preamble informs labor organizations of the reasons that the information will be collected, the way in which it will be used, the Department's estimate of the average burden of compliance, the fact that reporting is mandatory, the fact that all information collected will be made public, and the fact that they need not respond unless the form displays a currently valid OMB control number; (7) the Department has explained its plans for the efficient and effective management and use of the information to be collected, to enhance its utility to the Department and the public; (8) the Department has explained why the method of collecting information is "appropriate to the purpose for which the information is to be collected"; and (9) the changes implemented by this rule make extensive, appropriate use of information technology "to reduce burden and improve data quality, agency efficiency and responsiveness to the public." 5 CFR 1320.9; *see also* 44 U.S.C. 3506(c).

A. Summary of the Rule: Need and Economic Impact

The following is a summary of the need for and objectives of the rule. A more complete discussion of various aspects of the rule is found in the preamble.

This rule rescinds the Form T–1 Trust Annual Report established by final rule on October 2, 2008, and amends the Form LM–2 Labor Organization Annual Report to require unions to include on that report information concerning its wholly, owned, controlled, and financed subsidiary organizations. (Under the Form T–1 reporting regime, these subsidiaries would have been included on a Form T–1 report, rather than on the union's annual report.). This rule also amends the Form LM–3 Labor Organization Annual Report to conform its subsidiary organization reporting to those established for the Form LM–2 in this rule. Finally, the rule also returns the Department to a prior interpretation of the Labor-Management Reporting and Disclosure Act (LMRDA), which excludes wholly public sector intermediate bodies from coverage under the Act. *See* section 3(j)(5), 29 U.S.C. 402(j)(5).

The LMRDA was enacted to protect the rights and interests of employees, labor organizations and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and labor organization officers, employees, and representatives. Provisions of the LMRDA include financial reporting and disclosure requirements for labor organizations and others as set forth in Title II of the Act. *See* 29 U.S.C. 431–36, 441. Under Section 201(b) of the Act, 29 U.S.C. 431(b), labor organizations are required to file for public disclosure annual financial reports, which are to contain information about a labor organization's assets, liabilities, receipts, and disbursements.

The Department has developed several forms to implement the union annual reporting requirements of the LMRDA. The reporting detail required of labor organizations, as the Secretary has established by rule, varies depending on the amount of the labor organization's annual receipts. The Form LM–2 Annual Report, the most detailed of the annual labor organization reports, and that required to be filed by labor organizations with $250,000 or more in annual receipts, must include reporting of loans to officers, employees and business enterprises; payments to each officer; and payments to each employee of the labor organization paid more than $10,000, in addition to other information. The Secretary also has prescribed simplified annual reports for smaller labor organizations. Form LM–3 may be filed by unions with $10,000 or more, but less than $250,000 in annual receipts, and Form LM–4 may be filed by unions with less than $10,000 in annual receipts.

On October 2, 2008, the Department issued a final rule establishing the Form T–1 Trust Annual Report, which prescribed the form and content of annual reporting by unions concerning entities defined in Section 3(l) of the LMRDA as "trusts in which a labor organization is interested." 73 FR 57412. Prior to the implementation of the Form T–1 rule, the Department's LMRDA reporting program had not provided for separate trust reporting by unions. The objective of this rule is to rescind the Form T–1 Trust Annual Report, as the Department has determined that it is overbroad, and not necessary to prevent the circumvention and evasion of the Title II requirements. This rule also reinstates a longstanding requirement, eliminated under the 2003 rule, that unions report financial information about their subsidiary organizations on Form LM–2.

The Department has defined the term "subsidiaries of labor organizations" as "any separate organization of which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization." *See* Form LM–2 Instructions, Part II: What Form to File, 68 FR 58473 (modifying pre-2003 Form LM–2); Form LM–3 Instructions, Part X, Labor Organizations With Subsidiary Organizations (reproduced at *http://www.dol.gov/olms/regs/compliance/LM3_instructions_2008.pdf*). *See also* 68 FR at 58413 (preamble to 2003 rule). The Department continues to hold the view that reporting all subsidiaries is necessary for members and the public to have an accurate understanding of a particular labor organization's financial condition. Without the inclusion of the financial information for all subsidiaries, the financial disclosures on the Form LM–2 will be incomplete. The subsidiary's assets are the labor organization's assets. Unless reported along with the union's other assets, it is not possible to accurately understand the union's finances.

Prior to the Department's development of the concept of the trust annual report, the Department's regulations required unions to report information on subsidiaries on their Form LM–2 reports. This requirement was revoked by revisions to the Form LM–2 in 2003. Labor Organization Annual Financial Reports, 68 FR 58374 (Oct. 9, 2003). The return of subsidiary organizations to the Form LM–2 reporting requirements improves the amount of financial disclosure of such entities, as compared to the disclosure provided on the Form T–1, as the Form T–1 had no equivalent to the Form LM–2 assets and liabilities Schedules 1–10, and the itemization threshold for receipts and disbursements on the Form LM–2 is $5,000 while that on the Form T–1 was $10,000. Under this rule, and as the pre-2003 Form LM–2 had long required, a union must disclose the financial information of its subsidiary to the same level of detail as other funds of the union, including details regarding assets and liabilities that were not required to be reported on the Form T–1.

The Department makes available to Form LM–2 filers two options regarding the reporting of their subsidiaries, rather than the three options formerly permitted in the pre-2003 Form LM–2 Instructions. First, the Department permits a labor union to consolidate its subsidiaries' financial information with the union's financial information on its Form LM–2 report. Alternatively, the Department will permit a labor union to file, with its Form LM–2 report, a

regular annual report of the financial condition and operations of each subsidiary organization, accompanied by a statement signed by an independent public accountant certifying that the financial report presents fairly the financial condition and operations of the subsidiary organization and was prepared in accordance with generally accepted accounting principles. When choosing to file a separate accountant's report, the union is required also to include information regarding loans payable and payments to union officers and employees in the same detail required by the Form LM–2 instructions on the related schedules (Schedules 1, 11, and 12).

The Department is not reinstating a third option previously available on Form LM–2: that of filing a separate Form LM–2 report on each subsidiary organization. In the Department's experience, the filing of a separate Form LM–2 in addition to the union's primary report creates confusion for union members and others viewing the reports in that the form is designed for unions, not segregated funds and assets. Moreover, a union must file one Form LM–2 report per fiscal year, and the filing of multiple forms by a union for its subsidiaries creates confusion as to which one is the primary form. While consolidation contains some risk of confusion, the Department's experience is that combined reports are easier to follow than separate reports. This is a particularly appropriate and desirable option for some unions with subsidiaries that perform traditional union operations, such as strike funds and other special union funds. Thus, the Department preserves this option for Form LM–2 filers.

To remain consistent with the reporting options available for Form LM–2 filers, the Department also revises the Form LM–3 instructions regarding the reporting of subsidiary organizations. Form LM–3 filers will have the same two options to report required information about subsidiaries as the Form LM–2 filers, and the reporting unions' option to file a separate Form LM–3 report on a subsidiary organization will likewise be eliminated. Again, this would avoid potential confusion for the public and would align the Form LM–3 subsidiary reporting regime with that available for Form LM–2 filers.

The obligation to report on the Form T–1 caused an increase in reporting burdens for those labor organizations with reportable trusts. Given that increase, and as stated more fully below, this rule represents a net reduction in the total filing burden for Form LM–2 filers, as the rescission of the Form T–1 removes the information collection burden associated with that form and replaces it with the reinstatement of subsidiary organization reporting, which presents only a small increase in the total Form LM–2 reporting burden. As demonstrated in the 2008 Form T–1 rule, the Form T–1 represented a total burden, for the estimated 2,292 Form LM–2 filers affected by the rule, of approximately 423,900 hours in the first year and 306,700 in the subsequent years. Additionally, the projected total cost on filers in the first year was approximately $15.2 million in the first year and approximately $8.2 million in subsequent years. 73 FR at 57441 and 57445. This rule eliminates these burdens and costs from OMB 1215–0188, although, as discussed below, the reinstatement of subsidiary reporting offsets a small portion of this burden and transfers it to the Form LM–2.

This rule does not add any burden associated with the electronic submission of reports. The Department has in place an electronic reporting system for use by labor organizations, e.LORS. The objectives of the e.LORS system include the electronic filing of current Forms LM–2, LM–3, and LM–4, as well as other LMRDA disclosure documents; disclosure of reports via a searchable Internet database; improving the accuracy, completeness and timeliness of reports; and creating efficiency gains in the reporting system. Effective use of the system reduces the burden on reporting organizations, provides increased information to members of labor organizations, and enhances LMRDA enforcement by OLMS. The OLMS Online Public Disclosure site is available for public use at *http://www.unionreports.gov.* The site contains a copy of each labor organization's annual financial report for reporting year 2000 and thereafter as well as an indexed computer database of the information in each report.

Filing labor organizations have several advantages with the current electronic filing system. With e.LORS, data from the reporting unions' electronic records can be directly imported into Form LM–2. Not only is entry of the information eased, the software makes mathematical calculations and checks for errors or discrepancies. Additionally, any attachments to Form LM–2, such as would be required for unions choosing to submit a separate independent audit report for their subsidiary organizations, could be submitted electronically with the Form LM–2 reports.

As discussed in more detail below, there is negligible, if any, new information collection burden associated with the minor change for the Form LM–3 reporting requirements regarding subsidiary organizations, nor is there any information collection associated with the proposal to change the Department's interpretation regarding wholly public sector intermediate bodies.

B. Overview of Subsidiary Reporting on Form LM–2 and Trust Reporting on Form T–1

Every labor organization whose total annual receipts are $250,000 or more and those organizations that are in trusteeship must file an annual financial report using the Form LM–2, Labor Organization Annual Report, within 90 days after the end of the labor organization's fiscal year, to disclose their financial condition and operations for the preceding fiscal year. The Form LM–2 is also used by labor organizations with total annual receipts of $250,000 or more to file a terminal report upon losing their identity by merger, consolidation, or other reason. Prior to 2003, unions required to file a Form LM–2 had to report information relating to their subsidiary organizations on the Form LM–2. (See preamble to Form LM–2.) The 2003 rule eliminated this requirement and, at the same time, established the Form T–1, which was designed to capture information about subsidiary organizations and other trusts and funds in which a reporting union held an interest. However, this portion of the 2003 rule was vacated. Under the 2008 rule, the pertinent Form T–1 requirements were reinstated. Neither the 2003 nor 2008 rules changed the longstanding requirement that Form LM–3 filers must include the assets, liabilities, receipts, and disbursements of their subsidiaries within the Form LM–3 report.

As a result of the 2003 changes to the Form LM–2, unions were required to identify subsidiaries on the Form LM–2 in Item 10, Trusts or Funds (albeit without distinguishing them from other reported trusts or funds), and they were required to calculate the total receipts of the subsidiary for purposes of the Form LM–2 filing threshold of $250,000. However, there were no further Form LM–2 reporting obligations concerning such subsidiaries. Rather, filers were required to report information on such subsidiaries on the Form T–1. As discussed in the preamble and in this burden analysis, this rule returns to the pre-2003 requirement that Form LM–2 filers also have to include on their form

such information regarding their subsidiaries.

The Form LM–2 consists of 21 questions that identify the labor organization and provide basic information (in primarily a yes/no format); a statement of 11 financial items on different assets and liabilities (Statement A); a statement of receipts and disbursements (Statement B); and 20 supporting schedules (Schedules 1–10, Assets and Liabilities related schedules; Schedules 11–12 and 14–20, receipts and disbursements related schedules; and Schedule 13, which details general membership information).

The Form LM–2 requires such information as: Whether the labor organization has any trusts (Item 10);[14] whether the labor organization has a political action committee (PAC) or a subsidiary organization (Items 11(a) and 11(b));[15] whether the labor organization discovered any loss or shortage of funds (Item 13); the number of members (Item 20); rates of dues and fees (Item 21); the dollar amount for seven asset categories, such as accounts receivable, cash, and investments (Items 22–28); the dollar amount for four liability categories, such as accounts payable and mortgages payable (Items 30–33); the dollar amount for 13 categories of receipts such as dues and interest (Items 36–48); and the dollar amount for 16 categories of disbursements such as payments to officers and repayment of loans obtained (Items 50–65).

Schedules 1–10 requires detailed information and itemization on assets and liabilities, such as loans receivable and payable and the sale and purchase of investments and fixed assets. There are also nine supporting schedules (Schedules 11–12, 14–20) for receipts and disbursements that provide members of labor organizations with more detailed information by general groupings or bookkeeping categories to identify their purpose. Labor organizations are required to track their receipts and disbursements in order to correctly group them into the categories on the current form.

The Form T–1 provided similar but not identical reporting and disclosure for section 3(l) trusts, currently including subsidiaries, of Form LM–2 filing labor organizations. The Form T–1 required information such as: Losses or shortages of funds or other property (Item 16); acquisition or disposal of any goods or property in any manner other than by purchase or sale (Item 17); whether or not the trusts liquidated, reduced, or wrote-off any liabilities without full payment of principal and interest (Item 18); whether the trust extended any loan or credit during the reporting period to any officer or employee of the reporting labor organization at terms below market rates (Item 19); whether the trust liquidated, reduced, or wrote-off any loans receivable due from officers or employees of the reporting labor organization without full receipt of principal and interest (Item 20); and the aggregate totals of assets, liabilities, receipts, and disbursements (Items 21–24). Additionally, the union was required to report detailed itemization and other information regarding receipts in Schedule 1, disbursements in Schedule 2, and disbursements to officers and employees of the trust in Schedule 3.

Although the Form T–1 had a higher reporting threshold for receipts and disbursements ($10,000) than does the Form LM–2 ($5,000), both forms require filers to provide nearly identical information regarding receipts and disbursements. For example, unions would have itemized receipts of trusts with virtually identical detail on Form T–1, Schedule 1, as does the Form LM–2 on its Schedule 14. Further, the information required on Form T–1 Schedules 2 and 3 correspond almost directly to the information required on Form LM–2 Schedules 15–20 and 11–12, respectively, although the format does not directly correlate. However, as discussed earlier, Form T–1 did not provide as much detail regarding assets and liabilities of trusts as the Form LM–2 requires. For example, although Form T–1 Items 16 and 17 correspond directly to Form LM–2 Items 13 and 15, and the information required in Form T–1 Items 18–20 is required in a different format in Form LM–2, Schedules 2 and 8–10, there is also significant information required on the Form LM–2 and not on the Form T–1. Significantly, the detailed information regarding assets and liabilities required by Form LM–2, Schedules 1–10 is not captured by the Form T–1. Thus, consolidation of subsidiaries on the Form LM–2 provides greater transparency for such entities than did the Form T–1.

Additionally, the Department provided the public with separate burden analyses for the Form LM–2 and the Form T–1, in addition to the other forms required to be filed with the Department under the LMRDA. These analyses include the time for reviewing the respective set of instructions, searching existing data sources, gathering and maintaining data needed, creating needed accounting procedures, purchasing software, and completing and reviewing the collection of information. This rule eliminates the need for a Form T–1 burden analysis, as it eliminates that form and its separate reporting regime. This rule also amends the reporting requirements for the Form LM–2 to bring subsidiary reporting back into its reporting regime, but it does not establish a new reporting regime. Thus, many of the areas analyzed in other LMRDA reporting and disclosure burden analyses are not relevant to this discussion, as the existence and basic structure and procedures of the present Form LM–2 reporting regime is not amended by this rule.

Finally, for the purposes of the analysis below, the following is a brief discussion of the similarities and differences between subsidiary organizations and other entities included within the Form T–1 reporting regime, which demonstrates that data used for evaluating the burden of the Form T–1 may also be used in evaluating the burden of reporting on subsidiary organizations on the Form LM–2. As stated in the preamble, subsidiary organizations are entities wholly owned, controlled, and financed by a union, and the Department estimates that they constitute at least one third of the expected Form T–1 reports. These subsidiaries include entities such as strike funds and building corporations, and they also include other entities unrelated to typical union functions. Other entities included within the Form T–1 include Taft-Hartley funds, which are funded by an employer pursuant to a collective bargaining agreement and established and managed jointly between union(s) and employer(s). The latter includes apprenticeship and training funds. Although the entities within the reporting regime of the Form T–1 often differ widely in terms of their structure (including within the subsidiary category itself), subsidiaries and Taft-Hartley funds share many characteristics in this area, such as size, number of officers and employees, assets, liabilities, receipts, and disbursements. As such, although subsidiaries often differ from Taft-Hartley funds in terms of function and certainly in management, they also often have commonalities in areas such as structure and typical reporting and disclosure categories.

[14] Before this rule, Item 10 also included subsidiary organizations.

[15] Before this rule, Item 11 only asked whether the labor organization had a PAC. This rule breaks Item 11 into two parts, 11(a) and 11(b), with 11(b) asking if the labor organization has a subsidiary.

C. Comments on the PRA Analysis Presented in the NPRM Regarding Subsidiary Reporting on the Form LM–2

As noted in the preamble, the Department received several comments from unions addressing the burden associated with compliance with the 2008 rule. A federation of unions noted the substantial differences between the estimated burdens from complying with the Form T–1 and the proposed rule ($15 million vs. $3 million total first year costs), offering its view that the reporting requirements in the 2008 rule are not justified in light of the burden they impose. Several other unions concurred with the federation's general conclusion. An international union asserted that the 2008 rule imposed an extreme burden on unions and section 3(l) trusts, characterizing the estimated burden associated with that rule as "ridiculously low." It emphasized the unrealistic burden that would be imposed on a union that participated only nominally in a section 3(l) trust. A national union asserted that in the 2008 rule the Department underestimated the number of Form T–1 reports that unions would be required to file and the costs associated with such reports. A public interest group stated that some of the Form T–1 reporting requirements would have been unduly burdensome for unions and of little value to members while others were of great value to members. This group did not identify what aspects of the rule were unnecessarily burdensome or offer specific changes to the proposed rule, but stated that the Department should not limit reporting to subsidiary organizations as the Department had proposed.

The comments to the NPRM did not challenge the burden analysis in this rule, nor did they provide the Department with any information or data that affects the analytical framework or assumptions underlying the analyses contained in the proposed rule. Indeed, the Department received several comments in support of certain aspects of the analysis. Although there were comments relating to the burden estimates in the 2008 rule, the focus now is appropriately on the burden associated with this final rule. Regardless of whether the 2008 rule reasonably forecast the burden associated with the Form T–1 or not, it is evident that this rule reflects a very substantial reduction in reporting burden.

D. Methodology for the Burden Estimates [16]

Initially, as stated above, this rule produces an overall reduction of burden hours for Form LM–2 filers. The Department rescinds the Form T–1, which results in a reduction of 423,913.74 burden hours in the first year and 306,736.92 in the subsequent years that an estimated 2,292 Form LM–2 filers would incur. Additionally, in the 2008 Form T–1 rule, the total cost to filers was projected to be $15,186,874.46 in the first year and $8,168,474.74 in subsequent years. 73 FR at 57441 and 57445. The burden reduction resulting from rescission of Form T–1 will be partly offset by the burden of reporting subsidiary organizations on Form LM–2, but the net burden, both in the aggregate and individually, is reduced substantially. To assess the burden savings, the Department has taken into account as appropriate the data, methodology and assumptions used to calculate the burden for Form T–1. Those places in which the analysis from the 2008 Form T–1 rule is modified or not used are noted.

The Department's analysis focuses on Form LM–2 filers. The changes to the Form LM–3 reporting requirements do not result in any significant increase or decrease to the burden for those filers. As stated above, Form LM–3 filers, prior to this rule, had three options in which to report on their subsidiaries: (1) Consolidate all financial transactions on one Form LM–3; (2) file a separate Form LM–3 for each subsidiary organization; or (3) attach an audit to the Form LM–3, prepared in accordance with the Form LM–3 Instructions for each subsidiary. In the Department's experience, a substantial majority of Form LM–3 filers with subsidiary organizations elect to file a consolidated Form LM–3, with few choosing either of the other options. Additionally, the burden for filing a separate LM–3 is virtually identical to consolidating the information on one report. The Department, therefore, does not consider that the removal of the option to file separate Form LM–3s for each subsidiary organization will result in a change to the filing burden for Form LM–3 filers.

In reaching its estimates regarding the burden on Form LM–2 filers to consolidate information regarding their subsidiary organizations, the Department considered the recurring costs associated with the rule. However, as explained below, the Department determined that non-recurring costs are nominal and therefore are only briefly addressed herein. Additionally, the Department used the Form T–1 cost and burden estimates as the basis for the estimates for consolidating subsidiary organization information on the Form LM–2 (73 FR 57436–57445). As stated above, although subsidiary organizations represent only a portion of the Form T–1 universe, and they differ from Taft-Hartley funds and other trusts in their function and management, the Department considers the similarity in the make-up of the organizations and the similar level of reporting of receipts and disbursements required by the Form T–1 and Form LM–2, as justifying the use of Form T–1 estimates. However, there are differences between Form T–1 reporting and consolidating subsidiary organization financial information on the Form LM–2, and the analysis below will address these issues.

Additionally, the Department's labor cost estimates reflect the Department's assumption that the labor organizations will rely upon the services of some or all of the following positions (either internal or external staff): The labor organization's president, secretary-treasurer, accountant, and bookkeeper. In the 2008 Form T–1 rule, the salaries for these positions are measured by wage rates published by the Bureau of Labor Statistics or derived from data reported in e.LORS.

1. Number of Subsidiary Organizations

The Department estimates that Form LM–2 filers have approximately 1,187 subsidiary organizations. This number is based on a review of Form LM–2 reports filed in 2004, the final year in which filers were required to identify on Item 10 whether they had a subsidiary organization. A review of these reports indicated that 1,087 Form LM–2 filers indicated that they had at least one subsidiary organization. In addition to this base figure, the Department took into account its experience that generally about one-half of the 100 largest labor organizations have multiple subsidiary organizations, with the remainder of such filers have only one subsidiary organization. In the Department's experience, these labor organizations have on average two additional subsidiary organizations. Therefore, the Department added 100 (2 subsidiaries × 50 labor organizations) to the 1,087 filers indicating that they had at least one subsidiary organization, for a total estimate of 1,187 subsidiaries.[17]

[16] Some of the burden numbers included in both this PRA analysis and the regulatory flexibility analysis will not add perfectly due to rounding.

[17] These figures differ from the Department's estimates in the Form T–1 analysis. *See* 73 FR

2. Hours To Complete and File a Consolidated Form LM–2: Reporting and Recordkeeping

Initially, the Department considered the issue of non-recurring burden hours associated with Form LM–2 subsidiary reporting, but it does not view the burdens such as those associated with reviewing the Form LM–2 instructions, training staff, acquiring the necessary software to complete and submit the form, and similar up-front burdens, as existing separately with subsidiary organization reporting. Therefore, unlike with the Form T–1, there are no non-recurring burdens associated with subsidiary organization reporting; only recurring ones. These burdens are already included in the Form LM–2 burden estimate, and the similar burdens related to the Form T–1 are rescinded by this proposed rule (*See* Form T–1 final rule, Table 5, 73 FR 57444). Many recurring burdens and tasks, such as those analyzed in the Form T–1 analysis, are also not included in this analysis because they did not relate to the Form LM–2 requirements or are already accounted for in the Form LM–2 burden analysis. For example, the basic labor organization identifying information, the schedules and detailed information provided in Items 1–68, and the summary statements are accounted for in the existing Form LM–2 burden analysis. Therefore, this analysis focuses on additional costs necessary to consolidate subsidiary organization information on the filer's existing Form LM–2.

Additionally, the estimated reporting and recordkeeping burden hours for those filers who choose to undertake an audit are substantially the same as those who consolidate the data on their Form LM–2, as the detail required for the audit is congruent with the information required of those filers who consolidate subsidiary information on the Form LM–2. Accordingly, the Department has analyzed below the costs associated with consolidated reporting, and assumes as part of its conclusion that the costs of the audit option are no greater than those costs associated with consolidated reporting. The Department utilized the same approach in the 2003 and 2008 rules.

a. Recordkeeping Burden Hours To Complete Schedules for Assets, Liabilities, Receipts, Disbursements, and Officers and Employees Schedules

In promulgating the 2008 rule, the Department estimated the recordkeeping burden associated with the number of disbursements, receipts, officers, and employees of trusts. 73 FR 57440–45. The recordkeeping tasks associated with gathering information required for the Form T–1 are substantially the same as the tasks required by this rule. For instance, as explained above, although the Form T–1 uses a different format and requires reporting at a higher threshold than the Form LM–2, the Form T–1 receipts schedule, Schedule 1, corresponds to Form LM–2 Schedule 14; the Form T–1 general disbursements Schedule 2 corresponds to Form LM–2 Schedules 15–20; and the Form T–1 officer and employee disbursements Schedule 3 corresponds to Form LM–2 Schedules 11–12. In other words, the union will have to gather records on other receipts, on disbursements and officer and employee payments whether the Form LM–2 or T–1 is used. Therefore, the Department has used here the same burden hours for this purpose as used in the Form T–1 rule. For the categories of assets and liabilities, the Form T–1 has no schedules, while the Form LM–2 does provide for reporting these categories in its Schedules 1–10. No additional recordkeeping burden is required to complete these schedules because unions already maintain this information in the accounting systems used to electronically complete the existing schedules for assets and liabilities. *See* 68 FR at 58439 (no recurring burden for assets and liabilities in revised Form LM–2 where schedule and software unchanged). Accordingly, the Department concludes that a Form LM–2 filer keeping records necessary to report a subsidiary organization will spend 5.49 additional hours compiling information regarding receipts, 54.15 hours compiling information on general disbursements, and 10.07 hours compiling information to report on disbursements to officers and employees. *See* 73 FR at 57442 (specifically analyzing those recordkeeping tasks for the Form T–1). The total number of hours for recordkeeping tasks is reflected below in Table 1; *see also* 73 FR 57443.

The Form T–1 analysis was based in part on a randomly selected subset of the 2,292 Form LM–2 filers in 2006 whose Form LM–2 report for that year indicated an interest in at least one trust. That analysis has been adapted here for use in analyzing reporting on subsidiaries as opposed to trusts, and includes calculations estimating the recordkeeping burden for receipts (corresponding to Form T–1 Schedule 1; Form LM–2 Schedule 14), general disbursements (corresponding to Form T–1 Schedule 2; Form LM–2 Schedules 15–20), and disbursements to officers and employees (corresponding to Form T–1 Schedule 3; Form LM–2 Schedules 11–12). Based on that analysis, the Department has derived the information-compilation hours noted above (5.49 hours for receipts, 54.15 hours for general disbursements, and 10.07 hours for officer and employee disbursements) in a similar manner, as follows:

The Department estimates that, on average, consolidated Form LM–2 filers will expend 5.49 hours a year on recordkeeping to document the information necessary to complete the Form LM–2 receipts schedule 14. Based on the random sample of labor organizations with an interest in at least one trust outlined above, Form LM–2 filers on average itemize 11 receipts on Schedule 14 (other receipts). The remaining receipts are reported as aggregates in 12 separate categories on Statement B (cash receipts): Dues, per capita tax, fees, sales of supplies, interest, dividends, rents, sales of investment and fixed assets, loans, repayment of loans, receipts held on behalf of affiliates for transmission to them, and receipts from members for disbursement on their behalf. The Department does not believe subsidiaries will have receipts from per capita taxes or that they will they hold money for members and affiliates. For the Form T–1, the Department stated that, on average, trusts will itemize 109.86 receipts each year as estimated for the Form T–1. Experience with the Form LM–2 indicates that a labor organization can input all the necessary information on an itemized receipt in 3 minutes. The total number of itemized receipts, 109.86, was multiplied by 3 minutes to reach the yearly recordkeeping burden, 5.49 hours.[18]

For the Form LM–2 disbursement schedules (Schedules 15–20), the Department estimates that, on average, consolidated filers will expend 54.15 hours a year on recordkeeping. The average Form LM–2 has 1,083 itemized disbursements. Like receipts, the Department estimates it will take 3 minutes to input all the necessary information on an itemized disbursement. The total number of itemized disbursements, 1,083, was multiplied by 3 minutes to reach the yearly recordkeeping burden, 54.15 hours.[19]

57441. In the Form T–1 analysis, the Department estimated 2,292 Form LM–2 filers would submit a Form T–1 based upon an analysis of those filers who indicated on their 2006 report that they had at least one LMRDA section 3(l) trust. In this rule, the Department derives its estimate of the number of Form LM–2 filers with subsidiaries directly from the number of Form LM–2 filers who indicated on their 2004 Form LM–2 reports that they had a subsidiary organization. The number of Form LM–2 filers with subsidiaries is smaller than the number of LM–2 filers with section 3(l) trusts because the definition of section 3(l) trusts includes more entities than the definition of subsidiaries.

[18] This number differs slightly from the 5.43 hours used in the Form T–1 analysis (73 FR 57442) due to a rounding error in that analysis.

[19] This number differs slightly from the 54.13 hours used in the Form T–1 analysis (73 FR 57442) due to a rounding error in that analysis.

Regarding the officer and employee schedules (Schedules 11–12), the Department estimates consolidated Form LM–2 filers will expend 10.07 hours on recordkeeping to compile the information necessary to complete these schedules, as Form T–1 Schedule 3 is virtually identical to Form LM–2 Schedules 11–12. The Department based its estimate on the analysis used in the 2008 Form T–1 PRA analysis, as the rule required unions to file Form T–1 reports for subsidiaries, and the Department believes, as explained previously, that the filing burden for subsidiaries greatly resembles that of the burden for filing a Form T–1 for trusts. Specifically, similar to the Form T–1 analysis, a union will not have to increase recordkeeping for officers of subsidiaries, as they are already required to keep records on its officers and key employees (including those of the subsidiary) for the IRS Form 990, including name, address, current position, salary, fees, bonuses, severance payments, deferred compensation, allowances, and taxable and nontaxable fringe benefits. (*See* 73 FR 57440–42).

Additionally, the Department, consistent with the 2008 Form T–1 burden analysis and its Form LM–2 sample, estimated that Form LM–2 filers have, on average, 21.57 employees. Although in practice subsidiaries, such as strike funds and building corporations, likely will have considerably fewer employees, the Department assumes, for purposes of estimating burden, that subsidiaries will have a comparable number of employees. Nevertheless, subsidiaries, as part of unions and thus functioning in certain purposes as employers, keep wage records for each of their employees. The filers will also have to begin keeping records on non-key employees. *Id.*

Finally, for the assets and liabilities schedules (Form LM–2 Schedules 1–10), reporting in these categories was not required for the Form T–1. As explained above, the Department does not think that there is any new recordkeeping burden for these schedules, as subsidiaries already maintain this information as accounts receivable, accounts payable, and investments.

b. Reporting Burden Hours for Data Input

As with the recordkeeping burden above, the Department concludes that the number of hours required for data input for subsidiary reporting on the Form LM–2 is substantially the same as the number of hours required for data input for the Form T–1, which was assessed in the 2008 Form T–1 rule. 73 FR at 57442. For example, vendor specific information will have to be entered regardless of amount in order to determine whether the reporting threshold for itemized reporting is met (whether that threshold is set at $5,000 or $10,000). In its 2008 Form T–1 rule, the Department estimated that Form T–1 filers will spend 3.75 reporting hours on each schedule inputting the data. As stated in that analysis, experience with the Form LM–2 in previous rulemakings indicates that labor organizations will spend, for each type of reporting (*i.e.* receipts; general disbursements; officer and employee disbursements), 15 minutes a year training new staff, 60 minutes preparing the download, 90 minutes preparing and testing the data file, and 60 minutes editing, validating and importing the data.

In this analysis, the Department has removed the 15 minutes of additional training each year from its estimate because this extra training is already accounted for in the existing Form LM–2 burden and information relating to the subsidiary is entered on the Form in the same manner as any other asset. Because the current LM–2 form has been in effect since 2005, we believe most LM–2 filers have already conducted the necessary internal training to familiarize staff with reporting procedures. However, as in the Form T–1 analysis, the Department estimates that Form LM–2 filers will spend 3.5 hours inputting data for receipts (on Form LM–2, Schedule 14, which corresponds to Form T–1, Schedule 1); officer and employee disbursements (on Form LM–2, Schedules 11–12, which correspond to Form T–1, Schedule 3); the remaining disbursements (on Form LM–2, Schedules 15–20, which correspond to Form T–1, Schedule 2); as well as for the assets and liabilities schedules (on Form LM–2, Schedules 1–10, although the Form T–1 has no counterpart). Additionally, as in the Form T–1 analysis, the Department also estimates that the president and treasurer of the Form LM–2 filing union will each spend two extra hours reviewing the form to ensure the accuracy of the consolidated subsidiary information before signing. *See* 73 FR 57444. These figures are shown below in Table 2.

The Department also removed other reporting categories used in Table 3 of the Form T–1 burden analysis (73 FR 57443) because they did not relate the Form LM–2 requirements or are already included in the Form LM–2 reporting regime and accounted for separately. These categories include: fill out trust/labor organization information; answer questions; fill in assets, liabilities, disbursements and receipts; additional information; and signature.

c. Total Hours Spent on Recordkeeping and Reporting

As discussed above, and as reflected in the following tables, the Department estimates that, in addition to the existing burden to complete the Form LM–2 as calculated in the 2003 Form LM–2 Final Rule, 68 FR at 58436–40, Form LM–2 filers will expend, on average, 69.71 hours per year on recordkeeping per subsidiary organization and 18.00 hours on reporting.

TABLE 1—RECORDKEEPING BURDEN IN HOURS PER SUBSIDIARY ORGANIZATION

Schedule	Schedule or item description	Total recordkeeping burden (in hours)
Schedules 1–10	Assets and Liabilities Schedules	0.00
Schedule 14	Individually itemized receipts	5.49
Schedules 15–20	Individually itemized disbursements	54.15
Schedule 11 and 12	Disbursements to Officers and Employees of subsidiary	10.07
Total Recordkeeping Burden Hours per Subsidiary Organization.		69.71

TABLE 2—REPORTING BURDEN IN MINUTES PER SUBSIDIARY ORGANIZATION

Schedule	Schedule or item description	Prepare download	Preparation of test/data file	Edit/validate/import data file	Total reporting burden
Schedules 1–10	Assets and Liabilities Schedules	60	90	60	210

TABLE 2—REPORTING BURDEN IN MINUTES PER SUBSIDIARY ORGANIZATION—Continued

Schedule	Schedule or item description	Prepare download	Preparation of test/data file	Edit/validate/ import data file	Total reporting burden
Schedule 14	Individually itemized receipts	60	90	60	210
Schedules 15–20	Individually itemized disbursements	60	90	60	210
Schedule 11 and 12	Disbursements to Officers and Employees of subsidiary.	60	90	60	210
	Management Review				240
Total Burden per Subsidiary Organization		240	360	240	1080
Total Burden Hours per Subsidiary Organization		4.00	6.00	4.00	18.00

3. Cost of Personnel To Report Subsidiary Organization Financial Information on the Form LM–2

As in the Form T–1 analysis (73 FR 57443–45), the Department assumes that, on average, the completion by a labor organization of a consolidated Form LM–2 will involve an accountant/auditor, bookkeeper/clerk, labor organization president and labor organization treasurer. Based on the 2008 Bureau of Labor Statistics (BLS) wage data from its Occupational Employment Statistics Survey, accountants earn $34.74 per hour and bookkeepers/clerks earn $15.88 per hour.[20] The Department also increased each of these figures by 43.0% to account for fringe benefits.[21] *See* Table 3 below.

As in the Form T–1 analysis, the Department estimates the average annual salaries of labor organization officers needed to complete tasks for compliance with this rule—the president and treasurer—from responses to salary inquiries based on a sample of 205 labor organizations that filed a Form LM–2 in 2006 and indicated an interest in at least one section 3(l) trust. Because the Department assumes significant commonality between those labor organizations that would have reported on trust interests under the Form T–1 rule and those labor organizations that will report on subsidiaries under Form LM–2, the Department has employed here the salary data for labor organization President and Treasurer utilized in the Form T–1. The Form T–1 study determined that in 2006 Form LM–2 labor organization presidents with section 3(l) trusts make, on average, $24.89 an hour and treasurers $31.58. The average annual salaries were determined by multiplying the average hourly wage by the number of hours in a year, based on a standard 40 hour work week (40 × 52 = 2080 hours). The average hourly wage was then multiplied by the same 43.0% to reach $35.59 per hour and $45.16 per hour, for presidents and treasurers, respectively. *See* Table 3 below.

TABLE 3—COMPENSATION COST TABLE

Title	Total hourly wage	Total hourly compensation
Accountants/Auditors	$34.74	$49.68
Bookkeepers/Clerks	15.88	22.71
President	24.89	35.59
Treasurer	31.58	45.16

Once the labor costs were calculated, the Department applied those costs to each of the Form LM–2 tasks computed in the previous section. Each task was evaluated separately to determine which individual from a particular job category would be needed to complete the task. All tasks identified by the Department above as necessary for compliance with the requirements of this rule were analyzed to determine which personnel would conduct those tasks. As stated previously, the Department removed tasks associated with the Form T–1 burden analysis that do not correlate to a task needed to consolidate subsidiary information on the Form LM–2, or are otherwise accounted for in the pre-existing Form LM–2 reporting regime and its burden (*See* Form T–1 final rule, Table 5, 73 FR 57444). The following table presents this analysis. The Department notes that this rule corrects a calculation error made in the NPRM, Table 4, regarding the total reporting cost for an accountant to edit/validate/import data file. In the NPRM, the Department identified the total cost at $298.08, while the actual cost is $198.72 (the hourly compensation for an accountant, $49.68, multiplied by the hours needed to complete the task, 4.00). Table 4 below illustrates the correct cost for this task, and it also reflects the updated, correct total cost for subsidiary consolidation on the Form LM–2 ($2,332.25, rather than $2,431.61 in the NPRM).

[20] *See* Occupational Employment and Wages Survey. 2008, survey, Table 6, from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) Program; *http://www.bls.gov/news.release/pdf/ocwage.pdf.* The Form T–1 analysis utilized data from the 2007 survey, while this proposed rule has updated the data with the use of the 2008 survey.

[21] *See* Employer Costs for Employee Compensation Summary, from the BLS, at *http://www.bls.gov/news.release/ecec.nr0.htm.* The Department updated the total hourly compensation figures from the Form T–1 analysis (30.2% to 43.0%), in that it uses 2008 rather than 2007 numbers, and it increased the hourly wage rate by the percentage total of the average hourly compensation figure ($8.90 in 2008) over the average hourly wage ($20.49 in 2008).

TABLE 4—COST BY TASK FOR SUBSIDIARY ORGANIZATION CONSOLIDATION ON THE FORM LM–2

Burden type	Task	Individuals participating	Hourly cost	Hours to complete	Cost
Recordkeeping	Input Records	Bookkeeper	$22.71	69.71	$1,583.11
Reporting	Prepare Download	Bookkeeper	22.71	4.00	90.84
Reporting	Preparation of Test/Data File	Accountant	49.68	6.00	298.08
Reporting	Edit/Validate/Import Data File	Accountant	49.68	4.00	198.72
Reporting	Management Review	President and Treasurer	35.59 and 45.16	4.00 (2 hours each)	161.50
Total Recordkeeping and Reporting Burdens Hours and Costs				87.71	2,332.25

4. Calculation of Total Costs To Form LM–2 Labor Organizations With a Subsidiary Organization

Based on the analysis reflected in the table above, the average cost per labor organization to consolidate its subsidiary's financial information on its Form LM–2 is $2,332.25. As noted earlier, the Department has employed here many of the assumptions about recordkeeping and reporting burdens from the cost analysis in the Form T–1 Final Rule because the two reporting regimes have many similarities. However, subsidiaries of smaller unions will not have as many officers, employees, receipts, or disbursements as the subsidiaries of larger unions. As a result, the Department views the burden estimate developed here as somewhat overstating what it will likely be.

Additionally, based upon experience, the Department estimates that 10% of filers will submit an audit rather than consolidate on its Form LM–2. For these filers, the Department estimates that the reporting and recordkeeping burden, as well as the total cost, will be virtually identical to filers who choose to consolidate, as the same information and level of detail is required for both options. However, the Department understands that the accountant who prepares a separate audit will not engage in the three separate reporting activities (prepare download, prepare data file, and edit import file). Rather, he or she will conduct an analysis of the records and create an audit report. Nevertheless, the Department believes that the reporting burden associated with preparing an audit report will be virtually identical to that of the reporting burden associated with consolidating such information on the Form LM–2. As a result, the Department estimates that the audit option will also cost Form LM–2 filers $2,332.25.

Based upon an estimate of 1,187 total subsidiaries for Form LM–2 filers, the Department estimates that the total cost for Form LM–2 subsidiary reporting is $2,768,380.75. These results are reflected in the table below. The Department corrected the average cost per subsidiary from the NPRM's total, as explained above, and the total cost has been updated to reflect the change to the average cost per subsidiary.

TABLE 5—REPORTING AND RECORDKEEPING BURDEN HOURS AND COSTS FOR FORM LM–2 SUBSIDIARY ORGANIZATION REPORTING

Number of subsidiaries	Reporting hours per subsidiary	Total reporting hours	Recordkeeping hours per subsidiary	Total record-keeping hours	Total burden hours per subsidiary	Total burden hours	Average cost per subsidiary	Total cost
1,187	18.00	21,366	69.71	82,745.77	87.71	104,111.77	$2,332.25	$2,768,380.75

5. Review of Public Comments

In accordance with the requirements of the PRA, the Department solicited comments on the information collections included in the NPRM. The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the NPRM, for OMB's review. As previously discussed, the comments to the NPRM did not challenge the burden analysis in this rule, nor did they provide the Department with any information or data that affects the analytical framework or assumptions underlying the analyses contained in the proposed rule. In connection with publication of this final rule, the Department submitted an ICR to OMB for its request of a new information collection. OMB approved the ICR on October 21, 2010, under OMB Control Number 1245–0003, which will expire on October 31, 2013.

Type of Review: Revision of a currently approved collection.

Agency: Office of Labor-Management Standards.

Title: Labor Organization and Auxiliary Reports.

OMB Number: 1245–0003 (formerly 1215–0188).

Affected Public: Private Sector: Not-for-profit institutions.

Number of Annual Responses: 33,684.

Frequency of Response: Annual for most forms.

Estimated Total Annual Burden Hours: 4,411,641.

Estimated Total Annual Burden Cost: $184,917,704.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.* PRA Addressee: Andrew R. Davis, (202) 693–0123. This is not a toll-free number.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* requires agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make initial analyses available for public comment. 5 U.S.C. 603, 604. If an agency determines that its rule will not have a significant economic impact on a substantial number of small entities, it must certify that conclusion to the Small Business Administration (SBA). 5 U.S.C. 605(b).

As in prior rulemakings, the Department's regulatory flexibility analysis utilizes the Small Business Administration's ("SBA") "small business" standard for "Labor Unions and Similar Labor Organizations." Specifically, the Department used the $5 million standard established in 2000, which was updated to $6.5 million in 2005 and in 2008 to $7 million, for purposes of its regulatory flexibility analyses. *See* 65 FR 30836 (May 15, 2000); 70 FR 72577 (Dec. 6, 2005). This same standard ($7 million) has been

used in developing the regulatory flexibility analysis for this rule.

All numbers used in this analysis are based on 2006 data taken from the Office of Labor-Management Standards e.LORS database, which contains data from annual financial reports field by labor organizations with the Department pursuant to the LMRDA, and BLS data.[22] Accordingly, the following analysis assesses the impact of these regulations on small entities as defined by the applicable SBA size standards.

As stated, the below RFA analysis is exactly as presented in the NPRM. The Department did not receive any comments regarding the analysis.

1. Statement of the Need for, and Objectives of, the Rule

The following is a summary of the need for and objectives of the rule. A more complete discussion is found earlier in this preamble.

The objective of this rule is to reinstate subsidiary organization reporting on Form LM–2. Subsidiary reporting on the Form LM–2 was eliminated with revisions to the form in 2003 in anticipation of the implementation of the Form T–1. Until 2003, a union's annual Form LM–2 report would not be complete without inclusion of subsidiaries' financial information. This requirement was superseded by the introduction of the Form T–1. With the rescission of the Form T–1, reporting on subsidiary organizations is reinstated within the Form LM–2 reporting requirements. Thus, the rule requires that labor organizations include within their Form LM–2 filing financial information concerning their subsidiary organizations, defined as "any separate organization of which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization." *See* proposed Form LM–2 Instructions, Section X.

As noted earlier in the preamble, the return of subsidiary organizations to the Form LM–2 reporting requirements improves the amount of financial disclosure of such entities, as compared to disclosure under the Form T–1. Under this rule, and as the Form LM–2 long required, a union must disclose the financial information of its subsidiary to the same level of detail as other assets of the union, even if the union chose to file a separate Form LM–2 report for the subsidiary or to file an audit for the entity. *See* pre-2003 Form LM–2 Instructions, Section X. In contrast, the Form T–1, while it required similar detail in reporting of receipts and disbursements, required less detailed reporting of assets and liabilities. *See* Form T–1, Items 16–24, and Form LM–2, Schedules 1–10.

The Department in this rule provides Form LM–2 filers two options regarding the reporting of their subsidiaries, rather than the three options provided in the pre-2003 Form LM–2 Instructions. Form LM–2 filers can either consolidate their subsidiaries' financial information on their Form LM–2 report, or they can file, with their Form LM–2 report, a regular annual report of the financial condition and operations of each subsidiary organization, accompanied by a statement signed by an independent public accountant certifying that the financial report presents fairly the financial condition and operations of the subsidiary organization and was prepared in accordance with generally accepted accounting principles. Specific information concerning loans payable and payments to officers and employees, in the same detail required under the related schedules on Form LM–2, also would have to be reported.

The Department in this rule did not reinstate a previous third option for filers: That of filing a separate Form LM–2 report that includes only the subsidiary's financial information. In the Department's experience, the filing of a separate Form LM–2 in addition to the union's primary report creates confusion for union members and others viewing the reports in that the form is designed for unions, not segregated funds and assets. Moreover, a union must file one Form LM–2 report per fiscal year, and the filing of multiple forms by a union for its subsidiaries creates confusion as to which one is the primary form. While consolidation contains some risk of confusion, the Department's experience is that combined reports are easier to follow than separate reports. Moreover, consolidation is entirely appropriate for subsidiaries that are wholly owned, wholly financed, and wholly controlled by the reporting labor union. This reporting method is a particularly appropriate and desirable option for some unions with subsidiaries that perform traditional union operations, such as strike funds and other special union funds. Thus, the Department preserves this option for Form LM–2 filers.

Additionally, to preserve consistency, this rule alters the Form LM–3 instructions regarding the reporting of subsidiary organizations by aligning them with the revised Form LM–2 instructions pertaining to the two options for reporting on subsidiaries. This establishes uniformity with the subsidiary reporting requirements of the two forms.

2. Legal Basis for Rule

The legal authority for this final rule is section 208 of the LMRDA. 29 U.S.C. 438. Section 208 provides that the Secretary of Labor shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under title II of the Act, including rules prescribing reports concerning trusts in which a labor organization is interested, and such other reasonable rules and regulations as she may find necessary to prevent the circumvention or evasion of the reporting requirements. 29 U.S.C. 438.

3. Number of Small Entities Covered Under the Rule

As stated in the preamble and in the PRA analysis, 1,087 filers indicated that they had at least one subsidiary organization on their 2004 Form LM–2 reports, the final year in which filers were required to identify on Item 10 whether they had a subsidiary organization. The Department assumes that of those 1,087 filers, 100 labor organizations have receipts valued above SBA's $7 million threshold used to differentiate between small and large entities. Therefore, the Department concludes that there are 987 small labor organizations with receipts below the $7 million threshold that may be affected by this rule. Further, in its experience, those smaller unions with under $7 million in annual receipts will each only have one subsidiary. *See* PRA analysis, *supra.*

4. Relevant Federal Requirements Duplicating, Overlapping or Conflicting With the Rule

To the extent that there are Federal rules that duplicate, overlap, or conflict with this rule, this is the result of the requirements of the LMRDA and other Federal statutes, such as the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. Section 201(b) of the LMRDA requires reporting of all assets, liabilities, receipts, and disbursements of labor organizations, and this includes their subsidiary organizations. 29 U.S.C. 431(b).

[22] In order to estimate the number of labor organizations that will report subsidiaries, the Department also analyzed Form LM–2 reports from 2004, which was the final year in which filers were required to identify whether they had a subsidiary organization.

However, to limit burden and any potential duplication, the Department allows filers to attach an audit rather than consolidate information on their subsidiaries.

5. Differing Compliance or Reporting Requirements for Small Entities

Labor organizations that have total annual receipts of $250,000 or more must file the revised Form LM–2. Under this rule, the reporting, recordkeeping, and other compliance requirements apply equally to all labor organizations that are required to file a Form LM–2 under the LMRDA.

6. Clarification, Consolidation and Simplification of Compliance and Reporting Requirements for Small Entities

Form LM–2 filers are directed to use an electronic reporting format. OLMS will provide compliance assistance for any questions or difficulties that may arise from using the Form LM–2 reporting software. A toll-free help desk is staffed during normal business hours and can be reached by telephone at 1–866–401–1109.

Additionally, the use of electronic forms makes it possible to download information from previously filed reports directly into the form; enables most schedule information to be imported onto the form; makes it easier to enter information; and automatically performs calculations and checks for typographical and mathematical errors and other discrepancies, which assists reporting compliance and reduces the likelihood that a union will have to file an amended report. The error summaries provided by the software, combined with the speed and ease of electronic filing, also make it easier for both the reporting labor organization and OLMS to identify errors in both current and previously filed reports and to file amended reports to correct them.

7. Steps Taken To Reduce Burden

This rule substantially reduces the burden on labor organizations that file the Form LM–2, including many small labor organizations. By rescinding Form T–1, which was estimated to affect 2,292 Form LM–2 filers, this rule will eliminate a projected average cost per filer of $4,851.20 in the first year and $2,609.29 in subsequent year. Subsidiary organization reporting, in contrast, impacts fewer unions (only 1,087 unions are estimated to have such entities), and the cost to consolidate their financial information is only $2,332.25. The Department has further reduced the burden by permitting those unions who already have audit reports for such subsidiaries to attach them to their Form LM–2. *See* PRA analysis, *supra.*

8. Reporting, Recording and Other Compliance Requirements of the Rule

This analysis only considers labor organizations with annual receipts between $250,000 and $7 million. Labor organizations with less than $250,000 in annual receipts are not required to file the Form LM–2 and those with annual receipts greater than $7 million are outside of the coverage of the RFA. The rule is not expected to have a significant economic impact on a substantial number of small entities. The LMRDA is primarily a reporting and disclosure statute. Accordingly, the primary economic impact will be the cost of obtaining and reporting required information.

As stated above, the Department estimates that there are 987 labor unions with under $7 million in total annual receipts, which are affected by this rule. Additionally, these unions will have a burden of only $2,332.25,[23] which comes out to merely 0.93% of the total annual receipts of the smallest Form LM–2 filers ($250,000 in total annual receipts) and about 0.07% of the median of unions between $250,000 and $7 million in total annual receipts (*i.e.* $3,375,000 in total annual receipts). The Department has further reduced the burden by permitting those unions who already have audit reports for such subsidiaries to attach them to their Form LM–2. *See* PRA analysis, *supra.* Moreover, the Department estimates that the burden will not be as great on smaller unions as those with greater than $7 million in total annual receipts, as the smaller unions' subsidiaries will not be as complicated and as large, in areas such as total officers, employees, receipts and disbursements.

9. Conclusion

The RFA does not define either "significant economic impact" or "substantial" as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, "what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact." A Guide for Government Agencies, supra, at 17. As to economic impact, one important indicator is the cost of compliance in relation to revenue of the entity. *Id.*

As noted above, the Department estimates that there are 987 labor unions with under $7 million in total annual receipts that will be affected by this rule, and each of these has an estimated one subsidiary about which it will be required to report. As noted in the PRA analysis, *supra,* the Department estimated above that a labor organization's cost for filing a report for one subsidiary is $2,332.25. This cost represents less that one percent (0.93%) of the total annual receipts of the smallest Form LM–2 filers ($250,000 in total annual receipts). Further, this cost represents less than one-tenth of one percent (0.07%) of the median of unions between $250,000 and $7 million in total annual receipts (i.e. $3,375,000 in total annual receipts).

The Department concludes that this economic impact is not significant, as that term is employed for the purpose of this analysis. As to the number of labor organizations affected by this rule, the Department has determined, by examining e.LORS data, that there are 987 smaller unions (each with one subsidiary) affected by this rule. This total represents only 23.34% of the recent total of 4,228 Form LM–2s from labor organizations with receipts between $250,000 and $7,000,000 (which constitute just 17.6% of the 24,065 labor organizations that must file any of the annual financial reports required under the LMRDA (Forms LM–2, LM–3, or LM–4)). The Department concludes that the rule does not impact a substantial number of small entities. Therefore, under 5 U.S.C. 605, the Department concludes that the rule will not have a significant economic impact on a substantial number of small entities.

Electronic Filing of Forms and Availability of Collected Data

Appropriate information technology is used to reduce burden and improve efficiency and responsiveness. The Form LM–2 now in use can be downloaded from the OLMS Web site. OLMS also has implemented a system to require Form LM–2 filers and permit Form LM–3 and Form LM–4 filers to submit forms electronically with digital signatures. Labor organizations are currently required to pay a fee to obtain electronic signature capability for the two officers who sign the form. Digital signatures ensure the authenticity of the reports.

The OLMS Internet Disclosure site at *http://www.unionreports.gov* is available for public use. The site contains a copy of each labor organization's annual financial report for reporting years 2000 and thereafter,

[23] As noted in the PRA section, the cost per subsidiary has been updated from the NPRM, based upon the correction of a calculation error.

as well as an indexed computer database of the information in each report that is searchable through the Internet.

Information about this system can be obtained on the OLMS Web site at *http://www.olms.dol.gov.*

List of Subjects in 29 CFR Part 403

Labor unions, Trusts, Reporting and recordkeeping requirements.

Text of Rule

■ Accordingly, the Department amends part 403 of 29 CFR chapter IV as set forth below:

PART 403—LABOR ORGANIZATION ANNUAL FINANCIAL REPORTS

■ 1. The authority citation for part 403 is revised to read as follows:

Authority: Labor-Management Reporting and Disclosure Act Secs. 202, 207, 208, 73 Stat. 525, 529 (29 U.S.C. 432, 437, 438); Secretary's Order No. 4–2007, May 2, 2007, 72 FR 26159.

§ 403.2 [Amended]

■ 2. In § 403.2, remove paragraph (d).

§ 403.5 [Amended]

■ 3. In § 403.5, remove paragraph (d).

§ 403.8 [Amended]

■ 4. In § 403.8, remove paragraph (c) and redesignate paragraph (d) as paragraph (c).

Editor's note: The following will not appear in the Code of Federal Regulations.

Appendix A: Specific Changes to the Form LM–2 Instructions

A. General Instructions:

Section II. What Form To File

Current instructions read:

Every labor organization subject to the LMRDA, CSRA, or FSA with total annual receipts of $250,000 or more must file Form LM–2. The term "total annual receipts" means all financial receipts of the labor organization during its fiscal year, regardless of the source, including receipts of any special funds as described in Section VIII (Funds To Be Reported) of these instructions. Receipts of a trust in which the labor organization is interested should not be included in the total annual receipts of the labor organization when determining which form to file unless the trust is wholly owned, wholly controlled, and wholly financed by the labor organization.

Labor organizations with total annual reports of less than $250,000 may file the simplified annual report Form LM–3, if not in trusteeship as defined in Section IX (Labor Organizations In Trusteeship) of these instructions. Labor organizations with total annual receipts of less than $10,000 may file the abbreviated annual report Form LM–4, if not in trusteeship.

The Department revises the above language to read:

Every labor organization subject to the LMRDA, CSRA, or FSA with total annual receipts of $250,000 or more must file Form LM–2.

Labor organizations with total annual receipts of less than $250,000 may file the simplified Form LM–3, if not in trusteeship as defined in Section IX (Labor Organization In Trusteeship) of these instructions. Labor organizations with total annual receipts of less than $10,000 may file the abbreviated annual report Form LM–4, if not in trusteeship.

The term "total annual receipts" means all financial receipts of the labor organization during its fiscal year, regardless of the source, including receipts of any special funds as described in Section VIII (Funds To Be Reported) or as described in Section X (Labor Organizations With Subsidiary Organizations). Receipts of an LMRDA section 3(l) trust in which the labor organization is interested (as described in Information Item 10) should not be included in the total annual receipts of the labor organization when determining which form to file, unless the 3(l) trust is a subsidiary organization of the union.

Section VIII. Funds To Be Reported

Current instructions read:

The labor organization must report financial information on Form LM–2 for all funds of the labor organization. Include any special purpose funds or accounts, such as strike funds, vacation funds, and scholarship funds even if they are not part of the labor organization's general treasury. The labor organization is required to report information about any trust in which it is interested on the Form T–1. *See* Section X (Trusts In Which A Labor Organization Is Interested).

The Department revises the above language to read:

The labor organization must report financial information on Form LM–2 for all funds of the labor organization. Include any special purpose funds or accounts, such as strike funds, vacation funds, and scholarship funds even if they are not part of the labor organization's general treasury.

All labor organization political action committee (PAC) funds are considered to be labor organization funds. However, to avoid duplicate reporting, PAC funds that are kept separate from your labor organization's treasury are not required to be included in your organization's Form LM–2 if publicly available reports on the PAC funds are filed with a Federal or state agency.

Your organization is required to report financial information about any "subsidiary organizations." Financial information about your organization and its subsidiary organizations may be combined on a single Form LM–2 or you may attach to your Form LM–2 report the regular annual report of the financial condition and operations of the subsidiary organization with a signed certification by an independent public accountant, as described in Section X (Labor Organizations With Subsidiary Organizations).

If combining the information concerning subsidiary organizations, be sure to include the requested information and amounts for the subsidiary organizations as well as for all other assets of your union in all items.

Special Instructions for Certain Organizations

Section X. Labor Organizations With Subsidiary Organizations

Current instructions read:

A trust in which a labor organization is interested is defined in Section 3(l) of the LMRDA (29 U.S.C. 402(l)) as:

* * * a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

The definition of a trust in which a labor organization is interested may include, but is not limited to, joint funds administered by a union and an employer pursuant to a collective bargaining agreement, educational or training institutions, credit unions created for the benefit of union members, and redevelopment or investment groups established by the unions for the benefit of its members. The determination whether a particular entity is a trust in which a labor organization is interested must be based on the facts in each case.

A labor organization is required to report in Form LM–2 information concerning each LMRDA Section 3(l) trust in accordance with the instructions in Item 10 of Form LM–2.

A labor organization must, in addition, file a separate Form T–1 report disclosing assets, liabilities, receipts, and disbursements of a trust in which the labor organization is interested if the labor organization, alone or in combination with other labor organizations, either (1) appoints or selects a majority of the members of the trust's governing board or (2) contributes to the trust greater than 50% of the trust's receipts during the one year reporting period. Any contributions made pursuant to a collective bargaining agreement shall be considered the labor organization's contribution.

No Form T–1 should be filed for any labor organization that already files a Form LM–2, LM–3, or LM–4, nor should a report be filed for any entity that is expressly exempted from reporting in the Act, such as organizations composed entirely of state or local government employees or state or local central bodies.

No Form T–1 need be filed for

- A Political Action Committee (PAC) if timely, complete, and publicly available reports on the PAC funds are filed with a Federal or state agency
- A political organization under 26 U.S.C. 527, if timely, complete, and publicly available reports are filed with the Internal Revenue Service
- A federal employee health benefit plan subject to the provisions of the Federal Employees Health Benefits Act (FEHBA)
- A for-profit commercial bank established or operating pursuant to the Bank Holding Act of 1956, 12 U.S.C. 1843

• An employee benefit plan required to file a Form 5500 for a plan year ending during the reporting period of the union.

For purposes of these instructions, only, a trust is "required to file a Form 5500" if a plan administrator is required to file an annual report on behalf of the trust under 29 U.S.C. sections 1021 and/or 1024.[24] However, if the plan administrator of the trust is eligible for an exemption from filing a Form 5500 or Form 5500–SF, then a Form T–1 must be filed for that section 3(l) trust regardless of whether a Form 5500 or Form 5500–SF is filed on its behalf. For a definition of plans "required to file a Form 5500" for purposes of filing the Form T–1, see 29 CFR 403.2(d)(3)(vi).

An abbreviated Form T–1 report may be filed where a qualifying independent audit also is submitted, in accordance with requirements specified in the Form T–1 instructions.

A Form T–1 report must be filed within 90 days after the end of the union's fiscal year. The Form T–1 covers the most recently concluded fiscal year of the trust.

See Instructions for Form T–1, Trust Annual Report.

Questions regarding these reporting requirements should be directed to the OLMS Division of Interpretations and Standards, which can be reached by e-mail at *OLMS–Public@dol.gov,* by phone at 202–693–0123, by fax at 202–693–1340, or at the following address: U.S. Department of Labor, Employment Standards Administration, Office of Labor-Management Standards, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210.

Examples of a trust in which a labor organization is interested may include, but are not limited to, the following entities:

Example A: The Building Corporation—A labor organization creates a corporation which owns the building where the union has its offices. The building corporation must be reported as a trust in which the labor organization is interested.

Example B: The Redevelopment Corporation—A labor organization creates an entity named the Redevelopment Corporation, or appoints one or more of the members of the governing board of the Corporation, which is established primarily to enable members of the labor organization to obtain low cost housing constructed with Federal Housing and Urban Development (HUD) grants. The Redevelopment Corporation must be reported as a trust in which it is interested. A labor organization that neither participated in the creation of the Corporation, nor appointed members of its governing board, but loaned money to the Corporation to use as matching money for HUD grants need not report the Corporation as a trust in which it is interested.

Example C: The Educational Institute—Five reporting labor organizations form the Educational Institute to provide educational services primarily for the benefit of their members. Similar services are also provided to the general public. Each labor organization contributes funds to start the Educational Institute, which will then offer various educational programs that will generate revenue. Each labor organization that participated in forming the Institute, or that appoints a member to its governing body, must report the Educational Institute as a trust in which it is interested.

Example D: Joint Funds—A reporting labor organization that forms a "joint fund" with a large national manufacturer to offer a variety of training and jobs skills programs for members of the labor organization, or appoints a member to the governing body of such a fund, must report the joint fund as a trust in which the labor organization has an interest.

Example E: Job Targeting Fund—A reporting labor organization creates an entity for the purpose of making targeted disbursements to increase employment opportunities for its members. The fund must be reported as a trust in which the labor organization is interested.

The Department revises the above language to read:

The labor organization must disclose assets, liabilities, receipts, and disbursements of a subsidiary organization.

Within the meaning of these instructions, a subsidiary organization is defined as any separate organization of which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization. A subsidiary organization is considered to be wholly financed if the initial financing was provided by the reporting labor organization even if the subsidiary organization is currently wholly or partially self-sustaining. An example of a subsidiary organization is a building corporation which holds title to a building; the labor organization owns the building corporation, selects the officers, and finances the operation of the building corporation.

A labor organization is required to report financial information for each of its subsidiary organizations using one of the following methods:

Method (1)—Consolidate the financial information for the subsidiary organization and the labor organization on a single Form LM–2.

Method (2)—File, with the labor organization's Form LM–2, the regular annual report of the financial condition and operations of the subsidiary organization, accompanied by a statement signed by an independent public accountant certifying that the financial report presents fairly the financial condition and operations of the subsidiary organization and was prepared in accordance with generally accepted accounting principles.

Financial information reported separately for subsidiary organizations under method (2) must include the name of the subsidiary organization and the name and file number of the labor organization as shown on its Form LM–2. The financial report of the subsidiary organization must cover the same reporting period as that used by the reporting labor organization.

When method (2) is used and the subsidiary organization is an investment, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 26 (Investments) and in Schedule 5 (Investments) of the labor organization's Form LM–2. When method (2) is used and the subsidiary organization is of a non-investment nature, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 28 (Other Assets) and in Schedule 7 (Other Assets) of the labor organization's Form LM–2.

The same type of information required on Form LM–2 regarding disbursements to officers and employees and loans made by labor organizations must also be reported with respect to the subsidiary organization. In method (1) the information relating to the subsidiary organization must be combined with that of the labor organization and reported on the labor organization's Form LM–2 on Schedule 11 (All Officers and Disbursements to Officers) and Schedule 12 (Disbursements to Employees) and Statement A, Item 24 (Loans Receivable) and Schedule 2 (Loans Receivable) in the detail required by the instructions. If method (2) is used, an attachment must be submitted containing the information required by the instructions for Schedules 2, 11, and 12.

The information regarding loans made by the subsidiary organization must include in Schedule 2 (Loans Receivable) a listing of the names of each officer, employee, or member of the labor organization and each officer or employee of the subsidiary organization whose total loan indebtedness to the subsidiary organization, to the labor organization, or to both at any time during the reporting period exceeded $250. However, if method (2) is used, the amount reported by the subsidiary organization should be only the amount owed to the subsidiary organization.

The annual financial report must also include on Schedule 11 (All Officers and Disbursements to Officers) all disbursements made by the subsidiary organization to or on behalf of its officers and officers of the labor organization. The report must also list on Schedule 12 (Disbursements to Employees) the name and position of the subsidiary organization's employees whose total gross salaries, allowances, and other disbursements from the subsidiary organization, the reporting labor organization, and any

[24] The following sections of title 29 of the Code of Federal Regulations identify for purposes of these instructions, the types of ERISA plans that are not required to file a Form 5500: section 2520.104–20 (small unfunded, insured, or combination welfare plans), section 2520.104–22 (apprenticeship and training plans), section 2520.104–23 (unfunded or insured management and highly compensated employee pension plans), section 2520.104–24 (unfunded or insured management and highly compensated employee welfare plans), section 2520.104–25 (day care center plans), section 2520.104–26 (unfunded dues financed welfare plans maintained by employee organizations), section 2520.104–27 (unfunded dues financed pension plans maintained by employee organizations), section 2520.104–43 (certain small welfare plans participating in group insurance arrangements), and section 2520.104–44 (large unfunded, insured, or combination welfare plans; certain fully insured pension plans). Labor organizations must file a Form T–1 for these types of plans.

affiliates were more than $10,000. However, if method (2) is used, only the disbursements of the subsidiary organization for its employees should be reported.

XI Completing Form LM–2

Item 10 currently reads:

10. TRUSTS OR FUNDS—Answer "Yes" to Item 10, if the labor organization has an interest in a trust as defined in 29 U.S.C. 402(l) (*see* Section X of these Instructions). Provide in Item 69 (Additional Information) the full name, address, and purpose of each trust. Also include in Item 69 the fiscal year ending date for any trust for which a Form T–1 is filed if the trust's fiscal year is different from that of the labor organization. If no Form T–1 is required to be filed on the trust because (1) the trust had annual receipts of less than $250,000 during the trust's most recent fiscal year or (2) the labor organization's financial contribution to the trust or the contribution made on the labor organization's behalf, or as a result of a negotiated agreement to which the labor organization is a party, is less than $10,000, the labor organization should also report the amount of the contribution in Item 69 and, if the contribution was made by the labor organization itself, in the appropriate disbursement item in Statement B. Additionally, if no Form T–1 is filed because financial information is already available as a result of the disclosure requirements of another Federal statute, list the name of any government agency, such as the Employee Benefits Security Administration (EBSA) of the Department of Labor, with which the trust files a publicly available report, and the relevant file number of the trust, or otherwise indicate where the relevant report may be viewed. *See* Instructions for Form T–1, Trust Annual Report, for guidance on reporting the assets, liabilities, receipts, disbursements, and other information about these entities.

The Department revises the above language to read:

10. TRUSTS OR FUNDS—Answer "Yes" to Item 10, if the labor organization has an interest in a trust or other fund as defined in 29 U.S.C. 402(l). Provide in Item 69 (Additional Information) the full name, address, and purpose of each trust or other fund. If a report has been filed for the trust or other fund under the Employee Retirement Income Security Act of 1974 (ERISA), report in Item 69 (Additional Information) the ERISA file number (Employer Identification Number—EIN) and plan number, if any.

A trust in which a labor organization is interested is defined in Section 3(l) of the LMRDA (29 U.S.C. 402(l)) as:

* * * a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

The determination whether a particular entity is a trust in which a labor organization is interested will be based on the facts in each case.

The Department revises the Form LM–2 to break current Item 11 on the form into two questions to read as follows:

Item 11(a). During the reporting period did the labor organization have a political action committee fund (PAC)?

Item 11(b). During the reporting period did the labor organization have a subsidiary organization as defined in Section X of these Instructions?

Current instructions read:

If the labor organization answered "Yes" to Item 11, provide in Item 69 (Additional Information) the full name of each separate political action committee (PAC) and list the name of any government agency, such as the Federal Election Commission or a state agency, with which the PAC has filed a publicly available report, and the relevant file number of the PAC. (PAC funds kept separate from the labor organization's treasury need not be included in the labor organization's Form LM–2 if publicly available reports on the PAC funds are filed with a Federal or state agency.)

The Department revises the above language to read:

If the labor organization answered "Yes" to Item 11(a), in reference to a political action committee, provide in Item 69 (Additional Information) the full name of each separate political action committee (PAC) and list the name of any government agency, such as the Federal Election Commission or a state agency, with which the PAC has filed a publicly available report, and the relevant file number of the PAC. (PAC funds kept separate from the labor organization's treasury need not be included in the labor organization's Form LM–2 if publicly available reports on the PAC funds are filed with a Federal or state agency.)

If the labor organization answered "Yes" to Item 11(b), in reference to a subsidiary organization, provide in Item 69 (Additional Information) the name, address, and purpose of each subsidiary organization. Indicate whether the information concerning its financial condition and operations is included in this Form LM–2 or in a separate report. *See* Section X of these instructions for information on reporting subsidiary organizations.

Schedule 2—Loans Receivable

The instructions regarding Column (A) currently read:

Column (A): Enter the following information on Lines 1 through 3 (and on continuation pages if necessary):

• The name of each officer, employee, or member whose total loan indebtedness to the labor organization at any time during the reporting period exceeded $250, and the name of each business enterprise which had any loan indebtedness, regardless of amount, at any time during the reporting period;

The Department revises the above language to read:

Column (A): Enter the following information on Lines 1 through 3 (and on continuation pages if necessary):

• The name of each officer, employee, or member whose total loan indebtedness to the labor organization, including any subsidiary organization, at any time during the reporting period exceeded $250, and the name of each business enterprise which had any loan indebtedness, regardless of amount, at any time during the reporting period;

Schedule 5—Investments Other Than U.S. Treasury Securities

Schedule 5, Item 6 currently reads:

List each other investment which has a book value over $5,000 and exceeds 5% of Line 5. Also, list each Trust which is an investment.

The Department revises Schedule 5, Item 6 to read:

List each other investment which has a book value over $5,000 and exceeds 5% of Line 5. Also, list each subsidiary for which separate reports are attached.

The Instructions for Schedule 5 currently read:

Report details of all the labor organization's investments at the end of the reporting period, other than U.S. Treasury securities. Include mortgages purchased on a block basis and any investments in a trust as defined in Section X (Trusts in Which a Labor Organization is Interested) of these instructions. Do not include savings accounts, certificates of deposit, or money market accounts, which must be reported in Item 22 (Cash) of Statement A.

The Department revises the Instructions for Schedule 5 to read:

Report details of all the labor organization's investments at the end of the reporting period, other than U.S. Treasury securities. Include mortgages purchased on a block basis and investments in any subsidiary organization not reported on a consolidated basis in accordance with method (1) explained in Section X of these instructions. Do not include savings accounts, certificates of deposit, or money market accounts, which must be reported in Item 22 (Cash) of Statement A.

The Instructions for the Schedule 5, Note currently read:

Note: All trusts in which the labor organization is interested which are investments of the labor organization (such as real estate trusts, building corporations, etc.) must be reported in Schedule 5. On Lines 6(a) through (d) enter the name of each trust in Column (A) and the labor organization's share of its book value in Column (B).

The Department revises the Instructions for Schedule 5, Note to read:

Note: If your organization has a subsidiary organization for which a separate report is being submitted in accordance with Section X of these instructions, the subsidiary organization must be reported in Schedule 5 if it is an investment. Enter in Line F the name of each subsidiary organization in Column (A) and its book value in Column (B).

The Instructions for Schedule 7—Other Assets, Note currently read:

Note: If the labor organization has an ownership interest of a non-investment nature in a trust in which it is interested (such as a training fund) the value of the labor organization's ownership interest in the entity as shown on the labor organization's books must be reported in Schedule 7 (Other

Assets). Enter in Column (A) the name of any such entity. Enter in Column (B) the value as shown on the labor organization's books of its share of the net assets of any such entity.

The Department revises the Instructions for Schedule 7, Note to read:

Note: If your organization has a subsidiary organization for which a separate report is being submitted in accordance with Section X of these instructions, the value of the subsidiary organization as shown on your organization's books must be reported in Schedule 7 if it is of a non-investment nature. Enter in Column (A) the name of any such subsidiary organization. Enter in Column (B) the value as shown on your organization's books of the net assets of any such subsidiary organization.

The Instructions for Schedule 12—Disbursements to Employees, Columns (A), (B), and (C) currently read:

Column (A): Enter the last name, first name, and middle initial of each employee who during the reporting period received $10,000 or more in gross salaries, allowances, and other direct and indirect disbursements from the labor organization or from the labor organization and any affiliates and/or trusts of the labor organization. ("Affiliates" means labor organizations chartered by the same parent body, governed by the same constitution and bylaws, or having the relation of parent and subordinate.) The labor organization's report, however, should not include disbursements made by affiliates or trusts but should include only the disbursements made by the labor organization.

Column (B): Enter the position each listed employee held in the labor organization.

Column (C): Enter the name of any affiliate or trust that paid any salaries, allowances, or expenses on behalf of a listed employee.

The Department revises the Instructions for Schedule 12, Columns (A), (B), and (C) to read:

Column (A): Enter the last name, first name, and middle initial of each employee who during the reporting period received $10,000 or more in gross salaries, allowances, and other direct and indirect disbursements from the labor organization (including any subsidiary organizations) or from any affiliates of the labor organization. ("Affiliates" means labor organizations chartered by the same parent body, governed by the same constitution and bylaws, or having the relation of parent and subordinate.) The labor organization's report, however, should not include disbursements made by affiliates but should include only the disbursements made by the labor organization.

Column (B): Enter the position each listed employee held in the labor organization (including any subsidiary organizations).

Column (C): Enter the name of any affiliate that paid any salaries, allowances, or expenses on behalf of a listed employee. If a subsidiary of the labor organization paid any salaries, allowances, or expenses on behalf of a listed employee, see Section X of these Instructions for information about reporting these disbursements.

The Department seeks comments on its proposed changes to the Form LM–2 and instructions.

Appendix B: Specific Proposed Changes to the Form LM–3 and Form LM–4 Instructions

The text of the Form LM–3 and Form LM–4 Instructions will be changed to address the reporting of subsidiary organizations. With respect to the Form, the Department proposes to remove Item 3(c), which currently requires that a labor organization identify if the report is exclusively filed for a subsidiary organization, as the Department proposes to remove this option, as described above. The proposed revised Form LM–3 Instructions include changes to sections I, VIII and X.

Section VIII currently reads:

VIII. FUNDS TO BE REPORTED

Your labor organization's Form LM–3 must report financial information for all funds of your organization. Include any special purpose funds or accounts, such as strike funds, vacation funds, and scholarship funds even it they are not part of your organization's general treasury. All labor organization political action committee (PAC) funds are considered to be labor organization funds. However, to avoid duplicate reporting, PAC funds which are kept separate from your labor organization's treasury are not required to be included in your organization's Form LM–3 if publicly available reports on the PAC funds are filed with a Federal or state agency.

Your organization is required to report financial information about any "subsidiary organization(s)." Financial information about your organization and its subsidiary organizations may be combined on a single Form LM–3 or a separate report may be filed for any subsidiary organization. *See* Section X of these instructions for information on reporting financial information for subsidiary organizations.

In combining the information concerning special funds and/or any subsidiary organizations, be sure to include the requested information and amounts for the "special funds" and subsidiary organizations as well as for your organization in all items.

The Department revises Section VIII to read:

VIII. FUNDS TO BE REPORTED

Your labor organization's Form LM–3 must report financial information for all funds of your organization. Include any special purpose funds or accounts, such as strike funds, vacation funds, and scholarship funds even it they are not part of your organization's general treasury. All labor organization political action committee (PAC) funds are considered to be labor organization funds. However, to avoid duplicate reporting, PAC funds which are kept separate from your labor organization's treasury are not required to be included in your organization's Form LM–3 if publicly available reports on the PAC funds are filed with a Federal or state agency.

Your organization is required to report financial information about any "subsidiary organizations." Financial information about your organization and its subsidiary organizations may be combined on a single Form LM–3 or you may attach to your Form LM–3 report the regular annual report of the financial condition and operations of the subsidiary organization with a signed certification by an independent public accountant. See Section X of these instructions for information on reporting financial information for subsidiary organizations.

If combining the information concerning subsidiary organizations, be sure to include the requested information and amounts for the subsidiary organizations as well as for all other assets of your union in all items.

Current Section X reads:

X. LABOR ORGANIZATIONS WITH SUBSIDIARY ORGANIZATIONS

A subsidiary organization, within the meaning of these instructions, is any separate organization of which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization. A subsidiary organization is considered to be wholly financed if the initial financing was provided by the reporting labor organization even if the subsidiary organization is currently wholly or partially self-sustaining. An example of a subsidiary organization is a building corporation which holds title to a building; the labor organization owns the building corporation, selects the officers, and finances the operation of the building corporation.

If your organization has no subsidiary organization as defined above, skip to Section Xl of these instructions.

A labor organization is required to report financial information for each of its subsidiary organizations using one of the following methods:

Method (1)—Consolidate the financial information for the subsidiary organization(s) and the labor organization on a single Form LM–3.

Method (2)—Complete a separate Form LM–3 for the subsidiary organization and file it with the labor organization's Form LM–3. The LM–3 report for the subsidiary organization must be identified by selecting Item 3(c).

Method (3)—File, with the labor organization's Form LM–3, the regular annual report of the financial condition and operations of the subsidiary organization, accompanied by a statement signed by an independent public accountant certifying that the financial report presents fairly the financial condition and operations of the subsidiary organization and was prepared in accordance with generally accepted accounting principles. Financial information reported separately for subsidiary organizations under methods (2) and (3) above must include the name of the subsidiary organization and the name and file number of the labor organization as shown on its Form LM–3. The financial report of the subsidiary organization must cover the same reporting period as that used by the reporting labor organization.

When method (2) or (3) is used and the subsidiary organization is an investment, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 28 (Investments) of the labor organization's Form LM–3.

When method (2) or (3) is used and the subsidiary organization is of a non-investment nature, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 30 (Other Assets) of the labor organization's Form LM–3.

The same type of information required on Form LM–3 regarding disbursements to officers and employees and loans made by labor organizations must also be reported with respect to the subsidiary organization. In method (1) the information relating to the subsidiary organization must be combined with that of the labor organization and reported on the labor organization's Form LM–3 in Item 24 and in Item 56 in the detail required by the instructions for Items 17 and 18. In method (2) this information must be reported on the separate Form LM–3 of the subsidiary organization in Item 24 and in Item 56 in the detail required by the instructions for Items 17 and 18. If method (3) is used, an attachment must be submitted containing the information required by the instructions for Items 17, 18, and 24.

The information regarding loans made by the subsidiary organization must include a listing of the names of each officer, employee, or member of the labor organization and each officer or employee of the subsidiary organization whose total loan indebtedness to the subsidiary organization, to the labor organization, or to both at any time during the reporting period exceeded $250. However, if method (2) or (3) is used, the amount reported by the subsidiary organization should be only the amount owed to the subsidiary organization.

The annual financial report must also include all disbursements made by the subsidiary organization to or on behalf of its officers and officers of the labor organization. The report must also list the name and position of the subsidiary organization's employees whose total gross salaries, allowances, and other disbursements from the subsidiary organization, the reporting labor organization, and any affiliates were more than $10,000. However, if method (2) or (3) is used, only the disbursements of the subsidiary organization for its employees should be reported.

The Department revises Section X to read:

X. LABOR ORGANIZATIONS WITH SUBSIDIARY ORGANIZATIONS

A subsidiary organization, within the meaning of these instructions, is any separate organization of which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization. A subsidiary organization is considered to be wholly financed if the initial financing was provided by the reporting labor organization even if the subsidiary organization is currently wholly or partially self-sustaining. An example of a subsidiary organization is a building corporation which holds title to a building; the labor organization owns the building corporation, selects the officers, and finances the operation of the building corporation.

If your organization has no subsidiary organization as defined above, skip to Section Xl of these instructions.

A labor organization is required to report financial information for each of its subsidiary organizations using one of the following methods:

Method (1)—Consolidate the financial information for the subsidiary organization(s) and the labor organization on a single Form LM–3.

Method (2)—File, with the labor organization's Form LM–3, the regular annual report of the financial condition and operations of the subsidiary organization, accompanied by a statement signed by an independent public accountant certifying that the financial report presents fairly the financial condition and operations of the subsidiary organization and was prepared in accordance with generally accepted accounting principles. Financial information reported separately for subsidiary organizations under this method must include the name of the subsidiary organization and the name and file number of the labor organization as shown on its Form LM–3. The financial report of the subsidiary organization must cover the same reporting period as that used by the reporting labor organization.

When method (2) is used and the subsidiary organization is an investment, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 28 (Investments) of the labor organization's Form LM–3.

When method (2) is used and the subsidiary organization is of a non-investment nature, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 30 (Other Assets) of the labor organization's Form LM–3.

The same type of information required on Form LM–3 regarding disbursements to officers and employees and loans made by labor organizations must also be reported with respect to the subsidiary organization. In method (1) the information relating to the subsidiary organization must be combined with that of the labor organization and reported on the labor organization's Form LM–3 in Item 24 (All Officers and Disbursements to Officers) and in Item 56 (Additional Information) for Items 17 (Employees) and 18 (Loans), in the detail required by the instructions. If method (2) is used, an attachment must be submitted containing the information required by the instructions for Items 17, 18, and 24.

The information regarding loans made by the subsidiary organization must include a listing of the names of each officer, employee, or member of the labor organization and each officer or employee of the subsidiary organization whose total loan indebtedness to the subsidiary organization, to the labor organization, or to both at any time during the reporting period exceeded $250. However, if method (2) is used, the amount reported by the subsidiary organization should be only the amount owed to the subsidiary organization.

The annual financial report must also include all disbursements made by the subsidiary organization to or on behalf of its officers and officers of the labor organization. The report must also list the name and position of the subsidiary organization's employees whose total gross salaries, allowances, and other disbursements from the subsidiary organization, the reporting labor organization, and any affiliates were more than $10,000. However, if method (2) is used, only the disbursements of the subsidiary organization for its employees should be reported.

Appendix C: Revised Form LM–2 (Form and Instructions); Revised Form LM–3 (Form and Instructions); and Revised Form LM–4 (Instructions Only)

BILLING CODE P

U.S. Department of Labor
Office of Labor-Management Standards
Washington, DC 20210

FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT

MUST BE USED BY LABOR ORGANIZATIONS WITH $250,000 OR MORE IN TOTAL ANNUAL RECEIPTS AND LABOR ORGANIZATIONS IN TRUSTEESHIP

Form Approved
Office of Management and Budget
No. 1245-0003
Expires: XX-XX-XXXX

This report is mandatory under P.L. 86-257, as amended. Failure to comply may result in criminal prosecution, fines, or civil penalties as provided by 29 U.S.C. 439 or 440.

READ THE INSTRUCTIONS CAREFULLY BEFORE PREPARING THIS REPORT.

For Official Use Only	1. FILE NUMBER	2. PERIOD COVERED MO DAY YEAR From Through	3. (a) AMENDED — If this is an amended report, check here: ☐ (b) HARDSHIP — If filing under the hardship procedures, check here: ☐ (c) TERMINAL — If this is a terminal report, check here: ☐

4. AFFILIATION OR ORGANIZATION NAME		8. MAILING ADDRESS (Type or print in capital letters.)	
		First Name	Last Name
5. DESIGNATION (Local, Lodge, etc.)	6. DESIGNATION NUMBER	P.O. Box - Building and Room Number	
7. UNIT NAME (if any)		Number and Street	
		City	
9. Are your organization's records kept at its mailing address? Yes ☐ No ☐ (If "No," provide address in Item 69.)		State	ZIP Code + 4

69. ADDITIONAL INFORMATION (Text entered will appear on last page of form. To enter comments, press the "General Additional Information" button.)

Each of the undersigned, duly authorized officers of the above labor organization, declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including the information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned's knowledge and belief, true, correct, and complete. (See Section VI on penalties in the instructions.)

70. SIGNED: _____ PRESIDENT (If other title, see instructions.)
/ / ( ) —
Date Telephone Number

71. SIGNED: _____ TREASURER (If other title, see instructions.)
/ / ( ) —
Date Telephone Number

COMPLETE ITEMS 10 THROUGH 21

FILE NUMBER:

10. During the reporting period did the labor organization create or participate in the administration of a trust or other fund or organization, as defined in the instructions, which provides benefits for members or their beneficiaries? Yes ☐ No ☐

11(a). During the reporting period did the labor organization have a political action committee (PAC) fund? Yes ☐ No ☐

11(b). During the reporting period did the labor organization have a subsidiary organization as defined in Section X of these instructions? Yes ☐ No ☐

12. During the reporting period did the labor organization have an audit or review of its books and records by an outside accountant or by a parent body auditor/representative? Yes ☐ No ☐

13. During the reporting period did the labor organization discover any loss or shortage of funds or other assets? (Answer "Yes" even if there has been repayment or recovery.) Yes ☐ No ☐

14. What is the maximum amount recoverable under the labor organization's fidelity bond for a loss caused by any officer, employee or agent of the labor organization who handled union funds? ☐

15. During the reporting period did the labor organization acquire or dispose of any assets in any manner other than by purchase or sale? Yes ☐ No ☐

16. Were any of the labor organization's assets pledged as security or encumbered in any other way at the end of the reporting period? Yes ☐ No ☐

17. Did the labor organization have any contingent liabilities at the end of the reporting period? Yes ☐ No ☐

18. During the reporting period did the labor organization have any changes in its constitution and bylaws, other than rates of dues and fees, or in practices/procedures listed in the instructions? Yes ☐ No ☐

19. What is the date of the labor organization's next regular election of officers? ☐

20. How many members did the labor organization have at the end of the reporting period? (Total from Line 8 of Schedule 13) ☐

21. What are the labor organization's rates of dues and fees? (Enter a minimum and maximum if more than one rate applies for any line.)

Rates of Dues and Fees

Dues/Fees	Amount		Unit	Minimum	Maximum
(a) Regular Dues/Fees		per			
(b) Working Dues/Fees		per			
(c) Initiation Fees		per			
(d) Transfer Fees		per			
(e) Work Permits		per			

If the answer to any of the above questions is "Yes," provide details in Item 69 (Additional Information) as explained in the instructions for each item.

STATEMENT A – ASSETS AND LIABLITIES

Complete Schedules 1 Through 20 Before Completing Statement A

FILE NUMBER:

ASSETS

ASSETS	Schedule Number	Start of Reporting Period (A)	End of Reporting Period (B)
22. Cash			
23. Accounts Receivable	1		
24. Loans Receivable	2		
25. U.S. Treasury Securities			
26. Investments	5		
27. Fixed Assets	6		
28. Other Assets	7		
29. TOTAL ASSETS			

LIABILITIES

LIABILITIES	Schedule Number	Start of Reporting Period (C)	End of Reporting Period (D)
30. Accounts Payable	8		
31. Loans Payable	9		
32. Mortgages Payable			
33. Other Liabilities	10		
34. TOTAL LIABILITIES			

35. NET ASSETS (Item 29 Less Item 34)		

STATEMENT B – RECEIPTS AND DISBURSEMENTS

Complete Schedules 1 Through 20 Before Completing Statement B

FILE NUMBER:

Item CASH RECEIPTS	SCH #	AMOUNT
36. Dues and Agency Fees		
37. Per Capita Tax		
38. Fees, Fines, Assessments, Work Permits		
39. Sale of Supplies		
40. Interest		
41. Dividends		
42. Rents		
43. Sale of Investments and Fixed Assets	3	
44. Loans Obtained	9	
45. Repayments of Loans Made	2	
46. On Behalf of Affiliates for Transmittal to Them		
47. From Members for Disbursement on Their Behalf		
48. Other Receipts	14	
49. TOTAL RECEIPTS		

Item CASH DISBURSEMENTS		SCH #	AMOUNT
50. Representational Activities		15	
51. Political Activities and Lobbying		16	
52. Contributions, Gifts, and Grants		17	
53. General Overhead		18	
54. Union Administration		19	
55. Benefits		20	
56. Per Capita Tax			
57. Strike Benefits			
58. Fees, Fines, Assessments, etc.			
59. Supplies for Resale			
60. Purchase of Investments and Fixed Assets		4	
61. Loans Made		2	
62. Repayment of Loans Obtained		9	
63. To Affiliates of Funds Collected on Their Behalf			
64. On Behalf of Individual Members			
65. Direct Taxes			
66. Subtotal			
67. Withholding Taxes and Payroll Deductions			
67a. Total Withheld			
67b. Less Total Disbursed			
67c. Total Withheld But Not Disbursed			
68. TOTAL DISBURSEMENTS (Line 66 – Line 67c)			

SCHEDULE 1 – ACCOUNTS RECEIVABLE AGING SCHEDULE

FILE NUMBER:

Entity or Individual Name (A)	Total Account Receivable (B)	90 - 180 Days Past Due (C)	180+ Days Past Due (D)	Liquidated Account Receivable (E)
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				
19.				
20.				
21.				
22.				
23.				
24.				
25. Totals from Continuation pages (if any)				
26. Totals of Lines 1 through 25				
27. Totals from all other accounts receivable				
28. **Totals of Lines 26 and 27** (Total from Line 28, Column (B) will be automatically entered in Item 23, Column (B).)				

SCHEDULE 2 – LOANS RECEIVABLE

FILE NUMBER:

List below loans to officers, employees, or members which at any time during the reporting period exceeded $250 and list all loans to business enterprises regardless of amount. (A)	Loans Outstanding at Start of Period (B)	Loans Made During Period (C)	Repayments Received During Period		Loans Outstanding at End of Period (E)
			Cash (D)(1)	Other Than Cash (D)(2)	
1. Name: _____ Purpose: _____ Security: _____ Terms of Repayment: _____					
2. Name: _____ Purpose: _____ Security: _____ Terms of Repayment: _____					
3. Name: _____ Purpose: _____ Security: _____ Terms of Repayment: _____					
4. Totals from Continuation pages (if any)					
5. Totals of loans not listed above					
6. Totals of Lines 1 through 5					

The Totals from Line 6 will be automatically entered in ……Item 24 Column (A) ……..Item 61 ……Item 45……..Item 69 with Explanation……Item 24 Column (B)

SCHEDULE 3 – SALE OF INVESTMENTS AND FIXED ASSETS

FILE NUMBER:

Description (if land or buildings, give location) (A)	Cost (B)	Book Value (C)	Gross Sales Price (D)	Amount Received (E)
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12. Totals from Continuation pages (if any)				
13. Totals of Lines 1 through 12				
			14. Less Reinvestments	
		(The total from line 15 will be automatically entered in Item 43.)	**15. Net Sales**	

SCHEDULE 4 – PURCHASE OF INVESTMENTS AND FIXED ASSETS

FILE NUMBER:

Description (if land or buildings, give location) (A)	Cost (B)	Book Value (C)	Cash Paid (D)
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12. Totals from Continuation pages (if any)			
13. Totals of Lines 1 through 12			
		14. Less Reinvestments	
	(The total from line 15 will be automatically entered in Item 60.)	**15. Net Purchases**	

SCHEDULE 5 – INVESTMENTS

FILE NUMBER:

Description (A)	Amount (B)
Marketable Securities	
1. Total Cost	
2. Total Book Value	
3. List each marketable security which has a book value over $5,000 and exceeds 5% of Line 2.	
(a)	
(b)	
(c)	
(d) Total from Continuation pages (if any)	
Other Investments	
4. Total Cost	
5. Total Book Value	
6. List each other investment which has a book value over $5,000 and exceeds 5% of Line 5. Also, list each subsidiary for which separate reports are attached.	
(a)	
(b)	
(c)	
(d)	
(e) Total from Continuation pages (if any)	
7. Total of Lines 2 and 5 (The total from Line 7 will be automatically entered in Item 26, Column (B).)	

SCHEDULE 6 – FIXED ASSETS

FILE NUMBER:

Description (A)	Cost or Other Basis (B)	Total Depreciation or Amount Expensed (C)	Book Value (D)	Value (E)
1. Land (give location)				
2. Totals from Continuation pages (if any)				
3. Buildings (give location)				
4. Totals from Continuation pages (if any)				
5. Automobiles and Other Vehicles				
6. Office Furniture and Equipment				
7. Other Fixed Assets				
8. **Totals of Lines 1 through 7** (The Total from Line 8, Column (D) will be automatically entered in Item 27, Column (B).)				

SCHEDULE 7 – OTHER ASSETS

FILE NUMBER:

Description (A)	Book Value (B)
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	
11.	
12.	
13.	
14. Total from Continuation pages (if any)	
15. **Total of Lines 1 through 14** (The Total from Line 15 will be automatically entered in Item 28, Column (B).)	

SCHEDULE 8 – ACCOUNTS PAYABLE AGING SCHEDULE

FILE NUMBER:

Entity or Individual Name (A)	Total Account Payable (B)	90 - 180 Days Past Due (C)	180+ Days Past Due (D)	Liquidated Account Payable (E)
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				
19.				
20.				
21.				
22.				
23.				
24.				
25. Totals from Continuation pages (if any)				
26. Totals of Lines 1 through 25				
27. Totals from all other accounts payable				
28. **Totals of Lines 26 and 27** (Line 28, Column (B) will be automatically entered in Item 30, Column (D).)				

SCHEDULE 9 – LOANS PAYABLE

FILE NUMBER:

Source of Loans Payable at Any Time During the Reporting Period (A)	Loans Owed at Start of Period (B)	Loans Obtained During Period (C)	Repayment Made During Period		Loans Owed at End of Period (E)
			Cash (D)(1)	Other Than Cash (D)(2)	
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					
11.					
12. Totals from Continuation pages (if any)					
13. Totals of Lines 1 through 12					

The Totals from Line 13 will be automatically entered in ……Item 31 Column (C) ……..Item 44 …… ……Item 62……..Item 69 with Explanation ……Item 31 Column (D)

SCHEDULE 10 – OTHER LIABILITIES

FILE NUMBER:

Description (A)	Amount at End of Period (B)
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	
11.	
12.	
13. Total from Continuation pages (if any)	
14. Total of Lines 1 through 13 (The Total from Line 14 will be automatically entered in Item 33, Column (D).)	

SCHEDULE 11 – ALL OFFICERS AND DISBURSEMENTS TO OFFICERS

FILE NUMBER:

	(A) Name	(B) Title	(C) Status	(D) Gross Salary Disbursements (before any deductions)	(E) Allowances Disbursed	(F) Disbursements for Official Business	(G) Other Disbursements not reported in (D) through (F)	(H) TOTAL
1 A								
B								
C								

I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%

2 A								
B								
C								

I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%

3 A								
B								
C								

I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%

4 A								
B								
C								

I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%

5 A								
B								
C								

I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%

6. TOTALS FROM CONTINUATION PAGES (if any)					
7. TOTAL OF LINES 1 – 6					
8. LESS DEDUCTIONS					
9. NET DISBURSEMENTS					

SCHEDULE 12 – DISBURSEMENTS TO EMPLOYEES

FILE NUMBER:

	(A) Name	(B) Title	(C) Other Payer	(D) Gross Salary Disbursements (before any deductions)	(E) Allowances Disbursed	(F) Disbursements for Official Business	(G) Other Disbursements not reported in (D) through (F)	(H) TOTAL
1 A								
B								
C								
I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%
2 A								
B								
C								
I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%
3 A								
B								
C								
I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%
4 A								
B								
C								
I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%
5 A								
B								
C								
I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%
6. TOTAL RECEIVED BY ALL OTHER EMPLOYEES MAKING $10,000 OR LESS								
I	Schedule 15 Representational Activities	%	Schedule 16 Political Activities and Lobbying	%	Schedule 17 Contributions	%	Schedule 18 General Overhead	%	Schedule 19 Administration	%

7. TOTALS FROM CONTINUATION PAGES (if any)					
8. TOTAL OF LINES 1 – 7					
9. LESS DEDUCTIONS					
10. NET DISBURSEMENTS					

SCHEDULE 13 – MEMBERSHIP STATUS

FILE NUMBER:

Category of Membership (A)	Number (B)	Voting Eligibility (C)
1.		Yes ☐
2.		Yes ☐
3.		Yes ☐
4.		Yes ☐
5.		Yes ☐
6.		Yes ☐
7. Total from Continuation page(s)		
8. Members (Total of Lines 1 through 7; Enter the Total from Line 8 in Item 20.)		
9. Agency Fee Payers*		
10. Total Members/Fee Payers (Total of Lines 8 and 9)		
*Agency Fee Payers are not considered members of the labor organization.		

DETAILED SUMMARY PAGE – SCHEDULES 14 THROUGH 19

FILE NUMBER:

Complete Itemization Pages BEFORE the Detailed Summary Page

SCHEDULE 14 **OTHER RECEIPTS**	1. Named Payer Itemized Receipts		
	2. Named Payer Non-Itemized Receipts		
	3. All Other Receipts		
	4. Total Receipts *(add Lines 1 through 3)*		**Item 48**

SCHEDULE 15 **REPRESENTA-TIONAL ACTIVITIES**	1. Named Payee Itemized Disbursements		
	2. Named Payee Non-Itemized Disbursements		
	3. To Officers		
	4. To Employees		
	5. All Other Disbursements		
	6. Total Disbursements *(add Lines 1 through 5)*		**Item 50**

SCHEDULE 16 **POLITICAL ACTIVITIES AND LOBBYING**	1. Named Payee Itemized Disbursements		
	2. Named Payee Non-Itemized Disbursements		
	3. To Officers		
	4. To Employees		
	5. All Other Disbursements		
	6. Total Disbursements *(add Lines 1 through 5)*		**Item 51**

SCHEDULE 17 **CONTRIBUTIONS, GIFTS, AND GRANTS**	1. Named Payee Itemized Disbursements		
	2. Named Payee Non-Itemized Disbursements		
	3. To Officers		
	4. To Employees		
	5. All Other Disbursements		
	6. Total Disbursements *(add Lines 1 through 5)*		**Item 52**

SCHEDULE 18 **GENERAL OVERHEAD**	1. Named Payee Itemized Disbursements		
	2. Named Payee Non-Itemized Disbursements		
	3. To Officers		
	4. To Employees		
	5. All Other Disbursements		
	6. Total Disbursements *(add Lines 1 through 5)*		**Item 53**

SCHEDULE 19 **UNION ADMINISTRATION**	1. Named Payee Itemized Disbursements		
	2. Named Payee Non-Itemized Disbursements		
	3. To Officers		
	4. To Employees		
	5. All Other Disbursements		
	6. Total Disbursements *(add Lines 1 through 5)*		**Item 54**

SCHEDULE 14 – OTHER RECEIPTS

FILE NUMBER:

Complete Itemization Pages BEFORE the Detailed Summary Page

Name and Address (A)	Purpose (C)	Date (D)	Amount (E)
(B) Type or Classification			
	(F) Total of Transactions Listed Above		
	(G) Total of All Transactions from Continuation Pages with this Payee/Payer		
	(H) Total of All Itemized Transactions with this Payee/Payer (Sum of (F) and (G))		
	(I) Total of All Non-Itemized Transactions with this Payee/Payer		
	(J) Total of All Transactions with this Payee/Payer for this Schedule (Sum of (H) and (I))		

SCHEDULE 15 – REPRESENTATIONAL ACTIVITIES

FILE NUMBER:

Complete Itemization Pages BEFORE the Detailed Summary Page

Name and Address (A)	Purpose (C)	Date (D)	Amount (E)
(B) Type or Classification			
	(F) Total of Transactions Listed Above		
	(G) Total of All Transactions from Continuation Pages with this Payee/Payer		
	(H) Total of All Itemized Transactions with this Payee/Payer (Sum of (F) and (G))		
	(I) Total of All Non-Itemized Transactions with this Payee/Payer		
	(J) Total of All Transactions with this Payee/Payer for this Schedule (Sum of (H) and (I))		

SCHEDULE 16 – POLITICAL ACTIVITIES AND LOBBYING

FILE NUMBER:

Complete Itemization Pages BEFORE the Detailed Summary Page

Name and Address (A)	Purpose (C)	Date (D)	Amount (E)
(B) Type or Classification			
	(F) Total of Transactions Listed Above		
	(G) Total of All Transactions from Continuation Pages with this Payee/Payer		
	(H) Total of All Itemized Transactions with this Payee/Payer (Sum of (F) and (G))		
	(I) Total of All Non-Itemized Transactions with this Payee/Payer		
	(J) Total of All Transactions with this Payee/Payer for this Schedule (Sum of (H) and (I))		

SCHEDULE 17 – CONTRIBUTIONS, GIFTS, AND GRANTS

FILE NUMBER:

Complete Itemization Pages BEFORE the Detailed Summary Page

Name and Address (A)	Purpose (C)	Date (D)	Amount (E)
(B) Type or Classification			
	(F) Total of Transactions Listed Above		
	(G) Total of All Transactions from Continuation Pages with this Payee/Payer		
	(H) Total of All Itemized Transactions with this Payee/Payer (Sum of (F) and (G))		
	(I) Total of All Non-Itemized Transactions with this Payee/Payer		
	(J) Total of All Transactions with this Payee/Payer for this Schedule (Sum of (H) and (I))		

SCHEDULE 18 – GENERAL OVERHEAD

FILE NUMBER:

Complete Itemization Pages BEFORE the Detailed Summary Page

Name and Address (A)	Purpose (C)	Date (D)	Amount (E)
(B) Type or Classification			
	(F) Total of Transactions Listed Above		
	(G) Total of All Transactions from Continuation Pages with this Payee/Payer		
	(H) Total of All Itemized Transactions with this Payee/Payer (Sum of (F) and (G))		
	(I) Total of All Non-Itemized Transactions with this Payee/Payer		
	(J) Total of All Transactions with this Payee/Payer for this Schedule (Sum of (H) and (I))		

SCHEDULE 19 – UNION ADMINISTRATION

FILE NUMBER:

Complete Itemization Pages BEFORE the Detailed Summary Page

Name and Address (A)	Purpose (C)	Date (D)	Amount (E)
(B) Type or Classification			
	(F) Total of Transactions Listed Above		
	(G) Total of All Transactions from Continuation Pages with this Payee/Payer		
	(H) Total of All Itemized Transactions with this Payee/Payer (Sum of (F) and (G))		
	(I) Total of All Non-Itemized Transactions with this Payee/Payer		
	(J) Total of All Transactions with this Payee/Payer for this Schedule (Sum of (H) and (I))		

SCHEDULE 20 – BENEFITS

FILE NUMBER:

Description (A)	To Whom Paid (B)	Amount (C)
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		
21.		
22. Total of Continuation pages (if any)		
23. Total of Lines 1 through 22 (The Total from Line 23 will be automatically entered in Item 55.)		

69. ADDITIONAL INFORMATION SUMMARY

FILE NUMBER:

Public reporting burden for this collection of information is estimated to average 536 hours per response. For filers who have subsidiary organizations, as defined in Section X of these instructions, an additional public reporting burden is estimated to average 88 hours per response. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. Reporting of this information is mandatory and is required by the Labor-Management Reporting and Disclosure Act of 1959, as amended, for the purpose of public disclosure. As this is public information, there are no assurances of confidentiality. If you have any comments regarding this estimate or any other aspect of this information collection, including suggestions for reducing this burden, please send them to the U.S. Department of Labor, Office of Labor-Management Standards, Division of Interpretations and Standards, Room N-5609, 200 Constitution Avenue, NW, Washington, DC 20210.

INSTRUCTIONS FOR FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT
(11/2010)

GENERAL INSTRUCTIONS

I. WHO MUST FILE

Every labor organization subject to the Labor-Management Reporting and Disclosure Act, as amended (LMRDA), the Civil Service Reform Act (CSRA), or the Foreign Service Act (FSA) must file a financial report, Form LM-2, LM-3, or LM-4, each year with the Office of Labor-Management Standards (OLMS) of the U.S. Department of Labor. These laws cover labor organizations that represent employees who work in private industry, employees of the U.S. Postal Service, and most Federal government employees. Labor organizations that include or represent only state, county, or municipal government employees are not covered by these laws and, therefore, are not required to file. If you have a question about whether the labor organization is required to file, contact the nearest OLMS field office listed at the end of these instructions.

II. WHAT FORM TO FILE

Every labor organization subject to the LMRDA, CSRA, or FSA with total annual receipts of $250,000 or more must file Form LM-2.

Labor organizations with total annual receipts of less than $250,000 may file the simplified Form LM-3, if not in trusteeship as defined in Section IX (Labor Organization In Trusteeship) of these instructions. Labor organizations with total annual receipts of less than $10,000 may file the abbreviated annual report Form LM-4, if not in trusteeship.

The term “total annual receipts” means all financial receipts of the labor organization during its fiscal year, regardless of the source, including receipts of any special funds as described in Section VIII (Funds To Be Reported) or as described in Section X (Labor Organizations With Subsidiary Organizations). Receipts of an LMRDA section 3(l) trust in which the labor organization is interested (as described in Information Item 10) should not be included in the total annual receipts of the labor organization when determining which form to file, unless the 3(l) trust is a subsidiary organization of the union.

III. WHEN TO FILE

Form LM-2 must be filed within 90 days after the end of the labor organization's fiscal year (12-month reporting period). The law does not authorize the Department to grant an extension of time for filing reports. The penalties for delinquency are described in Section VI (Officer Responsibilities and Penalties) of these instructions.

If the labor organization went out of existence during its fiscal year, a terminal financial report must be filed within 30 days after the date it ceased to exist. See Section XII (Labor Organizations That Have Ceased to Exist) of these instructions for information on filing a terminal financial report.

IV. HOW TO FILE

Form LM-2 must be submitted electronically to the Department. Form LM-2 filers will be able to file reports in paper format only if they assert a temporary hardship exemption or apply for and are granted a continuing hardship exemption.

If you have difficulty navigating the software, or have questions about its functions and features, call the OLMS Help Desk at: (866) 401-1109. You may also send questions via e-mail to olms-public@dol.gov.

HARDSHIP EXEMPTIONS

A labor organization that must file Form LM-2 may assert a temporary hardship exemption or apply for a continuing hardship exemption to prepare and submit the report in paper format.

TEMPORARY HARDSHIP EXEMPTION:

If a labor organization experiences unanticipated technical difficulties that prevent the timely preparation and submission of an electronic filing, the organization may file Form LM-2 in paper format by the required due date. An electronic format copy of the filed paper format document shall be submitted to the Department within ten business days after the required due date. Indicate in Item 3 (Amended, Hardship Exempted, or Terminal Report) that the labor organization is filing under the hardship exemption procedures. Unanticipated technical difficulties that may result in additional delays should be brought to the attention of the OLMS Division of Interpretations and Standards, which can be reached at the address below, by email at OLMS-Public@dol.gov, by phone at 202-693-0123, or by fax at 202-693-1340.

Note: If either the paper filing or the electronic filing is not received in the timeframe specified above, the report will be considered delinquent.

CONTINUING HARDSHIP EXEMPTION:

(a) A labor organization may apply in writing for a continuing hardship exemption if Form LM-2 cannot be filed electronically without undue burden or expense. Such written application shall be received at least 30 days prior to the required due date of the report(s). The written application shall contain the information set forth in paragraph (b).

The application must be mailed to the following address:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210

Questions regarding the application should be directed to the OLMS Division of Interpretations and Standards, which can be reached at the above address, by e-mail at OLMS-Public@dol.gov, by phone at 202-693-0123, or by fax at 202-693-1340.

(b) The request for the continuing hardship exemption shall include, but not be limited to, the following: (1) the justification for the requested time period of the exemption; (2) the burden and expense that the labor organization would incur if it was required to make an electronic submission; and (3) the reasons for not submitting the report(s) electronically. The applicant must specify a time period not to exceed one year.

(c) The continuing hardship exemption shall not be deemed granted until the Department notifies the applicant in writing. If the Department denies the application for an exemption, the labor organization shall file the report(s) in electronic format by the required due date. If the Department determines that the grant of the exemption is appropriate and consistent with the public interest and the protection of union members and so notifies the applicant, the labor organization shall follow the procedures set forth in paragraph (d).

(d) If the request is granted, the labor organization shall submit the report(s) in paper format by the required due date. The filer may be required to submit Form LM-2 in electronic format upon the expiration of the period for which the exemption is granted. Indicate in Item 3 (Amended, Hardship Exempted, or Terminal Report) that the labor organization is filing under the hardship exemption procedures.

Note: If either the paper filing or the electronic filing is not received in the timeframe specified above, the report will be considered delinquent.

V. PUBLIC DISCLOSURE

The LMRDA requires that the Department make labor organization financial reports available for inspection by the public. Reports may be viewed and downloaded from the OLMS Web site at www.unionreports.gov. Copies of reports and union constitutions and bylaws can also be ordered at the same Web site. Reports may also be examined and copies purchased at the OLMS Public Disclosure Room at the following address:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-1519
Washington, DC 20210

VI. OFFICER RESPONSIBILITIES AND PENALTIES

The president and treasurer or the corresponding principal officers of the labor organization required to sign Form LM-2 are personally responsible for its filing and accuracy. Under the LMRDA, officers are subject to criminal penalties for willful failure to file a required report and for false reporting. False reporting includes making any false statement or misrepresentation of a material fact while knowing it to be false, or for knowingly failing to disclose a material fact in a required report or in the information required to be contained in it or in any information required to be submitted with it.

The reporting labor organization and the officers required to sign Form LM-2 are also subject to civil prosecution for violations of the filing requirements. Section 210 of the LMRDA (29 U.S.C. 440) provides that "whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate."

Under the CSRA and FSA and implementing regulations, false reporting and failure to report may result in administrative enforcement action and litigation. The officers responsible for signing Form LM-2 are also subject to criminal penalties for false reporting and perjury under Sections 1001 of Title 18 and 1746 of Title 28 of the United States Code.

VII. RECORDKEEPING

The officers required to file Form LM-2 are responsible for maintaining records that will provide in sufficient detail the information and data necessary to verify the accuracy and completeness of the report. The records must be kept for at least 5 years after the date the report is filed. Any record necessary to verify, explain or clarify the report must be retained, including, but not limited to, vouchers, worksheets, receipts, applicable resolutions, and any electronic documents, including recordkeeping software, used to complete, read, and file the report.

VIII. FUNDS TO BE REPORTED

The labor organization must report financial information on Form LM-2 for all funds of the labor organization. Include any special purpose funds or accounts, such as strike funds, vacation funds, and scholarship funds even if they are not part of the labor organization's general treasury.

All labor organization political action committee (PAC) funds are considered to be labor organization funds. However, to avoid duplicate reporting, PAC funds that are kept separate from your labor organization's treasury are not required to be included in your organization's Form LM-2 if publicly available reports on the PAC funds are filed with a Federal or state agency.

Your organization is required to report financial information about any "subsidiary organizations." Financial information about your organization and its subsidiary organizations may be combined on a single Form LM-2 or you may attach to your Form LM-2 report the regular annual report of the financial condition and operations of the subsidiary organization with a signed certification by an independent public accountant, as described in Section X (Labor Organizations With Subsidiary Organizations).

If combining the information concerning subsidiary organizations, be sure to include the requested information and amounts for the subsidiary organizations as well as for all other assets of your union in all items.

SPECIAL INSTRUCTIONS FOR CERTAIN ORGANIZATIONS

IX. LABOR ORGANIZATIONS IN TRUSTEESHIP

Any labor organization that has placed a subordinate labor organization in trusteeship is responsible for filing the subordinate's annual financial report. A trusteeship is defined in section 3(h) of the LMRDA (29 U.S.C. 402) as "any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws."

Annual financial reports filed for any labor organization in trusteeship must be filed on Form LM-2. The report must be signed by the president and treasurer or corresponding principal officers of the labor organization that imposed the trusteeship. The trustees of the subordinate labor organization must also sign and date Form LM-2. To add signature blocks, click on the “Add Signature Block” button on the bottom of page 1.

X. LABOR ORGANIZATIONS WITH SUBSIDIARY ORGANIZATIONS

The labor organization must disclose assets, liabilities, receipts, and disbursements of a subsidiary organization.

Within the meaning of these instructions, a subsidiary organization is defined as any separate organization of which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization. A subsidiary organization is considered to be wholly financed if the initial financing was provided by the reporting labor organization even if the subsidiary organization is currently wholly or partially self-sustaining. An example of a subsidiary organization is a building corporation which holds title to a building; the labor organization owns the building corporation, selects the officers, and finances the operation of the building corporation.

A labor organization is required to report financial information for each of its subsidiary organizations using one of the following methods:

Method (1) — Consolidate the financial information for the subsidiary organization and the labor organization on a single Form LM-2.

Method (2) —File, with the labor organization’s Form LM-2, the regular annual report of the financial condition and operations of the subsidiary organization, accompanied by a statement signed by an independent public accountant certifying that the financial report presents fairly the financial condition and operations of the subsidiary organization and was prepared in accordance with generally accepted accounting principles.

Financial information reported separately for subsidiary organizations under method (2) must include the name of the subsidiary organization and the name and file number of the labor organization as shown on its Form LM-2. The financial report of the subsidiary organization must cover the same reporting period as that used by the reporting labor organization.

When method (2) is used and the subsidiary organization is an investment, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 26 (Investments) and in Schedule 5 (Investments) of the labor organization’s Form LM-2. When method (2) is used and the subsidiary organization is of a non-investment nature, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 28 (Other Assets) and in Schedule 7 (Other Assets) of the labor organization’s Form LM-2.

The same type of information required on Form LM-2 regarding disbursements to officers and employees and loans made by labor organizations must also be reported with respect to the subsidiary organization. In method (1) the information relating to the subsidiary organization must be combined with that of the labor organization and reported on the labor organization’s Form LM-2 on Schedule 11 (All Officers and Disbursements to Officers) and Schedule 12 (Disbursements to Employees) and Statement A, Item 24 (Loans Receivable) and Schedule 2 (Loans Receivable) in the detail

required by the instructions. If method (2) is used, an attachment must be submitted containing the information required by the instructions for Schedules 2, 11, and 12.

The information regarding loans made by the subsidiary organization must include in Schedule 2 (Loans Receivable) a listing of the names of each officer, employee, or member of the labor organization and each officer or employee of the subsidiary organization whose total loan indebtedness to the subsidiary organization, to the labor organization, or to both at any time during the reporting period exceeded $250. However, if method (2) is used, the amount reported by the subsidiary organization should be only the amount owed to the subsidiary organization.

The annual financial report must also include on Schedule 11 (All Officers and Disbursements to Officers) all disbursements made by the subsidiary organization to or on behalf of its officers and officers of the labor organization. The report must also list on Schedule 12 (Disbursements to Employees) the name and position of the subsidiary organization's employees whose total gross salaries, allowances, and other disbursements from the subsidiary organization, the reporting labor organization, and any affiliates were more than $10,000. However, if method (2) is used, only the disbursements of the subsidiary organization for its employees should be reported.

XI. COMPLETING FORM LM-2

INTRODUCTION

Most pages have a "Save & Calculate" button to total and transfer data to fields in various parts of the form. You may click on one or more of these buttons as you fill out the form at any time.

You may click on the "Validate Form" button at any time to check for errors. This action will generate an "Errors Page" listing any errors that will need to be corrected before you will be able to sign the form. Clicking on the signature lines will also perform the validation function.

INFORMATION ITEMS 1–9

Items 1, 2, and 4-8 are "pre-filled" items. These fields are filled in by the software based on information you entered when you accessed and downloaded the form from our Web site. You cannot edit the information pre-filled in Items 1, 2, and 4-7.

1. FILE NUMBER — The software will enter the labor organization's 6-digit file number here and at the top of each page of Form LM-2. This is the number you entered when you downloaded Form LM-2. If the number is incorrect, you must download another copy of the form using the correct number. If the labor organization does not have the number on file and cannot obtain the number from prior reports filed with the Department, the number can be obtained from the OLMS Web site at www.unionreports.gov, or by contacting the nearest OLMS field office.

2. PERIOD COVERED — The software will enter the beginning and ending dates of the period covered by this report. These are the dates you entered when you downloaded Form LM-2. If the dates are incorrect, you must download another form using the correct dates.

If the labor organization changed its fiscal year, the ending date in Item 2 should be the labor organization's new fiscal year ending date and the labor organization should indicate in Item 69 (Additional Information) that the report is for a period of less than 12 months because its fiscal year has changed. For example, if the labor organization's fiscal year ending date changes from June 30 to December 31, a report must be filed for the partial year from July 1 to December 31. Thereafter, the labor organization's annual report should cover a full 12-month period from January 1 to December 31.

3. AMENDED, HARDSHIP EXEMPTED, OR TERMINAL REPORT — Do not complete this item unless this report is an amended, hardship exempted, or terminal report. Select Item 3(a) if the labor organization is filing an amended report correcting a previously filed report. Select Item 3(b) if the labor organization is filing under the hardship exemption procedures defined in Section IV. Select Item 3(c) if the labor organization has gone out of business by disbanding, merging into another labor organization, or being merged and consolidated with one or more labor organizations to form a

new labor organization, and this is the labor organization's terminal report. Be sure the date the labor organization ceased to exist is entered in Item 2 (Period Covered) after the word "Through." See Section XII (Labor Organizations That Have Ceased to Exist) of these instructions for more information on filing a terminal report.

4. AFFILIATION OR ORGANIZATION NAME — The software accesses this information from the OLMS database and will enter the name of the national or international labor organization that granted the labor organization a charter. "Affiliates," within the meaning of these instructions, are labor organizations chartered by the same parent body, governed by the same constitution and bylaws, or having the relationship of parent and subordinate. For example, a parent body is an affiliate of all of its subordinate bodies, and all subordinate bodies of the same parent body are affiliates of each other.

If the labor organization has not reported such an affiliation, the software will enter the name of the labor organization as currently identified in the labor organization's constitution and bylaws or other organizational documents.

This item cannot be edited by the filer. If the labor organization needs to change this information, contact OLMS at (202) 693-0124.

5. DESIGNATION — The software will enter the specific designation that is used to identify the labor organization, such as Local, Lodge, Branch, Joint Board, Joint Council, District Council, etc. This field cannot be edited by the filer.

6. DESIGNATION NUMBER — The software will enter the number or other identifier, if any, by which the labor organization is known. This field cannot be edited by the filer.

7. UNIT NAME — The software will enter any additional or alternate name by which the labor organization is known, such as "Chicago Area Local." This field cannot be edited by the filer.

8. MAILING ADDRESS — The software accesses the union's mailing address on record in the OLMS database and enters it in Item 8. The first and last name of the person, if any, to whom such mail should be sent and any building and room number should be included. These fields can be edited.

9. PLACE WHERE RECORDS ARE KEPT — If the records required to be kept by the labor organization to verify this report are kept at the address reported in Item 8 (Mailing Address), answer "Yes." If not, answer "No" and provide in Item 69 (Additional Information) the address where the labor organization's records are kept.

INFORMATION ITEMS 10–21

Answer Items 10 through 21 as instructed. Select the appropriate box for those questions requiring a "Yes" or "No" answer; do not leave both boxes blank. Enter a single "0" in the boxes for items requiring a number or dollar amount if there is nothing to report.

10. TRUSTS OR FUNDS — Answer "Yes" to Item 10, if the labor organization has an interest in a trust or other fund as defined in 29 U.S.C. 402(l). Provide in Item 69 (Additional Information) the full name, address, and purpose of each trust or other fund. If a report has been filed for the trust or other fund under the Employee Retirement Income Security Act of 1974 (ERISA), report in Item 69 (Additional Information) the ERISA file number (Employer Identification Number — EIN) and plan number, if any.

A trust in which a labor organization is interested is defined in Section 3(l) of the LMRDA (29 U.S.C. 402(l)) as:

> …a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

The determination whether a particular entity is a trust in which a labor organization is interested will be based on the facts in each case.

11. POLITICAL ACTION COMMITTEE FUNDS AND SUBSIDIARY ORGANIZATIONS — If the labor organization answered "Yes" to Item 11(a), in reference to a political action committee,

provide in Item 69 (Additional Information) the full name of each separate political action committee (PAC) and list the name of any government agency, such as the Federal Election Commission or a state agency, with which the PAC has filed a publicly available report, and the relevant file number of the PAC. (PAC funds kept separate from the labor organization's treasury need not be included in the labor organization's Form LM-2 if publicly available reports on the PAC funds are filed with a Federal or state agency.)

If the labor organization answered "Yes" to Item 11(b), in reference to a subsidiary organization, provide in Item 69 (Additional Information) the name, address, and purpose of each subsidiary organization. Indicate whether the information concerning its financial condition and operations is included in this Form LM-2 or in a separate report. See Section X of these instructions for information on reporting subsidiary organizations.

12. AUDIT OR REVIEW OF BOOKS AND RECORDS — If the labor organization answered "Yes" to Item 12, indicate in Item 69 (Additional Information) whether the audit or review was performed by an outside accountant or a parent body auditor/representative. If an outside accountant performed the audit or review, provide the name of the accountant or accounting firm. Report any audit or review by an outside accountant or a parent body auditor/representative in which the labor organization's books and records were examined to verify their accuracy and validity. The term "audit or review" does not include providing assistance in developing a bookkeeping system, providing routine bookkeeping services, or merely compiling information from the labor organization's books and records to prepare Form LM-2 or other financial reports. Also, do not answer "Yes" to Item 12 if an audit committee or trustees of the labor organization performed the audit or review.

13. LOSSES OR SHORTAGES — Answer "Yes" to Item 13 if the labor organization experienced a loss, shortage, or other discrepancy in its finances during the period covered. Describe the loss or shortage in detail in Item 69 (Additional Information), including such information as the amount of the loss or shortage of funds or a description of the property that was lost, how it was lost, and to what extent, if any, there has been an agreement to make restitution or any recovery by means of repayment, fidelity bond, insurance, or other means.

14. FIDELITY BOND — Enter the maximum amount recoverable for a loss caused by any officer, employee, or agent of the labor organization who handled the labor organization's funds. Enter "0" if the labor organization was not covered by a fidelity bond during the reporting period.

NOTE: If a labor organization has property and annual financial receipts that exceeded $5,000, each of the labor organization's officers, employees, and agents who handles funds or other property of the labor organization must be bonded. The amount of the bond must be at least 10% of the value of the funds handled by the individual during the last reporting period, up to a maximum bond of $500,000. The bond must be obtained from a surety company approved by the Secretary of the Treasury. If you have any questions or need more information about bonding requirements, contact the nearest OLMS field office.

15. ACQUISITION OR DISPOSITION OF ASSETS — If the labor organization answered "Yes" to Item 15, describe in Item 69 (Additional Information) the manner in which the labor organization acquired or disposed of the asset(s), such as donating office furniture or equipment to charitable organizations, trading in assets, writing off a receivable, or giving away other tangible or intangible property of the labor organization. Include the type of asset, its value, and the identity of the recipient or donor, if any. Also report in Item 69 the cost or other basis at which any acquired assets were entered on the labor organization's books or the cost or other basis at which any assets disposed of were carried on the labor organization's books. For example, assets may be entered on the labor organization's books at cost and carried at that value; carried at cost less accumulated depreciation; or carried at scrap value or other nominal value because the assets were fully depreciated or were expensed when purchased (that is, the cost was charged to current expenses rather than entered on the books and periodically depreciated).

For assets that were traded in, enter in Item 69 the cost, book value, and trade-in allowance.

16. PLEDGED OR ENCUMBERED ASSETS — If the labor organization answered "Yes" to Item 16, identify in Item 69 (Additional Information) all of the labor organization's assets pledged or encumbered in any way (such as those pledged as collateral for a loan) at the end of the reporting period. Also report in Item 69 their fair market value, and provide details of transactions related to the encumbrance.

17. CONTINGENT LIABILITIES — If the labor organization answered "Yes" to Item 17, describe in Item 69 (Additional Information) the transactions or events resulting in the contingent liabilities and include the identity of the claimant or creditor. Contingent liabilities are potential obligations that may or may not develop into actual liabilities in the future. Examples of a contingent liability are a loan co-signed by the labor organization, or a pending lawsuit that could result in the labor organization being ordered to pay damages or make other payments.

A pending administrative or judicial action is considered a contingent liability that must be reported in Item 17 if, in the opinion of legal counsel, it is reasonably possible that the labor organization will be required to make some payment. Such administrative or judicial actions must be reported as contingent liabilities regardless of whether or not the possible losses would have a materially adverse effect on the labor organization's financial condition. List in Item 69 each administrative or judicial action, including the case number, court, and caption.

18. CHANGES IN CONSTITUTION AND BYLAWS OR PRACTICES AND PROCEDURES — If the labor organization answered "Yes" to Item 18 because the labor organization's constitution and bylaws were changed during the reporting period (other than rates of dues and fees), a dated copy of the new constitution and bylaws must be submitted to OLMS as an electronic attachment to the Form LM-2.

If the labor organization is governed by a uniform or model constitution and bylaws prescribed by the labor organization's parent national or international body, the labor organization's parent body may file the constitution and bylaws on the labor organization's behalf. If the parent body files a constitution and bylaws on the labor organization's behalf, answer "Yes" to Item 18 and state that fact in Item 69 (Additional Information). If the labor organization has any supplemental governing documents or has modified a model constitution and bylaws, the labor organization must file these documents.
If the labor organization answered "Yes" to Item 18 because the labor organization changed any of the practices/procedures listed below during the reporting period and the practices/procedures are not described in the labor organization's constitution or bylaws, the labor organization must file an amended Form LM-1 (Labor Organization Information Report) to update information on file with the Department:

- qualifications for or restrictions on membership;
- levying assessments;
- participating in insurance or other benefit plans;
- authorizing disbursement of labor organization funds;
- auditing financial transactions of the labor organization;
- calling regular and special meetings;
- authorizing bargaining demands;
- ratifying contract terms;
- authorizing strikes;
- disciplining or removing officers or agents for breaches of their trust;
- imposing fines and suspending or expelling members including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures;
- selecting officers and stewards and any representatives to other bodies composed of labor organizations' representatives;
- invoking procedures by which a member may protest a defect in the election of officers (including not only all procedures for initiating an election protest but also all procedures for subsequently appealing an adverse decision, e.g., procedures for appeals to superior or parent bodies, if any); and
- issuing work permits.

Information on obtaining Form LM-1 may be obtained from the OLMS Web site at www.olms.dol.gov or from any OLMS field office.

NOTE: Federal employee labor organizations subject solely to the Civil Service Reform Act or Foreign Service Act are not required to submit an amended Form LM-1 to describe revised or changed practices/procedures.

19. NEXT REGULAR ELECTION — Enter the month and year of the labor organization's next regular election of general officers (president, vice president, treasurer, secretary, etc.). Do not report the date of any interim election to fill vacancies.

20. NUMBER OF MEMBERS — After Schedule 13 is completed and the "Save & Calculate" button is clicked, the software will enter the total number of members into Item 20.

21. DUES AND FEES — Enter the dues and fees established by the labor organization. If more than one rate applies, enter the minimum and maximum rates. Enter "0" where appropriate.

Line (a): Enter the regular dues, fees or other periodic payments that a member must pay to be in good standing in the labor organization, including the calendar basis for the payment (per month, per year, etc.). Include only the dues or fees of regular members and not dues or fees of members with special rates, such as apprentices, retirees, or unemployed members.

Line (b) If individuals covered by your organization's collective bargaining agreement(s) pay "working" dues in addition to their regular dues, enter the amount or percent of "working" dues, including the basis for the payment (per hour, per month, etc.).

Line (c): Enter the initiation fees required from new members.

Line (d): Enter the fees other than dues required from transferred members. Such fees are those charged to persons applying for a transfer of membership to the labor organization from another labor organization with the same affiliation. Do not report fees charged to members transferring from one class of membership to another within the labor organization.

Line (e): If the labor organization issues work permits, enter the fees required and enter the calendar basis for the payment (per month, per year, etc.). Work permit fees are fees charged to nonmembers of the labor organization who work within its jurisdiction. Do not report as work permit fees those fees charged to nonmember applicants for membership pending acceptance of their membership application, or fees charged to persons applying for transfer of membership to the labor organization pending acceptance of their application for transfer.

FINANCIAL DETAILS

REPORT ONLY DOLLAR AMOUNTS

Report all amounts in dollars only. Round cents to the nearest dollar. Amounts ending in $.01 through $.49 should be rounded down. Amounts ending in $.50 through $.99 should be rounded up.

REPORTING CLASSIFICATIONS

Complete all items and lines on the form. Do not use different accounting classifications or change the wording of any item or line.

BEGINNING AND ENDING AMOUNTS

Entries in Schedules 2 and 9 and in Statement A must report amounts for both the start and the end of the reporting period. The amounts entered for the start of the reporting period on the labor organization's report should be identical to the amounts entered for the end of the reporting period on last year's report. If the amounts are not the same, fully explain the difference in Item 69 (Additional Information).

COMPLETE SCHEDULES FIRST

Complete Schedules 1 through 20 before completing Statements A and B. Be sure to complete all applicable lines in Schedules 1 through 20. As you complete the schedules, the software will transfer some of the totals to the appropriate items in Statements A and B. You must enter the remaining totals manually.

COMPLETE ALL ITEMS 22 THROUGH 68

Complete all items in Statement A and Statement B. Enter "0" where appropriate.

SCHEDULES 1 THROUGH 12

SCHEDULE 1 – ACCOUNTS RECEIVABLE AGING SCHEDULE

The labor organization must report 1) all accounts with an entity or individual that aggregate to a value of $5,000 or more and that are 90 days or more past due at the end of the reporting period or were liquidated, reduced or written off during the reporting period; and 2) the total aggregated value of all other accounts receivable.

If additional lines are needed, click the "Add More Accounts Receivable" button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Column (A): Enter the name of each entity or individual with which the labor organization has an account receivable of $5,000 or more that is 90 days or more past due at the end of the reporting period or that was liquidated, reduced or written off during the reporting period without the receipt of cash sufficient to cover the total value of the account receivable.

Column (B): Enter the total amount of money owed to the labor organization by each listed entity or individual at the end of the reporting period. Enter on the "Total from all other accounts receivable" line the total amount of money owed to the labor organization in all other accounts receivable not required to be itemized in Schedule 1.

Click the "Save & Calculate" button at the top of the schedule and the software completes the "Total of all itemized accounts receivable" line" in Column (B) and enters the total accounts receivable in Column (B) and in Item 23, Column (B) of Statement A.

Column (C): Enter the total amount of money owed to the labor organization by each listed entity or individual at the end of the reporting period that is 90 to 180 days past due. Enter the total amount of money owed to the labor organization in all other accounts receivable (those of less than $5,000) that are 90 to 180 days past due and are not required to be itemized in Schedule 1 on the "Total from all other accounts receivable" line.

Click the "Save & Calculate" button at the top of the schedule and the software completes the "Total of all itemized accounts receivable" line in Column (C) and enters the total accounts receivable that were 90 to 180 days past due in Column (C).

Column (D): Enter the total amount of money owed to the labor organization by each listed entity or individual at the end of the reporting period that is more than 180 days past due. Enter the total amount of money owed to the labor organization in all other accounts receivable (those of less than $5,000 and not require to be itemized in Schedule 1) that are more than 180 days past due on the "Total from all other accounts receivable" line.

Click the "Save & Calculate" button at the top of the schedule and the software completes the "Total of all itemized accounts receivable" line in Column (D) and enters the total accounts receivable that were more than 180 days past due in Column (D).

Column (E): Enter the total amount of money owed to the labor organization by each entity or individual that was liquidated, reduced or written off during the reporting period by the reporting labor organization without the receipt of cash sufficient to cover the total value of the account receivable. Enter on the "Total from all other accounts receivable" line the total amount of money owed to the labor organization in all other accounts receivable (those of less than $5,000 and not required to be itemized in Schedule1) that was liquidated, reduced or written off during the reporting period by the reporting labor organization without the receipt of cash sufficient to cover the total value of the account receivable.

Click the "Save & Calculate" button at the top of the schedule and the software completes the "Total of all itemized accounts receivable" line in Column (E) and enters the total liquidated accounts receivable in Column (E).

Provide in Item 69 (Additional Information) all details and circumstances in connection with the liquidation, reduction or writing off of any account receivable, in accordance with the instructions for Item 15 (Acquisition or Disposition of Assets).

SCHEDULE 2 – LOANS RECEIVABLE

Report details of all direct and indirect loans (whether or not evidenced by promissory notes or secured by mortgages) owed to the labor organization at any time during the reporting period by individuals, business enterprises, benefit plans, and other entities including labor organizations. An example of an indirect loan is a disbursement by the labor organization to an educational institution for the tuition expense of an officer, employee, or member that must be repaid to the labor organization by that individual. Be sure to report all loans that were made and repaid in full during the reporting period. Do not include investments in corporate bonds or mortgages purchased on a block basis through a bank or similar institution that must be reported in Schedule 5 (Investments Other Than U.S. Treasury Securities).

NOTE: Advances, including salary advances, are considered loans and must be reported in Schedule 2 (Loans Receivable). However, advances to officers and employees of the labor organization for travel expenses necessary for conducting official business are not considered loans if the following conditions are met:

- The amount of an advance for a specific trip does not exceed the amount of expenses reasonably expected to be incurred for official travel in the near future, and the amount of the advance is fully repaid or fully accounted for by vouchers or paid receipts within 30 days after the completion or cancellation of the travel.
- The amount of a standing advance to an officer or employee who must frequently travel on official business does not unreasonably exceed the average monthly travel expenses for which the individual is separately reimbursed after submission of vouchers or paid receipts, and the individual does not exceed 60 days without engaging in official travel.

See the instructions for Schedules 7 (Other Assets), 11 (All Officers and Disbursements to Officers) and 12 (Disbursements to Employees) for reporting travel advances that meet these criteria.

If additional lines are needed, click the “Add More Loans Receivable” button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Column (A): Enter the following information:

- The name of each officer, employee, or member whose total loan indebtedness to the labor organization, including any subsidiary organization, at any time during the reporting period exceeded $250, and the name of each business enterprise which had any loan indebtedness, regardless of amount, at any time during the reporting period;
- The purpose of each loan;
- The security given for each loan; and
- The terms of repayment for each loan.

For each officer or employee listed, indicate after each name either "O" (officer) or "E" (employee).

Column (B): Enter the loan amounts outstanding at the start of the reporting period from each listed individual and business enterprise. Enter the total of loans made to officers, employees, or members whose total individual loan indebtedness to the labor organization at any time during the reporting period did not exceed $250, and all loans, regardless of amount, made to other individuals and entities on the “Total of loans not listed above” line.

Click the “Save & Calculate” button at the top of the schedule and the software will enter the total for Column (B) on the “Total of all lines above” line in Schedule 2 and in Item 24 (Loans Receivable), Column (A) of Statement A.

Column (C): Enter the amount of loans made during the reporting period to each listed individual and business enterprise. Enter the total of all other loans made during the reporting period on the “Total of loans not listed above” line.

Click the “Save & Calculate” button at the top of the schedule and the software will enter the total for Column (C) on the “Total of all lines above” line in Schedule 2 and in Item 61 (Loans Made) of Statement B.

Columns (D)(1) and (D)(2): Enter the amount of loan repayments during the reporting period from each listed individual and business enterprise. Report in these columns only the portion of the payments applied toward principal; interest received must be reported in Item 40 (Interest). Use Column (D)(1) to report repayments received in cash. Use Column (D)(2) to report repayments made in a manner

other than cash, such as repayments made by officers or employees by means of deductions from their salaries. Enter the amount of loan repayments from all other loans on the "Total of loans not listed above" line.

Click the "Save & Calculate" button at the top of the schedule and the software will enter the total for Columns (D)(1) and (D)(2) on the "Total of all lines above" line in Schedule 2 and the total from Column (D)(1) in Item 45 (Repayments of Loans Made) of Statement B. Explain in Item 69 (Additional Information) any non-cash amounts reported in Column (D)(2).

Column (E): Enter the loan amounts outstanding at the end of the reporting period for each listed individual and business enterprise. Enter the total amount outstanding at the end of the reporting period for all other loans on the "Total of loans not listed above" line.

Click the "Save & Calculate" button at the top of the schedule and the software will enter the total for Column (E) on the "Total of all lines above" line in Schedule 2 and in Item 24 (Loans Receivable), Column (B) of Statement A. If any loans receivable were liquidated, reduced or written off during the reporting period, the reason and the amount must be reported in Item 69 (Additional Information).

NOTE: Section 503(a) of the LMRDA (29 U.S.C. 503) prohibits labor organizations from making direct or indirect loans to any officer or employee of the labor organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000 at any time.

SCHEDULE 3 – SALE OF INVESTMENTS AND FIXED ASSETS

Report details of the sale or redemption by the labor organization of U.S. Treasury securities, marketable securities, other investments, and fixed assets, including those fixed assets that were expensed (that is, the cost of the asset was charged to current expenses, rather than entered on the books and periodically depreciated), during the reporting period. Include receipts from sales of mortgages that were purchased on a block basis through a bank or similar institution. Do not include the receipts from repayments by individual mortgagors, which must be reported in Schedule 2 (Loans Receivable) as loan repayments.

If additional lines are required click the "Add More Investments and Fixed Assets Sales" button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Column (A): Enter a general description of the type of investment or fixed asset sold, such as U.S. Treasury securities, stocks, bonds, land, automobiles, etc. If land or buildings were sold, enter the location of the property, including the street address, if appropriate.

Column (B): Enter the total cost of each type of investment (including any transaction costs) or fixed asset described in Column (A).

Column (C): Enter the value at which the investments or fixed assets were shown on the labor organization's books.

Column (D): Enter the gross sales (or contract) price of the investments or fixed assets.

Column (E): Enter the net amount received from the sale of the investments or fixed assets. If the amount received during the reporting period is less than the amount due (gross sales price less any deductions for selling expenses and repayments of secured loans or mortgages), the additional amount due to the labor organization must be reported in Schedule 7 (Other Assets) with a description sufficient to identify the type of asset. However, if a mortgage or note is taken back, it must be reported as a new loan in Schedule 2 (Loans Receivable).

Click the "Save & Calculate" button at the top of the schedule and the software enters the totals for Columns (B) through (E) on the "Total of all lines above" line.

Enter the total amount from the sale or redemption of U.S. Treasury securities, marketable securities, or other investments that was promptly reinvested (i.e., "rolled over") in U.S. Treasury securities, marketable securities, or other investments during the reporting period on the "Less Reinvestments" line. Calculate the total amount reinvested by adding, for each investment, the lower of each investment's original cost or the amount received from the

sale or redemption that was actually reinvested. If only a portion of the amount received was reinvested, only the reinvested portion may be included on the Less Reinvestments line. Interest and dividends received during the reporting period must be reported in Items 40 (Interest) and 41 (Dividends).

Click the “Save & Calculate” button at the top of the schedule and the software will enter the total ”Net Sales” in Column (E) and in Item 43 (Sale of Investments and Fixed Assets) of Statement B.

SCHEDULE 4 – PURCHASE OF INVESTMENTS AND FIXED ASSETS

Report details of the purchase by the labor organization of U.S. Treasury securities, marketable securities, other investments, and fixed assets, including those fixed assets that were expensed (that is, the cost of the asset was charged to current expenses, rather than entered on the books and periodically depreciated), during the reporting period. Include disbursements for mortgages that were purchased on a block basis through a bank or similar institution.

If additional lines are needed, click the “Add Investments And Fixed Assets Purchases” button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Column (A): Enter a general description of the type of investment or fixed asset purchased, such as U.S. Treasury securities, stocks, bonds, land, automobiles, etc. If land or buildings were purchased, enter the location of the property, including the street address, if appropriate.

Column (B): Enter the total cost of each type of investment (including any transaction costs) or fixed asset described in Column (A).

Column (C): Enter the value at which the investments or fixed assets were entered on the labor organization's books. If assets were traded in on assets purchased, answer Item 15 (Acquisition or Disposition of Assets) "Yes," and provide in Item 69 (Additional Information) the cost, book value, and trade-in allowance in accordance with the instructions for Item 15.

Column (D): Enter the total amount disbursed for each type of investment or fixed asset purchased during the reporting period. Do not include any unpaid balance that must be reported in Schedule 9 (Loans Payable) or Item 32 (Mortgages Payable) of Statement A.

Click the “Save & Calculate “button at the top of the schedule and the software will enter the totals for Columns (B) through (D) on the “Total of all lines above” line.

Enter the total amount from the sale or redemption of U.S. Treasury securities, marketable securities, or other investments that was promptly reinvested (i.e., "rolled over") in U.S. Treasury securities, marketable securities, or other investments during the reporting period on the “Less Reinvestments” line. Calculate the total amount reinvested by adding, for each investment, the lower of each investment's original cost or the amount received from the sale or redemption that was actually reinvested. If only a portion of the amount received was reinvested, only the reinvested portion may be included on the Less Reinvestments line. Interest and dividends received during the reporting period must be reported in Items 40 (Interest) and 41 (Dividends). The total on the Less Reinvestments line must agree with the amount reported as Reinvestments on Schedule 3 (Sale of Investments and Fixed Assets).

Click the “Save & Calculate” button at the top of the schedule and the software will enter the “Net Purchases” in Column (D) and in Item 60 (Purchase of Investments and Fixed Assets) of Statement B.

SCHEDULE 5 – INVESTMENTS OTHER THAN U.S. TREASURY SECURITIES

Report details of all the labor organization’s investments at the end of the reporting period, other than U.S. Treasury securities. Include mortgages purchased on a block basis and investments in any subsidiary organization not reported on a consolidated basis in accordance with method (1) explained in Section X of these instructions. Do not include savings accounts, certificates of deposit, or money market accounts, which must be reported in Item 22 (Cash) of Statement A.

Line A: Enter in Column (B) the total cost of all the labor organization's marketable securities including transaction costs such as brokerage commissions. Marketable securities are those

for which current market values can be obtained from published reports of transactions in listed securities or in securities traded "over the counter," such as corporate stocks and bonds, stock and bond mutual funds, state and municipal bonds, and foreign government securities.

Line B: Enter in Column (B) the total book value of all the labor organization's marketable securities. Book value is the lower of cost or market value.

Line C: List in Column (A) each Marketable Security that has a book value over $5,000 and exceeds 5% of the total book value entered in Line B, Column (B) above and enter its book value in Column (B).

If additional lines are needed to complete Line C, click the “Add More Marketable Securities” button in the schedule. The software will add lines to the schedule in increments of ten.

Line D: Enter in Column (B) the total cost, including any transaction costs, of all the labor organization's other investments (that is, those that are not U.S. Treasury securities or marketable securities). Include mortgages purchased on a block basis.

Line E: Enter in Column (B) the total book value of such other investments. Book value is the lower of cost or market value.

Line F: List in Line F, Column (A) each Other Investment that has a book value over $5,000 and exceeds 5% of the total book value entered on in Column (B) above and enter its book value in Column (B).

If additional lines are needed to complete Line F, click the “Add More Marketable Securities” button in the schedule. The software adds lines to the schedule in increments of ten.

NOTE: If your organization has a subsidiary organization for which a separate report is being submitted in accordance with Section X of these instructions, the subsidiary organization must be reported in Schedule 5 if it is an investment. Enter in Line F the name of each subsidiary organization in Column (A) and its book value in Column (B).

If additional lines are required, click the Add More Other Investments button on the top of the schedule. The software adds lines to the schedule in increments of ten.

Line G: Click the “Save & Calculate” button at the top of the schedule and the software will enter the total of Lines B and E on Line G and in Item 26 (Investments), Column (B) of Statement A.

SCHEDULE 6 – FIXED ASSETS

Report details of all fixed assets, such as land, buildings, automobiles and other vehicles, and office furniture and equipment owned by the labor organization at the end of the reporting period. Land and buildings must be itemized, whereas automobiles and other vehicles, and office furniture and equipment should be aggregated. Include fixed assets that were expensed (that is, the cost of the asset was charged to current expenses, rather than entered on the books and periodically depreciated), fully depreciated, or carried on the labor organization's books at scrap value or other nominal value.

Column (A): Enter under “Line A. Land (give location)” the location of any land and under “Line B. Buildings (give location)” the location of any buildings owned by the labor organization.

If additional lines are needed, click the “Add More Land Assets” button on Line A or the “Add More Building Assets” button on Line B, as applicable. The software will add lines to the schedule in increments of ten.

Column (B): Enter the cost or other basis of the fixed assets listed in Column (A).

Column (C): Enter the accumulated depreciation, if any, of the fixed assets (except land) listed in Column (A) whose cost or other basis is reported in Column (B). If the labor organization "expenses" fixed assets, also include in Column (C) the amount that the labor organization charged to expenses when the assets were purchased.

Column (D): Enter the amount at which the fixed assets listed in Column (A) are carried on the labor organization's books. Include the nominal amount, if any, at which fully depreciated assets are carried on the labor

organization's books. The amount reported in Column (D) should be the difference between Columns (B) and (C).

Column (E): Enter the fair market value of land and of all assets listed in Column (A) that were expensed, fully depreciated, or depreciated to scrap value or nominal value. It is not necessary to secure a formal appraisal of the assets; a good faith estimate is sufficient. The value used for insurance purposes or for tax appraisals, for example, will normally be acceptable as representing the fair market value.

Click the "Save & Calculate" button at the top of the schedule and the software will enter the totals of Columns (B) through (E) on Line F, and the total on Line F, Column (D) in Item 27 (Fixed Assets), Column (B) of Statement A.

SCHEDULE 7 – OTHER ASSETS

Report details of all the labor organization's assets at the end of the reporting period other than Item 22 (Cash), Item 23 (Accounts Receivable), Item 24 (Loans Receivable), Item 25 (U.S. Treasury Securities), Item 26 (Investments), and Item 27 (Fixed Assets).

The labor organization's other assets must be described in Column (A) and may be classified by general groupings or bookkeeping categories, such as utility deposits, inventory of supplies for resale, or travel advances that are not required to be reported as loans as explained in the instructions for Schedule 2 (Loans Receivable), if the description is sufficient to identify the type of assets. Enter in Column (B) the value as shown on the labor organization's books of each asset or group of assets described in Column (A).

NOTE: If your organization has a subsidiary organization for which a separate report is being submitted in accordance with Section X of these instructions, the value of the subsidiary organization as shown on your organization's books must be reported in Schedule 7 if it is of a non-investment nature. Enter in Column (A) the name of any such subsidiary organization. Enter in Column (B) the value as shown on your organization's books of the net assets of any such subsidiary organization.

If additional lines are needed, click the "Add More Other Assets" button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Click the "Save & Calculate" button at the top of the schedule and the software will enter the Total Other Assets in Column (B) of Schedule 7 and in Item 28 (Other Assets), Column (B) of Statement A.

SCHEDULE 8 – ACCOUNTS PAYABLE AGING SCHEDULE

The labor organization must report 1) individual accounts that are valued at $5,000 or more and that are 90 days or more past due at the end of the reporting period <u>or</u> were liquidated, reduced or written off during the reporting period; and 2) the total aggregated value of all other accounts.

If additional lines are needed, click the "Add More Accounts Payable Aging" button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Column (A): Enter the name of each entity or individual with which the labor organization has an account payable of $5,000 or more that is 90 days or more past due at the end of the reporting period <u>or</u> that was liquidated, reduced or written off during the reporting period without the disbursement of cash sufficient to cover the total value of the account payable.

Column (B): Enter the total amount of money owed by the labor organization to each listed entity or individual at the end of the reporting period. Enter the total amount of money owed by the labor organization in all other accounts payable not required to be itemized in Schedule 8 on the "Totals from all other accounts payable" line.

Click the "Save & Calculate" button at the top of the schedule and the software will complete the "Total of all itemized accounts payable" line in Column (B) and enter the total accounts payable in Column (B) and in Item 30, Column (D) of Statement A.

Column (C): Enter the total amount of money owed by the labor organization to the listed entity or individual at the end of the reporting period that is 90 to 180 days past due. Enter the total amount of money owed by the labor organization in all other accounts payable (those of less than $5,000) that are 90 to 180 days past

due on the "Totals from all other accounts payable" line.

Click the "Save & Calculate" button at the top of the schedule and the software will complete the "Total of all itemized accounts payable" line in Column (C) and enter the total accounts payable that were 90 to 180 days past due in Column (C).

Column (D): Enter the total amount of money owed by the labor organization to each entity or individual at the end of the reporting period that is more than 180 days past due. Enter the total amount of money owed by the labor organization in all other accounts payable (those of less than $5,000 and not required to be itemized in Schedule 8) that are more than 180 days past due and on the "Total from all other accounts payable" line.

Click the "Save & Calculate" button at the top of the schedule and the software will complete the "Total of all itemized accounts payable" line in Column (D) and enter the total accounts payable that were more than 180 days past due in Column (D).

Column (E): Enter the total amount of money owed by the labor organization to each entity or individual that was written off during the reporting period by the reporting labor organization without the disbursement of cash sufficient to cover the total value of the account payable. Enter the total amount of money owed by the labor organization in all other accounts payable (those of less than $5,000 and not required to be itemized in Schedule 8) that was written off during the reporting period by the reporting labor organization without the disbursement of cash sufficient to cover the total value of the account payable on the "Total from all other accounts payable" line.

Click the "Save & Calculate" button at the top of the schedule and the software will complete the "Total of all itemized accounts payable" line in Column (E) and enter the total liquidated accounts payable in Column (E).

Provide in Item 69 (Additional Information) all details and circumstances in connection with the writing off of the account payable, including the reason and amount.

SCHEDULE 9 – LOANS PAYABLE

Report details of all loans payable on which the labor organization owed money at any time during the reporting period except those secured by mortgages or similar liens on real property (land or buildings) that must be reported in Item 32 (Mortgages Payable) of Statement A.

If additional lines are needed, click the "Add More Loans Payable" button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Column (A): Enter the name of each business enterprise to which a loan was payable. Also list the source of all other loans by general categories, such as labor organizations, individuals, etc.

Column (B): For each loan source listed in Column (A), enter the amount, if any, owed by the labor organization at the start of the reporting period.

Click the "Save & Calculate" button at the top of the schedule and the software will enter the total for Column (B) on the "Total of all above lines" line in Schedule 9 and in Item 31(Loans Payable), Column (C) of Statement A.

Column (C): For each loan source listed in Column (A), enter the amount, if any, obtained by the labor organization during the reporting period. If, due to discounting by a bank or for any other reason, the amount received from a loan was less than the face value of the note or the amount repayable, enter the amount actually received and explain in Item 69 (Additional Information).

Click the "Save & Calculate" button at the top of the schedule and the software will enter the total for Column (C) on the "Total of all above lines" line in Schedule 9 and in Item 44 (Loans Obtained) of Statement B.

Columns (D)(1) and (D)(2): For each loan source listed in Column (A), enter the amount, if any, that the labor organization repaid to the lender during the reporting period. Report only repayments of principal; interest paid must be reported in Schedule 18 (General Overhead). Use Column (D)(1) to report repayments made in cash. Use Column (D)(2) to report repayments made in a manner other than by

cash, such as repayments made to a creditor by offsetting an amount owed by the creditor to the labor organization.

Click the “Save & Calculate” button at the top of the schedule and the software will enter the total for Columns (D)(1) and (D)(2) on the “Total of all above lines” line in Schedule 9 and the total for Column (D)(1) in Item 62 (Repayment of Loans Obtained) of Statement B. Explain in Item 69 (Additional Information) any non-cash amounts reported in Column (D)(2).

Column (E): For each loan source listed in Column (A), enter the balance, if any, that the labor organization owed the listed lender at the end of the reporting period. If any loans payable were written off during the reporting period, the reason and amount must be reported in Item 69 (Additional Information).

Click the “Save & Calculate button” at the top of the schedule and the software will enter the total for Column (E) on the “Total of all above lines” line in Schedule 9 and in Item 31 (Loans Payable), Column (D) of Statement A.

SCHEDULE 10 – OTHER LIABILITIES

Report details of all the labor organization's liabilities at the end of the reporting period other than Item 30 (Accounts Payable), Item 31 (Loans Payable), and Item 32 (Mortgages Payable) of Statement A.

Any portion of withheld taxes or any other payroll or other deductions, which have not been transmitted at the end of the reporting period, are liabilities of the labor organization and must be reported in Schedule 10. Payroll or other deductions that are retained by the labor organization (such as repayments of loans to officers or employees) must be fully explained in Item 69 (Additional Information).

The labor organization's other liabilities must be described in Column (A) and may be classified by general groupings or bookkeeping categories if the description is sufficient to identify the type of liability. List separately any payroll taxes withheld but not yet paid, other unpaid payroll taxes of the labor organization, such as FICA taxes, and any funds collected on behalf of affiliates or members and not disbursed by the end of the reporting period. Do not include reserves for special purposes (for example, "Reserve for Building Fund") that are actually an allocation of certain assets for specific purposes rather than a liability.

If additional lines are needed, click the “Add More Other Liabilities” button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Enter in Column (B) the amount of each liability described in Column (A). Click the Save button at the top of the schedule and the software will enter the total in Column (B) of Schedule 10 and in Item 33 (Other Liabilities), Column (D) of Statement A.

SCHEDULE 11 – ALL OFFICERS AND DISBURSEMENTS TO OFFICERS

List all the labor organization's officers and report all salaries and other direct and indirect disbursements to officers during the reporting period. Also report the percentage of time spent by each officer in the categories provided.

If additional lines are required, click the “Add More Disbursements to Officers” button at the top of the schedule. The software will add lines to the schedule in increments of ten.

NOTE: A "direct disbursement" to an officer is a payment made by the labor organization to the officer in the form of cash, property, goods, services, or other things of value.

An "indirect disbursement" to an officer is a payment made by the labor organization to another party for cash, property, goods, services, or other things of value received by or on behalf of the officer. "On behalf of the officer" refers to a payment received by a party other than the officer or the labor organization for the personal interest or benefit of the officer. Such payments include those made through a credit arrangement under which charges are made to the account of the labor organization and are paid by the labor organization. For example, when a union, through its credit arrangements, is billed directly and pays the hotel bills of an officer who, during his workweek, resides at a hotel in the city where the union headquarters is located away from his legal residence in another city, the payments must be reported as disbursements to the officer.

Column (A): Enter in (A) the last name, first name, and middle initial of each person who held office in the labor organization at any time during the reporting period. Include all the labor organization's officers whether or not any salary or other disbursements were made to them or on their behalf by the labor organization. "Officer" is defined in section 3(n) of the LMRDA (29 U.S.C. 402) as "any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body."

Column (B): Enter in (B) the title of the position each officer listed held during the reporting period. If an officer held more than one position during the reporting period, list each additional position and the dates on which the officer held the position in Item 69 (Additional Information).

Column (C): Use the drop-down menu to select the status of each officer: "N" for a new officer who took office during the reporting period; "P" for a past officer who was not in office at the end of the reporting period; or "C" for a continuing officer who was in office before the reporting period and was still in office at the end of the reporting period. If any officer was not elected at a regular election in accordance with the labor organization's constitution and bylaws or other governing documents on file with OLMS, explain the manner in which the officer was chosen in Item 69 (Additional Information).

Column (D): Enter the gross salary of each officer (before tax withholdings and other payroll deductions). Include disbursements for "lost time" or time devoted to union activities.

Column (E): Enter the total allowances made by direct and indirect disbursements to each officer on a daily, weekly, monthly, or other periodic basis. Do not include allowances paid on the basis of mileage or meals which must be reported in Column (F) or (G), as applicable.

Column (F): Enter all direct and indirect disbursements to each officer that were necessary for conducting official business of the labor organization, except salaries or allowances which must be reported in Columns (D) and (E), respectively.

Examples of disbursements to be reported in Column (F) include all expenses that were reimbursed directly to an officer, meal allowances and mileage allowances, expenses for officers' meals and entertainment, and various goods and services furnished to officers but charged to the labor organization. Such disbursements should be included in Column (F) only if they were necessary for conducting official business; otherwise, report them in Column (G). Also include in Column (F) travel advances that are not considered loans as explained in the instructions for Schedule 2 (Loans Receivable).

Do not report the following disbursements in Schedule 11:

- Reimbursements to an officer for the purchase of investments or fixed assets, such as reimbursing an officer for a file cabinet purchased for office use, which must be reported in Schedule 4 (Purchase of Investments and Fixed Assets) and explained in Item 69 (Additional Information);
- Indirect disbursements for temporary lodging (room rent charges only) or transportation by public carrier necessary for conducting official business while the officer is in travel status away from his or her home and principal place of employment with the labor organization if payment is made by the labor organization directly to the provider or through a credit arrangement and these disbursements are reported in disbursement Schedules 15 through 19;
- Disbursements made by the labor organization to someone other than an officer as a result of transactions arranged by an officer in which property, goods, services, or other things of value were received by or on behalf of the labor organization rather than the officer, such as rental of offices and meeting rooms, purchase of office supplies, refreshments and other expenses of membership banquets or meetings, and food and refreshments for the entertainment of groups other than the officers and membership on official business;
- Office supplies, equipment, and facilities furnished to officers by the labor organization for use in conducting official business; and
- Maintenance and operating costs of the labor organization's assets, including buildings, office furniture, and office equipment;

however, see "Special Rules for Automobiles" below.

Column (G): Enter all other direct and indirect disbursements to each officer. Include all disbursements for which cash, property, goods, services, or other things of value were received by or on behalf of each officer and were essentially for the personal benefit of the officer and not necessary for conducting official business of the labor organization.

Include in Column (G) all disbursements for transportation by public carrier between the officer's home and place of employment or for other transportation not involving the conduct of official business. Also, include the operating and maintenance costs of all the labor organization's assets (automobiles, etc.) furnished to officers essentially for the officers' personal use rather than for use in conducting official business.

Do not include in Column (G) loans to officers, which must be reported in Schedule 2 (Loans Receivable) or disbursements for benefits to officers, which must be reported in disbursement Schedule 20 (Benefits).

Column (H): Click the “Save & Calculate” button at the top of the schedule and the software will add the amounts in Columns (D) through (G) on each line and enter the individual totals in Column (H).

The software will also enter the totals for all officers listed in Columns (D) through (H) on the ”Total Officers Disbursements” line.

Enter the total amount of withheld taxes, payroll deductions, and all other deductions on the ”Less Deductions” line.

Click the “Save & Calculate” button at the top of the schedule and the software will subtract the “Less Deductions” line from the “Total Officers Disbursements” line and enter the difference on the “Net Disbursements” line.

Line (I): Enter the estimated percentage of time spent by the officer on activities that fall within Schedules 15 through 19 in the box next to that schedule. You may round to the nearest 10%. When the time reported by an individual in an activity is less than 5% of his or her total work time, the officer’s best estimate to the nearest percentage should be reported rather than rounding to zero. The total must equal 100%. It is understood that these figures may be imprecise. For instance, the president of an intermediate body may spend four months working intensely on a multi-state contract negotiation, two months lobbying against a state referendum, two more months on a contentious organizing drive, and throughout these activities he had to keep up with his other duties as president. The president’s good-faith estimate might be to report 50% on Schedule 15 – Representational Activities, 17% on Schedule 16 – Political Activities and Lobbying, 3% on Schedule 17 – Contributions, Gifts, and Grants, and 30% on Schedule 19 – Union Administration. The example is not intended to be a representation of a typical allocation of time but it should be used to help understand the rationale that should be employed when making these determinations.

Click the “Save & Calculate” button at the top of the schedule. Using these percentages, the software aggregates the amount of total disbursements (Column (H)) allocated to each schedule for every officer and enters the total on Line 3 of the Detailed Summary Page for Schedules 15-19.

SPECIAL RULES FOR AUTOMOBILES

Include in Column (G) of Schedule 11 that portion of the operating and maintenance costs of any automobile owned or leased by the labor organization to the extent that the use was for the personal benefit of the officer to whom it was assigned. This portion may be computed on the basis of the mileage driven on official business compared with the mileage for personal use. The portion not included in Column (G) must be reported in Column (F).

Alternatively, rather than allocating these operating and maintenance costs between Columns (F) and (G), if 50% or more of the officer's use of the vehicle was for official business, the labor organization may enter in Column (F) all disbursements relative to that vehicle with an explanation in Item 69 (Additional Information) indicating that the vehicle was also used part of the time for personal business. Likewise, if less than 50% of the officer's use of the vehicle was for official business, the labor organization may report all disbursements relative to the vehicle in Column (G) with an explanation in Item 69 indicating that

the vehicle was also used part of the time on official business.

The amount of decrease in the market value of an automobile used over 50% for the personal benefit of an officer must also be reported in Item 69.

SCHEDULE 12 – DISBURSEMENTS TO EMPLOYEES

Report all direct and indirect disbursements to employees of the labor organization during the reporting period. Also report the percentage of time spent by each employee in the categories provided. If additional lines are required, click the Add More Disbursements to Employees button on the top of the schedule. The software adds lines to the schedule in increments of ten.

Include disbursements to individuals other than officers who receive lost time payments even if the labor organization does not otherwise consider them to be employees or does not make any other direct or indirect disbursements to them. The definitions of "direct disbursements" and "indirect disbursements" are the same as the definitions stated above in Schedule 11.

If additional lines are required, click the “Add More Disbursements to Employees” button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Column (A): Enter the last name, first name, and middle initial of each employee who during the reporting period received $10,000 or more in gross salaries, allowances, and other direct and indirect disbursements from the labor organization (including any subsidiary organizations) or from any affiliates of the labor organization. (“Affiliates” means labor organizations chartered by the same parent body, governed by the same constitution and bylaws, or having the relation of parent and subordinate.) The labor organization’s report, however, should not include disbursements made by affiliates but should include only the disbursements made by the labor organization.

Column (B): Enter the position each listed employee held in the labor organization (including any subsidiary organizations).

Column (C): Enter the name of any affiliate that paid any salaries, allowances, or expenses on behalf of a listed employee. If a subsidiary of the labor organization paid any salaries, allowances, or expenses on behalf of a listed employee, see Section X of these Instructions for information about reporting these disbursements.

Columns (D) through (G) and Line (I): To complete Columns (D) through (G) and Line (I), follow the instructions for Columns (D) through (G) and for Line (I) of Schedule 11.

Column (H): Click the “Save & Calculate” button at the top of the schedule and the software will add the amounts in Columns (D) through (G) on each line and enter the individual totals in Column (H).

Enter in Columns (D) through (G) on the “Total Received By All Other Employees Making $10,000 Or Less,“ the totals of all gross salaries, allowances, and other disbursements for all employees of the labor organization not required to be listed above.

Click the “Save & Calculate” button and at the top of the schedule and the software will add the amounts in Columns (D) through (G) on the “Total Received By All Other Employees Making $10,000 or Less” line and enter the total in Column (H). The software will also enter the total of all amounts listed in Columns (D) through (H) on the “Total Employees Disbursements” line.

Enter the total amount of withheld taxes, payroll deductions, and all other deductions on the ”Less Deductions” line.

Click the “Save & Calculate” button on the page the software will subtract the “Less Deductions” line from the “Total Employees Disbursements” line and enter the difference on the “Net Disbursements” line.

SCHEDULE 13 – MEMBERSHIP STATUS INFORMATION

Enter in Column (A) the categories of membership tracked by the reporting labor organization. Define each category of membership in Item 69 (Additional Information). The definition should include a description of the members covered by the category and indicate whether the members pay full dues.

In Column (B) enter the number of members for each of the membership categories listed in Column (A).

If additional lines are required, click the "Add More Membership Statuses" button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Members (Total of all lines above) – Click the "Save & Calculate" button at the top of the schedule and the software will enter on this line the total number of all members reported in Column (B). The software will also enter the total number of members in your organization in Item 20 (Number of Members).

Agency Fee Payers Line – Enter the total number of agency fee payers in your organization. Agency fee paying nonmembers are those who make payments in lieu of dues to the reporting labor organization as a condition of employment under a union security provision in a collective bargaining agreement.

Total Members/Fee Payers Line – Click the "Save & Calculate" button at the top of the schedule and the software will enter the total of all members of the labor organization and agency fee payers reported in Column (B) This total in Column (B) is not the total number of members of the labor organization reportable in Item 20.

Check the "Yes" box in Column (C) if the category of membership listed in Column (A) is generally eligible to vote in all union elections held by the labor organization. Describe in Item 69 (Additional Information) any voting restrictions that apply to a category in Column (A).

SCHEDULES 14 THROUGH 19

Schedules 14 through 19 provide detailed information on the financial operations of the labor organization in categories that reflect the services provided to union members. Receipts and disbursements are allocated to Schedules 14 through 19 and are either listed as individual entries or as aggregated entries. **Note that before completing the Detailed Summary Page for Schedules 14 through 19, you must complete the itemization pages as described below.**

Allocating Receipts

Each receipt of the labor organization must be allocated to one of the receipt items in Statement B. Some of these items have backup schedules that require more detailed information. If a receipt does not conform to one of the defined items in Statement B it must be included in Schedule 14 (Other Receipts) in which any "major" receipts during the reporting period must be separately identified. A "major" receipt includes: 1) any individual receipt of $5,000 or more; or 2) total receipts from any single entity or individual that aggregate to $5,000 or more during the reporting period. All other receipts in this schedule are aggregated. This process is discussed further below.

Allocating Disbursements

Each disbursement of the labor organization must be allocated to one of the disbursement items in Statement B. Some of these items have backup schedules that require more detailed information. Schedules 15 through 19 reflect various services provided to union members by the union in which all "major" disbursements during the reporting period in the various categories must be separately identified. A "major" disbursement includes: 1) any individual disbursement of $5,000 or more; or 2) total disbursements to any single entity or individual that aggregate to $5,000 or more during the reporting period. All other disbursements in these schedules are aggregated.

All disbursements, other than those reported elsewhere in Statement B, must be allocated to Schedules 15 though 19, as appropriate.

Example 1: If the labor organization received a settlement of $4,999 in a small claims lawsuit, the receipt would not be individually identified, as long as the settlement was the only receipt from the entity or individual during the reporting period. The receipt would be aggregated with other small receipts in Line 3 of Schedule 14 (Other Receipts) on the Detailed Summary Page as discussed below.

Example 2: If the labor organization made three payments of $1,800 each to an office supplies vendor for office supplies used by employees engaged in contract negotiations during the reporting period, a single disbursement to the vendor of $5,400 would be listed in Line 1 on an itemization page for that vendor for Schedule 15

(Representational Activities) as discussed below.

Example 3: If a union pays a total of $5,500 to a printing company during the reporting year and determines that $5,050 should be allocated to organizing costs, that amount must be identified in an itemization page for the printing company for Schedule 15 (Representational Activities). If the remaining $450 paid to the same printer over the course of the year was attributable to charitable expenses, that amount will be reported in Line 5 of Schedule 17 (Contributions, Gifts, and Grants) on the Detailed Summary Page but the printer need not be identified as a recipient of any funds expended for Contributions, Gifts, and Grants, since the total paid to the printer during the reporting year for services related to Contributions, Gifts, and Grants did not exceed $5,000.

Example 4: The labor organization has an ongoing contract with a law firm that provides a wide range of legal services. The labor organization makes a single payment of $10,000 each month to the law firm. In a particular month the law firm spent 50% of its time on contract negotiation litigation and 50% advising the labor organization regarding, and working for the enactment of, a new Federal law. The labor organization must allocate the payment for that month as two distinct disbursements of $5,000 each to Schedule 15 (Representational Activities), and Schedule 16 (Political Activities and Lobbying).

Procedures for Completing Schedules 14 Through 19

Before completing the Detailed Summary Page for Schedules 14 through 19, complete an itemization page for each payer/payee for whom there is (1) an individual receipt/disbursement of $5,000 or more or (2) total receipts/disbursements that aggregate to $5,000 or more during the reporting period. Do not complete an itemization page for disbursements to officers or employees because these disbursements are reported in Lines 3 and 4 of the Detailed Summary Page.

Enter in Column (A) the full name and business address of the entity or individual from which the receipt was received or to which the disbursement was made. Do not abbreviate the name of the entity or individual. If you do not know and cannot reasonably attain the full address, the city and state are sufficient.

Enter in Column (B) the type of business or job classification of the entity or individual, such as printing company, office supplies vendor, lobbyist, think tank, marketing firm, legal counsel, etc.

If additional lines are needed to complete Columns (C) through (E) of the itemization page, click the “More Receipts For This Payer” for Schedule 14 or the “More Disbursements for This Payee” for Schedules 15 through 19 button in Column (A) of the itemization page. The software will add lines to the itemization page in increments of ten.

Enter in Column (C) the purpose of each individual receipt/disbursement for that payee/payer of $5,000 or more, which means a brief statement or description of the reason the receipt/disbursement was made. Examples of adequate descriptions include the following: preparing organizing campaign pamphlets, staffing a help desk, opposition research, litigation regarding representation issues, litigation regarding a refusal to bargain charge, grievance arbitration, get-out-the-vote, voter education, advocating or opposing legislation, job retraining, etc.

Enter in Column (D) the date that the receipt/disbursement was made. The format for the date must be mm/dd/yyyy. The date of receipt/disbursement for reporting purposes is the date the labor organization actually received or disbursed the money.

Enter in Column (E) the amount of the receipt/disbursement.

Click the “Save & Calculate” button at the top of the itemization page and the software will enter total of all itemized transactions for this payee/payer on the “Total of All Itemized Transaction with this Payee/Payer” line.

Enter the total of all non-itemized transactions for the payee/payer (that is, all individual transactions of less than $5,000 each) on the “Total of All Non-Itemized Transactions with this Payee/Payer” line.

Click the Save & Calculate” button at the top of the itemization page again and the software will

enter the total of all transactions for this payee/payer, both itemized and non-itemized, on the "Total of All Transactions with this Payee/Payer for this Schedule" line.

Special Instructions for Reporting Credit Card Disbursements

Disbursements to credit card companies may not be reported as a single disbursement to the credit card company as the vendor. Instead, charges appearing on credit card bills paid during the reporting period must be allocated to the recipient of the payment by the credit card company according to the same process as described above.

The Department recognizes that filers will not always have the same access to information regarding credit card payments as with other transactions. Filers should report all of the information required in the itemization schedules that is available to the union.

For instance, in the case of a credit card transaction for which the receipt(s) and monthly statement(s) do not provide the full legal name of a payee and the union does not have access to any other documents that would contain the information, the union should report the name as it appears on the receipt(s) and statement(s). Similarly, if the receipt(s) and statement(s) do not include a full street address, the union should report as much information as is available and no less than the city and state.

Once these transactions have been incorporated into the union's recordkeeping system they can be treated like any other transaction for purposes of assigning a description and purpose.

In instances when a credit card transaction is canceled and the charge is refunded in whole or part by entry of a credit on the credit card statement, the charge should be treated as a disbursement, and the credit should be treated as a receipt. In reporting a credit of $5,000 or more as a receipt, Column (C) must indicate that the receipt was in refund of a disbursement, and must identify the disbursement by date and amount.

Special Procedures for Reporting Confidential Information

Filers may use the procedure described below to report the following types of information:

- Information that would identify individuals paid by the union to work in a non-union bargaining unit in order to assist the union in organizing employees, provided that such individuals are not employees of the union who receive more than $10,000 in the aggregate in the reporting year from the union. Employees receiving more than $10,000 must be reported on Schedule 12 – Disbursements to Employees;
- Information that would expose the reporting union's prospective organizing strategy. The union must be prepared to demonstrate that disclosure of the information would harm an organizing drive. Absent unusual circumstances, information about past organizing drives should not be treated as confidential;
- Information that would provide a tactical advantage to parties with whom the reporting union or an affiliated union is engaged or will be engaged in contract negotiations. The union must be prepared to demonstrate that disclosure of the information would harm a contract negotiation. Absent unusual circumstances information about past contract negotiations should not be treated as confidential;
- Information pursuant to a settlement that is subject to a confidentiality agreement, or that the union is otherwise prohibited by law from disclosing; and,
- Information in those situations where disclosure would endanger the health or safety of an individual.

With respect to these specific types of information, if the reporting union can demonstrate that itemized disclosure of a specific major receipt or disbursement, or aggregated receipt or disbursement would be adverse to the union's legitimate interests, the union may include the receipt or disbursement in Line 3 of Summary Schedule 14 (Other Receipts) or in Line 5 of Summary Schedules 15 (Representational Activities) or 19 (Union Administration). In Item 69 (Additional Information) the union must identify each

schedule from which any itemized receipts or disbursements were excluded because of an asserted legitimate interest in confidentiality based on one of the first three reasons listed above. No notation need be made for exclusion of information disclosure of which is prohibited by law or that would endanger the health or safety of an individual. The notation must describe the general types of information that were omitted from the schedule, but the name of the payer/payee, date, and amount of the transaction(s) is not required. This procedure may not be used for Schedules 16 through 18.

A union member, however, has the statutory right "to examine any books, records, and accounts necessary to verify" the union's financial report if the member can establish "just cause" for access to the information. 29 U.S.C. 431(c); 29 U.S.C. CFR 403.8 (2002). Any exclusion of itemized receipts or disbursements from Schedules 14, 15, or 19 for one of the first three reasons listed above would constitute a *per se* demonstration of "just cause" for purposes of this Act. Consequently, any union member (and the Department), upon request, has the right to review the undisclosed information that otherwise would have appeared in the applicable schedule if the union withholds the information in order to protect confidentiality interests. Exclusion of information disclosure of which is prohibited by law or that would endanger the health or safety of an individual creates no per se demonstration of "just cause."

Procedures for Completing the Detailed Summary Page

The Detailed Summary Page is used to summarize Schedules 14 through 19.

For Summary Schedule 14 (Other Receipts) the software enters on Line 1 the total of all itemized receipts during the reporting period from named payers. This is the sum of the amounts entered on the "Total of All Itemized Transactions with this Payee/Payer" line on all itemization pages for Schedule 14.

The software enters on Line 2 the total of all non-itemized receipts from named payers. This is the sum of the amounts entered on the "Total of All Non-Itemized Transactions with this Payee/Payer" line in all itemization pages for Schedule 14.

Enter on Line 3 the total of all other receipts during the reporting period relating to the schedule. This is the total from your organization's books of all receipts during the reporting period relating to this schedule for payers who did not have a single receipt of $5,000 or more or receipts that aggregated $5,000 or more.

The software enters on Line 4 the total of Lines 1 through 3 and forwards this total to Item 48 of Statement B.

For Summary Schedules 15 –19, the software enters on Line 1 of each summary schedule the total of all itemized disbursements during the reporting period to named vendors. This is the sum of the amounts entered on the "Total of All Itemized Transactions with this Payee/Payer" line in all itemization pages for the schedule..

The software enters on Line 2 of each summary schedule the total of all non-itemized disbursements to named vendors. This is the sum of the amounts entered on the "Total of All Non-Itemized Transactions with this Payee/Payer" line in all itemization pages for the schedule

The software enters on Line 3 the total of all disbursements to officers allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered on Line (I) of Schedule 11.

The software enters in Line 4 the total of all disbursements to employees allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered on Line (I) of Schedule 12.

Enter on Line 5 the total of all other disbursements during the reporting period relating to the schedule. This is the total from your organization's books of all disbursements during the reporting period relating to this schedule for payees who did not have a single disbursement of $5,000 or more or disbursements that aggregated $5,000 or more.

The software enters on Line 6 the total of Lines 1 through 5 and forwards this total to the appropriate line item of Statement B.

For example, if in Schedule 15 (Representational Activities) a labor organization

has $200,000 in itemized disbursements of $5,000 or more to vendors, $35,000 in non-itemized disbursements of less than $5,000 each to those vendors, $100,000 in salary disbursements to officers, $50,000 in salary disbursements to employees, and $7,000 in disbursements to vendors who did not receive a major disbursement for representational activities, then the software will enter $200,000 in Line 1, $35,000 in Line 2, $100,000 in Line 3, $50,000 in Line 4, and the filer will enter $7,000 in Line 5 of Schedule 15 on the Detailed Summary Page. The total of Lines 1 through 5 is $392,000, which the software will enter in Line 6 of the summary schedule and Item 50 (Representational Activities) of Statement B.

SCHEDULE 14 – OTHER RECEIPTS

Report the labor organization's receipts from all sources during the reporting period, other than those that must be reported elsewhere in Statement B, such as reimbursements from officers and employees for excess expense payments or travel advances not reported as loans in Schedule 2 (Loans Receivable); receipts from fundraising activities such as raffles, bingo games, and dances; funds received from a parent body, other unions, or the public for strike fund assistance; and receipts from another labor organization that merged into the labor organization.

For all itemized receipts in this category:

Enter in Column (A) of an itemization page the full name and business address of the entity or individual from which the union received $5,000 or more in Other Receipts during the reporting period. Do not abbreviate the name of the entity or individual. If you do not know and cannot reasonably obtain the full address of the entity or individual, the city and state are sufficient.

Enter in Column (B) the type of business or job classification of the entity or individual from which the union received $5,000 or more in Other Receipts during the reporting period.

If additional lines are needed to complete Columns (C) through (E) for this Payer, click the “Add More Receipts for This Payer” button in Column (A) of the itemization page. The software will add lines to the itemization page in increments of ten.

Enter in Column (C) the purpose of each individual receipt of $5,000 or more from the payer in sufficient detail to determine why the receipt cannot be allocated to another schedule.

Enter in Column (D) the date that each individual receipt of $5,000 or more was received. The format for the date must be mm/dd/yyyy. The date of receipt for reporting purposes is the date the labor organization actually received the money.

Enter in Column (E) the amount of each individual receipt of $5,000 or more.

Enter the total of all non-itemized receipts from this payer (that is, all individual receipts of less than $5,000 each) on the “Total Non-Itemized Transactions with this Payee/Payer” line.

When you have completed entering all of the information for this payer, click the “Save & Calculate” button at the top of the itemization page and the software will enter the total in Column (E) on the “Total Itemized Transactions with this Payee/Payer” and the “Total of All Transactions with this Payee/Payer for This Schedule” lines.

An itemization page must be completed for each payer. Only one payer should be reported per page.

To create a new Other Receipts itemization page for a new payer, click the “Add More Other Receipts” button at the top of the itemization page and a new itemization page will open. Follow the instructions above to complete any additional Other Receipts itemization pages.

By clicking the “Show Payer” drop down arrow at the top of a Schedule 14 itemization page, you can select and view all of the Other Receipts itemization pages you have completed.

As you complete each itemization page, click the “Save & Calculate” button at the top of the page and the total itemized transactions will be added to line 1 of Summary Schedule 14 on the Detailed Summary Page, and the total non-itemized transactions will be added to Line 2 of the Summary Schedule.

Enter on Line 3 of Summary Schedule 14 the total amount of all other receipts relating to this schedule from other payers during the reporting

period. This is the total from your organization's books of all receipts relating to this schedule from payers who did not provide a single receipt of $5,000 or more or receipts that aggregated $5,000 or more.

The software adds Lines 1 through 3 and enters the total on Line 4 of Summary Schedule 14 and in Item 48 (Other Receipts) of Statement B.

SCHEDULE 15 – REPRESENTATIONAL ACTIVITIES

Report the labor organization's direct and indirect disbursements to all entities and individuals during the reporting period associated with preparation for, and participation in, the negotiation of collective bargaining agreements and the administration and enforcement of the agreements made by the labor organization. Do not include strike benefits that must be reported in Item 57 (Strike Benefits) of Statement B. The union must also report disbursements associated with efforts to become the exclusive bargaining representative for any unit of employees, or to keep from losing a unit in a decertification election or to another labor organization, or to recruit new members.

For all major disbursements in this category:

Enter in Column (A) of an itemization page the full name and business address of the entity or individual to which the disbursement was made. Do not abbreviate the name of the entity or individual. If you do not know and cannot reasonably obtain the full address of the entity or individual, the city and state are sufficient.

Enter in Column (B) the type of business or job classification of the entity or individual to which the union disbursed $5,000 or more in Representational Activities during the reporting period, such as printing company, office supplies vendor, legal counsel, etc.
If additional lines are required to complete Columns (C) through (E) for this Payee, click the "Add More Disbursements for This Payee" button in Column (A) of the itemization page. The software adds lines to the itemization page in increments of ten.

Enter in Column (C) the purpose of each individual disbursement of $5,000 or more, which means a brief statement or description of the reason the disbursement was made. Examples of adequate descriptions include the following: contract negotiation, grievance arbitration, litigation regarding the interpretation of a collective bargaining agreement, preparing organizing campaign pamphlets, staffing a help desk, opposition research, litigation regarding representation issues, litigation regarding a refusal to bargain, etc. Neither the name of the employer nor the specific bargaining unit that is the subject of the organizing activity need be identified.

Enter in Column (D) the date that each individual disbursement of $5,000 or more was made. The format for the date must be mm/dd/yyyy. The date of disbursement for reporting purposes is the date the labor organization actually disbursed the money.

Enter in Column (E) the amount of each individual disbursement of $5,000 or more.

Enter the total of all non-itemized disbursements to this payee (that is, all individual disbursements of less than $5,000 each) on the "Total Non-Itemized Transactions with this Payee/Payer" line.

When you have completed entering all of the information for this payee, click the "Save & Calculate" button at the top of the itemization page and the software will enter the totals in Column (E) on the "Total Itemized Transactions with this Payee/Payer" line and on the "Total of All Transactions with this Payee/Payer for This Schedule" line.

An itemization page must be completed for each payee who met the itemization threshold during the reporting period. Only one payee should be reported per page.

To create a new Representational Activities itemization page for a new payee, click the "Add More Representational Activities" button at the top of the itemization page and a new itemization page will open. Follow the instructions above to complete any additional Representational Activities itemization pages.

By clicking the "Show Payee" drop down arrow at the top of the Schedule 15 page, you can select and view all of the Representational Activities Itemization pages you have completed.

As you complete each itemization page, click the "Save & Calculate" button at the top of the page and the total itemized transactions will be added to line 1 of Summary Schedule 15 on the Detailed Summary Page and the total non-itemized transactions will be added to Line 2 of the Summary Schedule.

The software enters in Line 3 of Summary Schedule 15 the total of all disbursements to officers allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 11.

The software enters in Line 4 of Summary Schedule 15 the total of all disbursements to employees allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 12.

Enter the total amount of all other disbursements relating to this schedule made to other payees during the reporting period on Line 5 of Summary Schedule 15. This is the total from your organization's books of all disbursements relating to this schedule made to payees who did not have a single disbursement of $5,000 or more or disbursements that aggregated $5,000 or more.

The software adds Lines 1 through 5 and enters the total on Line 6 of Summary Schedule 15 and in Item 50 (Representational Activities) of Statement B.

SCHEDULE 16 – POLITICAL ACTIVITIES AND LOBBYING

Report the labor organization's direct and indirect disbursements to all entities and individuals during the reporting period associated with political disbursements or contributions in money. Also report the labor organization's direct and indirect disbursements to all entities and individuals during the reporting period associated with dealing with the executive and legislative branches of the Federal, state, and local governments and with independent agencies and staffs to advance the passage or defeat of existing or potential laws or the promulgation or any other action with respect to rules or regulations (including litigation expenses). It does not matter whether the lobbying attempt succeeds.

A political disbursement or contribution is one that is intended to influence the selection, nomination, election, or appointment of anyone to a Federal, state, or local executive, legislative or judicial public office, or office in a political organization, or the election of Presidential or Vice Presidential electors, and support for or opposition to ballot referenda. It does not matter whether the attempt succeeds. Include disbursements for communications with members (or agency fee paying nonmembers) and their families for registration, get-out-the-vote and voter education campaigns, the expenses of establishing, administering and soliciting contributions to union segregated political funds (or PACs), disbursements to political organizations as defined by the IRS in 26 U.S.C. 527, and other political disbursements.

For all major disbursements in this category:

Enter in Column (A) of an itemization page the full name and business address of the entity or individual to which the disbursement was made. Do not abbreviate the name of the entity or individual. If you do not know and cannot reasonably obtain the full address of the entity or individual, the union may report only the city and state.

Enter in Column (B) the type of business or job classification of the entity or individual to which the union disbursed $5,000 or more for Political Activities and Lobbying during the reporting period, such as campaign advisor, lobbyist, marketing firm, fund raiser, think tank, issue advocacy group, printing company, office supplies vendor, legal counsel, etc.

If additional lines are needed to complete Columns (C) through (E) for this Payee, click the "Add More Disbursements for This Payee" button in Column (A) of the itemization page. The software will add lines to the itemization page in increments of ten.

Enter in Column (C) the purpose of each individual disbursement of $5,000 or more, which means a brief statement or description of the reason the disbursement was made. Examples of adequate descriptions include the following: a registration drive, get-out-the-vote campaign, voter education campaign, fund raising, advocating or opposing legislation (including litigation challenging such legislation)

advocating or opposing regulations (including litigation challenging such regulations), etc. The specific campaign, legislation, regulation, referendum, etc. should be identified whenever possible. Distinguish between activities in the United States and activities in foreign countries.

Enter in Column (D) the date that each individual disbursement of $5,000 or more was made. The format for the date must be mm/dd/yyyy. The date of disbursement for reporting purposes is the date the labor organization actually disbursed the money.

Enter in Column (E) the amount of each individual disbursement of $5,000 or more.

Enter the total of all non-itemized disbursements to this payee (that is, all individual disbursements of less than $5,000 each) on the "Total Non-Itemized Transactions with this Payee/Payer" line.

When you have completed entering all of the information for this payee, click the "Save & Calculate" button at the top of the itemization page and the software will add the amounts in Column (E), and enter the sum on the "Total Itemized Transactions with this Payee/Payer" line and complete the "Total of All Transactions with this Payee/Payer for This Schedule" line.

An initial itemization page must be completed for each payee who met the itemization threshold during the reporting period. Only one payee should be reported per page.

To create a new "Political Activities And Lobbying" itemization page for a new payee, click the "Add More Political Activities And Lobbying Activities" button at the top of the page and a new itemization page opens. Follow the instructions above to complete any additional Political Activities And Lobbying itemization pages.

By clicking the Show Payee drop down arrow at the top of the Schedule 16 page, you can select and view all of the "Political Activities And Lobbying "itemization pages you have completed.

As you complete each itemization page, click the "Save & Calculate" button at the top of the page and the total itemized transactions will be added to line 1 of Summary Schedule 16 on the Detailed Summary Page and the total non-itemized transactions will be added to Line 2 of the Summary Schedule.

The software enters in Line 3 of Summary Schedule 16 the total of all disbursements to officers allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 11.

The software enters in Line 4 of Summary Schedule 16 the total of all disbursements to employees allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 12.

Enter the total amount of all other transactions relating to this schedule made to other payees during the reporting period on Line 5 of Summary Schedule 16. This is the total from your organization's books of all transactions relating to this schedule made to payees who did not have a single disbursement of $5,000 or more or transactions that aggregated $5,000 or more.

The software adds Lines 1 through 5 and enters the total on Line 6 of Summary Schedule 16 and in Item 51 (Political Activities and Lobbying) of Statement B.

SCHEDULE 17 – CONTRIBUTIONS, GIFTS, AND GRANTS

Report the labor organization's direct and indirect disbursements to all entities and individuals during the reporting period associated with contributions, gifts, and grants, other than those listed on Schedules 15, 16, and 20. Include, for example, charitable contributions, contributions to scholarship funds, etc.

For all major disbursements in this category:

Enter in Column (A) of an itemization page the full name and business address of the entity or individual to which the disbursement was made. Do not abbreviate the name of the entity or individual. If you do not know and cannot reasonably obtain the full address of the entity or individual, the union may report only the city and state.

Enter in Column (B) the type of business or job classification of the entity or individual to which

the union disbursed $5,000 or more in Contributions, Gifts, and Grants during the reporting period, such as charity, scholarship fund, state or local affiliate, etc.

If additional lines are needed to complete Columns (C) through (E) for this Payee, click the "Add More Disbursements for This Payee" button in Column (A) of the itemization page. The software will add lines to the itemization page in increments of ten.

Enter in Column (C) the purpose of each individual disbursement of $5,000 or more, which means a brief statement or description of the reason the disbursement was made. Examples of adequate descriptions include the following: medical research, community development, job retraining, education, disaster and relief assistance, athletic and youth sponsorships, etc.

Enter in Column (D) the date that each individual disbursement of $5,000 or more was made. The format for the date must be mm/dd/yyyy. The date of disbursement for reporting purposes is the date the labor organization actually disbursed the money.

Enter in Column (E) the amount of each individual disbursement of $5,000 or more.

Enter the total of all non-itemized disbursements to this payee (that is, all individual disbursements of less than $5,000 each) on the "Total Non-Itemized Transactions with this Payee/Payer" line.

When you have completed entering all of the information for this payee, click the "Save & Calculate" button at the top of the itemization page and the software will add the amounts in Column (E) and enter the sum on the "Total Itemized Transactions with this Payee/Payer" line, and it will complete the "Total of All Transactions with this Payee/Payer for This Schedule" line.

An initial itemization page must be completed for each payee who met the itemization threshold during the reporting period. Only one payee should be reported per page.

To create a new "Contributions, Gifts & Grants" itemization page for a new payee, click the "Add Contributions, Gifts & Grants" button on the top of the page and a new page opens. Follow the instructions above to complete any additional "Contributions, Gifts & Grants" itemization pages.

By clicking the "Show Payee" drop down arrow at the top of the Schedule 17 page, you can select and view all of the "Contributions, Gifts and Grants "itemization pages you have completed.

As you complete each itemization page, click the "Save & Calculate" button at the top of the page and the total itemized transactions will be added to line 1 of Summary Schedule 17 on the Detailed Summary Page and the total non-itemized transactions will be added to Line 2 of the Summary Schedule.

The software enters in Line 3 of Summary Schedule 17 the total of all disbursements to officers allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 11.

The software enters in Line 4 of Summary Schedule 17 the total of all disbursements to employees allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 12.

Enter the total amount of all other transactions relating to this schedule made to other payees during the reporting period on Line 5 of Summary Schedule 17. This is the total from your organization's books of all disbursements relating to this schedule made to payees who did not have a single disbursement of $5,000 or more or disbursements that aggregated $5,000 or more.

The software totals Lines 1 through 5 and enters that amount on Line 6 of Summary Schedule 17 and in Item 52 (Contributions, Gifts and Grants) of Statement B.

SCHEDULE 18 – GENERAL OVERHEAD

Report the labor organization's direct and indirect disbursements to all entities and individuals during the reporting period associated with general overhead that cannot be allocated to any of the other disbursement categories in Statement B.

Some disbursements for overhead do not support a specific function, so these disbursements should be reported in this schedule. Include support personnel at the labor organization's headquarters, such as building maintenance personnel and security guards, and other overhead costs. Not all support staff should be included in General Overhead. For instance, the salary of an assistant, whenever possible, should be allocated at the same ratio as the person or persons to whom they provide support.

For all major disbursements in this category:

Enter in Column (A) of an Initial Itemization Page the full name and business address of the entity or individual to which the disbursement was made. Do not abbreviate the name of the entity or individual. If you do not know and cannot reasonably obtain the full address of the entity or individual, the union may report only the city and state.

Enter in Column (B) the type of business or job classification of the entity or individual to which the union disbursed $5,000 or more in General Overhead during the reporting period, such as office supplies vendor, landlord, mortgage lender, cleaning firm, security firm, etc.

If additional lines are needed to complete Columns (C) through (E) for this Payee, click the "More Disbursements for This Payee" button in Column (A) of the itemization page. The software will add lines to the itemization page in increments of ten.

Enter in Column (C) the purpose of the disbursement of $5,000 or more, in sufficient detail to determine why the disbursement cannot be allocated to another schedule.

Enter in Column (D) the date that each individual disbursement of $5,000 or more was made. The format for the date must be mm/dd/yyyy. The date of disbursement for reporting purposes is the date the labor organization actually disbursed the money.

Enter in Column (E) the amount of each individual disbursement of $5,000 or more.

Enter the total of all non-itemized disbursements to this payee (that is, all individual disbursements of less than $5,000 each) on the "Total Non-Itemized Transactions with this Payee/Payer" line.

When you have completed entering all of the information for this payee, click the "Save & Calculate" button at the top of the itemization page and the software will add the amounts in Column (E) and enter the sum on the "Total Itemized Transactions with this Payee/Payer" line, and it will complete the "Total of All Transactions with this Payee/Payer for This Schedule" line.

An itemization page must be completed for each payee who met the itemization threshold during the reporting period. Only one payee should be reported per page.

To create a new "General Overhead" itemization page for a new payee, click the "Add More Overhead" button at the top of the page and a new itemization page opens. Follow the instructions above to complete any additional "General Overhead" itemization pages.

By clicking the "Show Payee" drop down arrow at the top of the Schedule 18 page, you can select and view all of the General Overhead itemization pages you have completed.

As you complete each itemization page, click the "Save & Calculate" button at the top of the page and the total itemized transactions will be added to line 1 of Summary Schedule 18 on the Detailed Summary Page and the total non-itemized transactions will be added to Line 2 of the Summary Schedule.

The software enters in Line 3 of Summary Schedule 18 the total of all disbursements to officers allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 11.

The software enters in Line 4 of Summary Schedule 18 the total of all disbursements to employees allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 12.

Enter the total amount of all other transactions relating to this schedule made to other payees during the reporting period on Line 5 of Summary Schedule 18. This is the total from your organization's books of all disbursements relating to this schedule made to payees who

did not have a single disbursement of $5,000 or more or disbursements that aggregated $5,000 or more.

The software totals Lines 1 through 5 and enters that amount on Line 6 of Summary Schedule 18 and in Item 53 (General Overhead) of Statement B.

SCHEDULE 19 – UNION ADMINISTRATION

Report the labor organization's direct and indirect disbursements to all entities and individuals during the reporting period associated with union administration. Union administration includes disbursements relating to the nomination and election of union officers, the union's regular membership meetings, intermediate, national and international meetings, union disciplinary proceedings, the administration of trusteeships, and the administration of apprenticeship and member education programs (not including political education which should be reported in Schedule 16).

For all major disbursements in this category:

Enter in Column (A) of an itemization Page the full name and business address of the entity or individual to which the disbursement was made. Do not abbreviate the name of the entity or individual. If you do not know and cannot reasonably obtain the full address of the entity or individual, the union may report only the city and state.

Enter in Column (B) the type of business or job classification of the entity or individual to which the union disbursed $5,000 or more for Union Administration during the reporting period, such as printing company, office supplies vendor, legal counsel, etc.

If additional lines are needed to complete Columns (C) through (E) for this Payee, click the "More Disbursements for This Payee" button in Column (A) of the itemization page. The software will add lines to the itemization page in increments of ten

Enter in Column (C) the purpose of the disbursement of $5,000 or more in sufficient detail to determine why the disbursement cannot be allocated to another schedule. For example, printing of election ballots, rental of meeting facilities for a union convention, printing of transcripts of trusteeship hearing, etc.

Enter in Column (D) the date that each individual disbursement of $5,000 or more was made. The format for the date must be mm/dd/yyyy. The date of disbursement for reporting purposes is the date the labor organization actually disbursed the money.

Enter in Column (E) the amount of each individual disbursement of $5,000 or more.

Enter the total of all non-itemized disbursements to this payee (that is, all individual receipts of less than $5,000 each) on the "Total Non-Itemized Transactions with this Payee/Payer" line.

When you have completed entering all of the information for this payee, click the "Save & Calculate" button at the top of the itemization page and the software will add the amounts in Column (E), and enter the sum on the "Total Itemized Transactions with this Payee/Payer" line, and it will complete the "Total of All Transactions with this Payee/Payer for This Schedule" line.

An itemization page must be completed for each payee who met the itemization threshold during the reporting period. Only one payee should be reported per page.

To create a new "Union Administration" itemization page for a new payee, click the "Add More Administration" button at the top of the page and a new itemization page opens. Follow the instructions above to complete any additional "Union Administration" itemization pages.

By clicking the "Show Payee" drop down arrow at the top of the Schedule 19 page, you can select and view all of the Union Administration Itemization pages you have completed.

As you complete each itemization page, click the "Save & Calculate" button at the top of the page and the total itemized transactions will be added to line 1 of Summary Schedule 19 on the Detailed Summary Page and the total non-itemized transactions will be added to Line 2 of the Summary Schedule.

The software enters in Line 3 of Summary Schedule 19 the total of all disbursements to officers allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 11.

The software enters in Line 4 of Summary Schedule 19 the total of all disbursements to employees allocated to the schedule. This is the sum of the amounts that correspond to the percentages entered in Line (I) of Schedule 12.

Enter the total amount of all other transactions relating to this schedule made to other payees during the reporting period on Line 5 of Summary Schedule 19. This is the total from your organization's books of all disbursements relating to this schedule made to payees who did not have a single disbursement of $5,000 or more or disbursements that aggregated $5,000 or more.

The software totals Lines 1 through 5 and enters that amount on Line 6 of Summary Schedule 19 and in Item 54 (Union Administration) of Statement B.

SCHEDULE 20 – BENEFITS

[Note: Do not use the Itemization Pages for Schedule 20. Instead use the separate Schedule 20]

Report the labor organization's direct and indirect disbursements to all entities and individuals during the reporting period associated with direct and indirect benefits for officers, employees, members, and their beneficiaries. Benefit disbursements to be reported in Schedule 20 include, for example, disbursements for life insurance, health insurance, and pensions. Do not include salary bonuses, severance payments, or payments for accrued vacation, which should be reported in Column (D) of Schedule 11 or 12.

Direct benefit disbursements are those made to officers, employees, members, and their beneficiaries from the labor organization's funds. Indirect benefit disbursements are those made from the labor organization's funds to a separate and independent entity, such as a trust or insurance company, which in turn and under certain conditions will pay benefits to the covered individuals. An example of an indirect benefit disbursement is the premium on group life insurance.

If additional lines are required, click the "Add More Benefits" button at the top of the schedule. The software will add lines to the schedule in increments of ten.

Enter in Column (A) the type of benefit, such as pension, welfare, etc.

Enter in Column (B) to whom payment was made; for example, union members, insurance company, etc. Individual union members and their beneficiaries are not required to be listed by name.

Enter in Column (C) the amount disbursed for each type of benefit.

Click the "Save & Calculate" button at the top of the schedule and the software will enter the total for Column (C) on the "Total of all lines above" line and in Item 55 (Benefits) of Statement B.

STATEMENT A
ASSETS AND LIABILITIES

ASSETS

The software pre-fills Columns (A) and (C) (Start of Reporting Period) from your organization's report for the previous fiscal year. If the data is inaccurate, however, it can be edited manually. Be sure to explain any changes in Item 69 (Additional Information).

22. CASH — Enter the total of all the labor organization's cash on hand and on deposit at the start and end of the reporting period in Columns (A) and (B), respectively. Include all cash on hand, such as undeposited cash, checks, and money orders; petty cash; and cash in safe deposit boxes. Cash on deposit includes funds in banks, credit unions, and other financial institutions, such as checking accounts, savings accounts, certificates of deposit, and money market accounts. Also, include any interest credited to the labor organization's account during the reporting period.

NOTE: The checking account balances reported should be obtained from the labor organization's books as reconciled with the balances shown on bank statements.

23. ACCOUNTS RECEIVABLE — Ordinarily, accounts receivable are moneys due for goods sold or services rendered evidenced by notes, statements, invoices, or other written evidence of a present obligation. Enter in Column (A) the total of all gross accounts receivable at the start of the reporting period. The software will enter in Column (B) the total of all gross accounts receivable at the end of the reporting period from Column (B) of Schedule 1 (Accounts Receivable Aging Schedule). If accounts receivable are carried on the labor organization's books at net (gross accounts receivable less the allowance for doubtful accounts), the labor organization may report the allowance for doubtful accounts in Item 69 (Additional Information).

24. LOANS RECEIVABLE — Enter in Column (A) the total of all gross loans receivable at the start of the reporting period, which is also reported in Column (B) of Schedule 2 (Loans Receivable). The software will enter the total of all gross loans receivable at the end of the reporting period in Column (B) from Column (E) of Schedule 2.

25. U.S. TREASURY SECURITIES — Enter the total value of all U.S. Treasury securities as shown on the labor organization's books at the start and end of the reporting period in Columns (A) and (B), respectively. If the value reported is different from the original cost, the original cost must be reported in Item 69 (Additional Information). Other U.S. Government obligations, state and municipal bonds, and foreign government securities must be reported in Schedule 5 (Investments Other Than U.S. Treasury Securities) under "Marketable Securities" and in Item 26 (Investments).

26. INVESTMENTS — Enter in Column (A) the total book value at the start of the reporting period of all investments other than U.S. Treasury securities, which are reported in Item 25 (U.S. Treasury Securities). The software will enter in Column (B) the total reported in Column (B) of Schedule 5 (Investments Other Than U.S. Treasury Securities).

27. FIXED ASSETS — Enter in Column (A) the total value as shown on the labor organization's books at the start of the reporting period of all fixed assets, such as land, buildings, automobiles, and office furniture and equipment. The software will enter in Column (B) the total reported in Column (D) of Schedule 6 (Fixed Assets).

28. OTHER ASSETS — Enter in Column (A) the total value as shown on the labor organization's books at the start of the reporting period of all assets not reported in Items 22 through 27. The software will enter in Column (B) the total reported in Column (B) of Schedule 7 (Other Assets).

29. TOTAL ASSETS — Click the "Save & Calculate" button at the top of Statement A and the software will total Items 22 through 28, Columns (A) and (B), and enter the respective totals in Item 29.

LIABILITIES

30. ACCOUNTS PAYABLE — Ordinarily, accounts payable are those obligations incurred on an open account for goods and services rendered. Enter in Column (C) the total of all gross accounts payable at the start of the reporting period. The software will enter the total of all gross accounts payable at the end of the reporting period in Column (D) from Column (B) of Schedule 8 (Accounts Payable Aging Schedule).

31. LOANS PAYABLE — Enter in Column (C) the total of all gross loans payable at the start of the reporting period, which is also reported in Column (B) of Schedule 9 (Loans Payable). The software will enter the total of all gross loans payable at the end of the reporting period in Column (D) from Column (E) of Schedule 9 (Loans Payable).

32. MORTGAGES PAYABLE — Enter the total amount of the labor organization's obligations that were secured by mortgages or similar liens on real property (land or buildings) at the start and end of the reporting period in Columns (C) and (D), respectively.

33. OTHER LIABILITIES — Enter in Column (C) the total amount as shown on the labor organization's books at the start of the reporting period of all liabilities not reported in Items 30 through 32. The software will enter in Column (D) the total reported in Column (B) of Schedule 10 (Other Liabilities).

34. TOTAL LIABILITIES — Click the "Save & Calculate" button at the top of Statement A and

the software will add the amounts in Items 30 through 33, Columns (C) and (D), and enter the respective amounts in Item 34. The software will also complete Item 35 (Net Assets) as explained in the next instruction.

35. NET ASSETS — As indicated in the previous instruction, when Item 34 is completed and the "Save & Calculate" button at the top of Statement A is clicked, the software subtracts Item 34 (Total Liabilities), Column (C) from Item 29 (Total Assets), Column (A) and enters the difference in Item 35, Column (C). The software also subtracts Item 34, Column (D) from Item 29, Column (B) and enters the difference in Item 35, Column (D).

STATEMENT B RECEIPTS AND DISBURSEMENTS

Under Statement B, receipts must be recorded when money is actually received by the labor organization and disbursements must be recorded when money is actually paid out by the labor organization.

The purpose of Statement B is to report the flow of cash in and out of the labor organization during the reporting period. Transfers between separate bank accounts or between special funds of the labor organization, such as vacation or strike funds, do not represent the flow of cash in and out of the labor organization. Therefore, these transfers should not be reported as receipts and disbursements of the labor organization. For example, do not report a transfer of cash from the labor organization's savings account to its checking account. Likewise, the use of funds reported in Item 22 (Cash) of Statement A to purchase certificates of deposit and the redemption of certificates of deposit should not be reported in Statement B.

Since Statement B reports all cash flowing in and out of the labor organization, "netting" is not permitted. "Netting" is the offsetting of receipts against disbursements and reporting only the balance (net) as either a receipt or disbursement. For example, if an officer received $1,000 from the labor organization for convention expenses, used only $800 and returned the remaining $200, the $1,000 disbursement must be reported in Schedule 11 (All Officers and Disbursements to Officers) and the appropriate disbursement Schedule 15 through 19, and the $200 receipt must be reported in Schedule 14 (Other Receipts). It would be incorrect to report only an $800 net disbursement to the officer.

Receipts and disbursements by an agent on behalf of the labor organization are considered receipts and disbursements of the labor organization and must be reported in the same detail as other receipts and disbursements. For example, if the labor organization owns a building managed by a rental agent, the agent's rental receipts and disbursements for expenses must be reported on the labor organization's Form LM-2. Also, if the labor organization's parent body or an intermediate body functions as an agent receiving and disbursing funds of the labor organization to third parties, these receipts and disbursements must be reported on the labor organization's Form LM-2. For example, if a parent body receives the labor organization's dues and makes disbursements from that money to pay the labor organization's bills (such as payments to an attorney for legal services), those receipts and disbursements must be reported on the labor organization's Form LM-2.

CASH RECEIPTS

36. DUES AND AGENCY FEES – Enter the total dues including regular dues, working dues, etc. received by the labor organization. Include dues received directly by the organization from members, dues received from employers through a checkoff arrangement, and dues transmitted to the organization by a parent body or other affiliate. Report the full dues received, including any portion that will later be transmitted to an intermediate or parent body as per capita tax. Also report in Item 36 payments in lieu of dues received from any nonmember employees as a condition of employment under a union security provision in a collective bargaining agreement.

If an intermediate or parent body receives dues checkoff directly from an employer on behalf of the reporting organization, do not report in Item 36 the portion retained by that organization for per capita tax or other purposes, such as a special assessment. Any amounts retained by the intermediate body or parent body other than per capita tax must be explained in Item 69 (Additional Information). For example, if the

intermediate body or parent body retained $500 of the reporting organization's dues checkoff as payment for supplies purchased from that body by the reporting organization, this should be explained in Item 69, but the $500 should not be reported as a receipt or disbursement on either organization's Form LM-2. If, however, the intermediate body or parent body disbursed part of the reporting organization's dues checkoff on that organization's behalf, this amount should be included in Item 36 and in the appropriate disbursement item on the reporting organization's Form LM-2. For example, if the intermediate body or parent body disbursed $500 of the reporting organization's dues checkoff to an attorney who had provided lobbying services to the reporting organization, this amount should be reported in Item 36 and as a disbursement in Schedule 16 (Political Activities and Lobbying) of the reporting organization's Form LM-2.

Do not report in Item 36 dues that the reporting organization collected on behalf of other organizations for transmittal to them. For example, if the reporting organization received dues from a member of an affiliate who worked in the reporting organization's jurisdiction, the dues collected on the affiliate's behalf must be reported in Item 46.

37. PER CAPITA TAX — Enter the total per capita tax received by your organization if your organization is an intermediate or parent body; otherwise, enter “0” in Item 37. Include the per capita tax portion of dues received directly by your organization from members of affiliates, per capita tax received from subordinates, either directly or through intermediaries, and the per capita tax portion of dues received through a checkoff arrangement whereby local dues are remitted directly to an intermediate or parent body by employers. Do not include dues collected on behalf of subordinate organizations for transmittal to them. For example, if a parent body received dues checkoff directly from an employer and returned the local’s portion of the dues, the parent body must report the dues received on behalf of the local in Item 46 (On Behalf of Affiliates for Transmittal to Them).

38. FEES, FINES, ASSESSMENTS, WORK PERMITS — Enter the labor organization's receipts from fees, fines, assessments, and work permits. Receipts by the labor organization on behalf of affiliates for transmittal to them must be reported in Item 46 (On Behalf of Affiliates for Transmittal to Them).

39. SALE OF SUPPLIES — Enter the total amount received by the labor organization from the sale of supplies such as union logo clothing, lapel pins, bumper stickers, etc.

40. INTEREST — Enter the total amount of interest received by the labor organization from savings accounts, bonds, mortgages, loans, and all other sources.

41. DIVIDENDS — Enter the total amount of dividends from stocks and other investments received by the labor organization. Do not include "dividends" from credit unions, savings and loan associations, etc., which must be reported in Item 40 (Interest).

42. RENTS — Enter the total amount of rents received by the labor organization.

43. SALE OF INVESTMENTS AND FIXED ASSETS — The software will enter the total ”Net Sales” reported in Column (E) of Schedule 3 (Sale of Investments and Fixed Assets).

44. LOANS OBTAINED — The software will enter the total reported in Column (C) of Schedule 9 (Loans Payable).

45. REPAYMENTS OF LOANS MADE — The software will enter the total reported in Column (D)(1) of Schedule 2 (Loans Receivable).

46. ON BEHALF OF AFFILIATES FOR TRANSMITTAL TO THEM — Enter the total amount of dues, fees, fines, assessments, and work permit fees received by the labor organization, through a checkoff arrangement or otherwise, on behalf of affiliates for transmittal to them. Do not include the amount withheld by the labor organization for per capita taxes or other purposes, such as loan repayments, which must be reported elsewhere in Statement B. When the receipts reported in Item 46 are transmitted, the disbursement must be reported in related Item 63 (To Affiliates of Funds Collected on Their Behalf).

47. FROM MEMBERS FOR DISBURSEMENT ON THEIR BEHALF — Enter the total receipts from members that are specifically designated by them for disbursement on their behalf; for example, contributions from members for

transmittal by the labor organization to charities. When receipts that are reported in Item 47 are transmitted, the disbursement must be reported in related Item 64 (On Behalf of Individual Members).

48. OTHER RECEIPTS — The software will enter the total reported on Summary Schedule 14, Line 4.

49. TOTAL RECEIPTS — Click the "Save & Calculate" button at the top of Statement B and the software will add the amounts in Items 36 through 48 and enter the total in Item 49.

CASH DISBURSEMENTS

50. REPRESENTATIONAL ACTIVITIES – The software will enter the total from Summary Schedule 15, Line 6.

51. POLITICAL ACTIVITIES AND LOBBYING – The software will enter the total from Summary Schedule 16, Line 6.

52. CONTRIBUTIONS, GIFTS, AND GRANTS – The software will enter the total from Summary Schedule 17, Line 6.

53. GENERAL OVERHEAD – The software will enter the total from Summary Schedule 18, Line 6.

54. UNION ADMINISTRATION – The software will enter the total from Summary Schedule 19, Line 6.

55. BENEFITS – The software will enter the total reported in Column (C.) of Schedule 20 (Benefits).

56. PER CAPITA TAX — Enter your organization's total amount of per capita tax paid as a condition or requirement of affiliation with your parent national or international union, state and local central bodies, a conference, joint or system board, joint council, federation, or other labor organization.

57. STRIKE BENEFITS – Enter the total amount of all disbursements made to, or on behalf of the members (or agency fee paying nonmembers) of the labor organization, and others, associated with strikes (including recognitional strikes), work stoppages and lockouts during the reporting period.

58. FEES, FINES, ASSESSMENTS, ETC. — Enter the total amount of fees, fines, assessments, and similar disbursements made by the labor organization to a parent body or other labor organization.

59. SUPPLIES FOR RESALE — Enter the labor organization's total disbursements for purchases of supplies such as union logo clothing, lapel pins, bumper stickers, etc. for resale.

60. PURCHASE OF INVESTMENTS AND FIXED ASSETS — The software will enter the total reported in Column (D) of Schedule 4 (Purchase of Investments and Fixed Assets).

61. LOANS MADE — The software will enter the total reported in Column (C) of Schedule 2 (Loans Receivable).

62. REPAYMENT OF LOANS OBTAINED — The software will enter the total reported in Column (D)(1) of Schedule 9 (Loans Payable).

63. TO AFFILIATES OF FUNDS COLLECTED ON THEIR BEHALF — Enter the total disbursements of funds collected on behalf of affiliates by the labor organization. This amount usually is the same as the amount reported in related Item 46 (On Behalf of Affiliates for Transmittal to Them). Any such funds not disbursed by the end of the reporting period are liabilities of the labor organization and must be reported in Schedule 10 (Other Liabilities).

64. ON BEHALF OF INDIVIDUAL MEMBERS — Enter the total disbursements of funds collected from members by the labor organization that were specifically designated by them for disbursement on their behalf. This amount usually is the same as the amount reported in related Item 47 (From Members for Disbursement on Their Behalf). Any such funds not disbursed by the end of the reporting period are liabilities of the labor organization and must be reported in Schedule 10 (Other Liabilities).

65. DIRECT TAXES – Enter all taxes assessed against and paid by your organization, including your organization's FICA taxes as an employer. Do not include disbursements for the transmittal of taxes withheld from the salaries of officers and employees which must be reported in Item 67 (Withholding Taxes and Other Payroll Deductions). Also, do not include indirect taxes,

such as sales and excise taxes, for purchases reported in other disbursement items.

66. SUBTOTAL — Click the "Save & Calculate" button at the top of Statement B and the software will add the amounts in Items 50 through 65 and enter the subtotal in Item 66.

67. WITHHOLDING TAXES AND OTHER PAYROLL DEDUCTIONS – a. Total Withheld - Enter the total amount of withholding taxes and all other payroll deductions during the reporting period.

b. Total Disbursed - Enter the total amount of withholding taxes and all other payroll deductions that were disbursed by your organization during the reporting period. This includes your organization's total disbursements to Federal, state, county, and municipal government agencies for the transmittal of taxes withheld from the salaries of officers and employees, including officers' and employees' portion of FICA taxes and all disbursements for the transmittal of other payroll deductions.

c. Total Withheld But Not Disbursed – Click the "Save & Calculate" button at the top of Statement B and the software will subtract Item 67b from Item 67a and enter the difference in Item 67c. The software will also complete Item 68 (Total Disbursements) as explained in the next instruction.

68. TOTAL DISBURSEMENTS – As indicated in the previous instruction, when Item 66c is completed and the "Save & Calculate" button at the top of Statement B is clicked the software subtracts Item 67c from Item 66 and enters the difference in Item 68.

NOTE: *The following worktable may be used to determine that the figures for receipts, disbursements, and cash are correctly reported on the labor organization's Form LM-2:*

A. Cash at Start of Reporting $ Period — Item 22, Column (A)

B. Add: Total Receipts — Item 49 $

C. Total of Lines A and B $

D. Subtract: Total Disbursements $ — Item 68

E. Cash at End of Period $

If Line E does not equal the amount reported in Item 22, Column (B), there is an error in the labor organization's report, which should be corrected.

ADDITIONAL INFORMATION AND SIGNATURES

69. ADDITIONAL INFORMATION — Use Item 69 to provide additional information as indicated on Form LM-2 and in these instructions. Enter the number of the item to which the information relates in the Item Number column if the software has not entered the number.

70-71. SIGNATURES — The completed Form LM-2 that is filed with OLMS must be signed by both the president and treasurer, or corresponding principal officers, of the labor organization. If an officer other than the president or treasurer performs the duties of the principal executive or principal financial officer, the other officer may sign the report. If an officer other than the president or treasurer signs the report, enter the correct title in the title field next to the signature and explain in Item 69 (Additional Information) why the president or treasurer did not sign the report.

Before signing the form, enter the telephone number at which the signatories conduct official business and the date. Click the Validate button at the top of the form to ensure that the report passes validation.

To sign the form, click the signature spaces provided. Fill in the requested information in the screen that pops up.

XII. LABOR ORGANIZATIONS THAT HAVE CEASED TO EXIST

If a labor organization has gone out of existence as a reporting labor organization, the last president and treasurer or the officials responsible for winding up the affairs of the labor organization must file a terminal financial report for the period from the beginning of the fiscal year to the date of termination. A terminal financial report must be filed if the labor organization has gone out of business by disbanding, merging into another organization, or being merged and consolidated with one or

more labor organizations to form a new labor organization. A terminal financial report is not required if the labor organization changed its affiliation but continues to function as a separate reporting labor organization.

The terminal financial report must be filed on Form LM-2 if the labor organization filed its previous annual report on Form LM-2 and must be submitted within 30 days after the date of termination.

To complete a terminal report on Form LM-2, follow the instructions in Section XI and, in addition:

- Enter the date the labor organization ceased to exist in Item 2 after the word "Through." The format for the date must be mm/dd/yyyy.
- Select Item 3(c) indicating that the labor organization ceased to exist during the reporting period and that this is the labor organization's terminal Form LM-2.
- Provide in Item 69 (Additional Information) a detailed statement of the reason the labor organization ceased to exist. Also report in Item 69 plans for the disposition of the labor organization's cash and other assets, if any (for example, transfer of cash and assets to the parent body). Provide the name and address of the person or organization that will retain the records of the terminated organization. If the labor organization merged with another labor organization, report that organization's name, address, and 6-digit file number.

Contact the nearest OLMS field office if you have questions about filing a terminal report.

If You Need Assistance

The Office of Labor-Management Standards has field offices located in the following cities to assist you if you have any questions concerning LMRDA and CSRA reporting requirements.

Atlanta, GA
Birmingham, AL
Boston, MA
Buffalo, NY
Chicago, IL
Cincinnati, OH
Cleveland, OH
Dallas, TX
Denver, CO
Detroit, MI
Grand Rapids, MI
Guaynabo, PR
Honolulu, HI
Houston, TX
Kansas City, MO
Los Angeles, CA
Miami, FL
Milwaukee, WI
Minneapolis, MN
Nashville, TN
New Haven, CT
New Orleans, LA
New York, NY
Newark, NJ
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
St. Louis, MO
San Francisco, CA
Seattle, WA
Tampa, FL
Washington, DC

Consult the OLMS Web site at www.olms.dol.gov or local telephone directory listings under United States Government, Labor Department, Office of Labor-Management Standards, for the address and telephone number of the nearest field office. You may also contact OLMS via email at OLMS-Public@dol.gov.

Copies of labor organization annual financial reports, employer reports, and labor relations consultant reports filed for the year 2000 and after can be viewed and printed at www.unionreports.gov. Copies of reports for the year 1999 and earlier can be ordered through the Web site.

Information about OLMS, including key personnel and telephone numbers, compliance assistance materials, the text of the LMRDA, and related Federal Register and Code of Federal Regulations documents, is also available on the OLMS website at www.olms.dol.gov.

U.S. Department of Labor
Office of Labor-Management Standards
Washington, DC 20210

FORM LM-3 LABOR ORGANIZATION ANNUAL REPORT

FOR USE ONLY BY LABOR ORGANIZATIONS WITH LESS THAN $250,000 IN TOTAL ANNUAL RECEIPTS

Form Approved
Office of Management and Budget
No. 1245-0003
Expires: XX-XX-XXXX

This report is mandatory under P.L. 86-257, as amended. Failure to comply may result in criminal prosecution, fines, or civil penalties as provided by 29 U.S.C. 439 or 440.

READ THE INSTRUCTIONS CAREFULLY BEFORE PREPARING THIS REPORT.

For Official Use Only

1. FILE NUMBER ___ — ___

2. PERIOD COVERED

	MO	DAY	YEAR
From			
Through			

3. (a) AMENDED — If this is an amended report correcting a previously filed report, check here: ☐

(b) TERMINAL — If your organization ceased to exist and this is its terminal report, see Section XII of the instructions and check here: ☐

4. AFFILIATION OR ORGANIZATION NAME

5. DESIGNATION *(Local, Lodge, etc.)*

6. DESIGNATION NUMBER

7. UNIT NAME *(if any)*

9. Are your organization's records kept at its mailing address? *(If "No," provide address in Item 56.)* Yes ☐ No ☐

8. MAILING ADDRESS *(Type or print in capital letters.)*

First Name

Last Name

P.O. Box • Building and Room Number *(if any)*

Number and Street

City

State ZIP Code + 4 —

56. ADDITIONAL INFORMATION *(If more space is needed, attach additional pages properly identified.)*

Item Number

Each of the undersigned, duly authorized officers of the above labor organization, declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including the information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned's knowledge and belief, true, correct, and complete. *(See Section VI on penalties in the instructions.)*

57. SIGNED: _____ PRESIDENT *(If other title, see instructions.)*

___/___/___ Date ( ) — Telephone Number

58. SIGNED: _____ TREASURER *(If other title, see instructions.)*

___/___/___ Date ( ) — Telephone Number

FILE NUMBER: ☐☐☐ — ☐☐☐

During the Reporting Period Did Your Organization:

	Yes	No
10. Have a "subsidiary organization" as defined in Section X of the instructions?	☐	☐
11. Create or participate in the administration of a trust or other fund or organization, as defined in the instructions, which provides benefits for members or their beneficiaries?	☐	☐
12. Have a political action committee (PAC) fund?	☐	☐
13. Acquire or dispose of any goods or property in any manner other than by purchase or sale?	☐	☐
14. Have an audit or review or its books and records by an outside accountant or by a parent body auditor/representative?	☐	☐
15. Discover any loss or shortage of funds or other property? *(Answer "Yes" even if there has been repayment or recovery.)*	☐	☐
16. Have any officer who was paid $10,000 or more by your organization and also received $10,000 or more as an officer or employee of another labor organization or of an employee benefit plan?	☐	☐
17. Pay any employee salary, allowances, and other expenses which, together with any payments from affiliates, totaled more than $10,000?	☐	☐
18. Have loans totaling more than $250 to any officer, employee, or member, or make any loans to a business enterprise?	☐	☐

(If the answer to any of the above questions is "Yes," provide details in Item 56 on page 1 as explained in the instructions for each item.)

19. How many members did your organization have at the end of the reporting period? ☐☐☐☐☐☐☐☐

20. What is the maximum amount recoverable under your organization's fidelity bond for a loss caused by any officer or employee of your organization? **$** ☐☐☐☐☐☐☐☐

21. During the reporting period, did your organization have any changes in its constitution and bylaws (other than rates of dues and fees) or in practices/procedures listed in the instructions? Yes ☐ No ☐
(If the constitution and bylaws have changed, attach two new dated copies. If practices/procedures have changed, see the instructions.)

22. What is the date of your organization's next regular election of officers? MO ☐☐ YEAR ☐☐☐☐

23. What are your organization's rates of dues and fees?
(Enter a minimum and maximum if more than one rate applies for any line.)

	Rates of Dues and Fees
(a) Regular Dues/Fees	$_____ per _____ *(Month, Year, etc.)*
(b) Initiation Fees	$_____
(c) Transfer Fees	$_____
(d) Work Permits	$_____ per _____ *(Month, Year, etc.)*

24. ALL OFFICERS AND DISBURSEMENTS TO OFFICERS

Enter Amounts in Dollars Only — Do Not Enter Cents

FILE NUMBER: ___ – ___

(A) Name *(List all persons who held office during the reporting period even if they received no salary or other disbursements. Use all capital letters.)*		Gross Salary (before taxes and other deductions) (D)	Allowances and Other Disbursements (E)	Total (F)
(B) Title *(Enter title of officer, such as PRESIDENT or TREASURER.)*	Status (C)*			
1. Last Name / First Name / Title / Status				
2. Last Name / First Name / Title / Status				
3. Last Name / First Name / Title / Status				
4. Last Name / First Name / Title / Status				
5. Last Name / First Name / Title / Status				
6. Last Name / First Name / Title / Status				
7. Last Name / First Name / Title / Status				
8. Totals from additional pages *(if any)*				
9. Totals of Lines 1 through 8				
			10. Less Deductions	
Enter the total from Line 11 in .....Item 45 ⇨			11. Net Disbursements	

*Code for Status (C): past officer — P; continuing officer — C; new officer during the reporting period — N. *(If any officer was not elected at a regular election in accordance with your organization's constitution and bylaws, explain in Item 56 on page 1.)*

Enter Amounts in Dollars Only — Do Not Enter Cents

FILE NUMBER: ___ — ___

STATEMENT A ASSETS AND LIABILITIES

ASSETS Item	Start of Reporting Period (A)	End of Reporting Period (B)	LIABILITIES Item	Start of Reporting Period (C)	End of Reporting Period (D)
25. Cash……			32. Accounts Payable…..		
26. Loans Receivable ……			33. Loans Payable……..		
27. U.S. Treasury Securities..			34. Mortgages Payable…		
28. Investments……			35. Other Liabilities……..		
29. Fixed Assets……..			36. TOTAL LIABILITIES..		
30. Other Assets……..					
31. TOTAL ASSETS……..			37. NET ASSETS *(Item 31 less Item 36)*…..		

STATEMENT B RECEIPTS AND DISBURSEMENTS

CASH RECEIPTS Item	AMOUNT	CASH DISBURSEMENTS Item	AMOUNT
38. Dues……		45. To Officers (*from Item 24*).....	
39. Per Capita Tax ……....		46. To Employees (*less deductions*).....	
40. Fees, Fines, Assessments & Work Permits…….....		47. Per Capita Tax	
41. Interest & Dividends…….....		48. Office & Administrative Expense	
42. Sale of Investments & Fixed Assets…….....		49. Professional Fees	
43. Other Receipts…….....		50. Benefits.....	
44. TOTAL RECEIPTS……...		51. Contributions, Gifts & Grants	
If total receipts reported in Item 44 are $250,000 or more, your organization must file Form LM-2 instead of this form.		52. Purchase of Investments & Fixed Assets	
		53. Loans Made	
		54. Other Disbursements.....	
		55. TOTAL DISBURSEMENTS	

ORGANIZATION NAME:

ENDING DATE OF PERIOD COVERED:

FILE NUMBER: ___ — ___

PAGE ____ OF ____ ADDITIONAL PAGES

24. ALL OFFICERS AND DISBURSEMENTS TO OFFICERS *(continued)*

(A) Name *(List all persons who held office during the reporting period even if they received no salary or other disbursements. Use all capital letters.)* / (B) Title *(Enter title of officer, such as PRESIDENT or TREASURER.)*	Status (C)	Gross Salary (before taxes and other deductions) (D)	Allowances and Other Disbursements (E)	Total (F)
Last Name / First Name / Title	Status			
Last Name / First Name / Title	Status			
Last Name / First Name / Title	Status			
Last Name / First Name / Title	Status			
Last Name / First Name / Title	Status			
Last Name / First Name / Title	Status			
Last Name / First Name / Title	Status			
Last Name / First Name / Title	Status			
	Totals			

ORGANIZATION NAME:

ENDING DATE OF PERIOD COVERED:

FILE NUMBER:

PAGE ____ OF ____ ADDITIONAL PAGES

24. ALL OFFICERS AND DISBURSEMENTS TO OFFICERS *(continued)*

(A) Name *(List all persons who held office during the reporting period even if they received no salary or other disbursements. Use all capital letters.)*			Gross Salary (before taxes and other deductions) (D)	Allowances and Other Disbursements (E)	Total (F)
(B) Title *(Enter title of officer, such as PRESIDENT or TREASURER.)*		Status (C)			
Last Name	First Name				
Title		Status			
Last Name	First Name				
Title		Status			
Last Name	First Name				
Title		Status			
Last Name	First Name				
Title		Status			
Last Name	First Name				
Title		Status			
Last Name	First Name				
Title		Status			
Last Name	First Name				
Title		Status			
Last Name	First Name				
Title		Status			
		Totals			

Public reporting burden for this collection of information is estimated to average 116 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. Reporting of this information is mandatory and is required by the Labor-Management Reporting and Disclosure Act of 1959, as amended, for the purpose of public disclosure. As this is public information, there are no assurances of confidentiality. If you have any comments regarding this estimate or any other aspect of this information collection, including suggestions for reducing this burden, please send them to the U.S. Department of Labor, Office of Labor-Management Standards, Division of Interpretations and Standards, Room N-5609, 200 Constitution Avenue, NW, Washington, DC 20210.

INSTRUCTIONS FOR FORM LM-3 LABOR ORGANIZATION ANNUAL REPORT

(11/2010)

GENERAL INSTRUCTIONS

I. WHO MUST FILE

Every labor organization subject to the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), the Civil Service Reform Act (CSRA), or the Foreign Service Act (FSA) must file a financial report, Form LM-2, LM-3, or LM-4, each year with the Office of Labor-Management Standards (OLMS) of the U.S. Department of Labor. These laws cover labor organizations that represent employees who work in private industry, employees of the U.S. Postal Service, and most Federal government employees. Labor organizations that represent or include only state, county, or municipal government employees are not covered by these laws and, therefore, are not required to file. If you have a question about whether your organization is required to file, contact the nearest OLMS field office listed at the end of these instructions.

II. WHAT FORM TO FILE

Every labor organization subject to the LMRDA, CSRA, or FSA with total annual receipts of less than $250,000 may file the simplified annual report Form LM-3, if not in trusteeship as defined in Section IX of these instructions. The term "total annual receipts" means all financial receipts of the labor organization during its fiscal year, regardless of the source, including receipts of any special funds as described in Section VIII of these instructions and any "subsidiaries" as defined in Section X.

Labor organizations with greater total annual receipts and those in trusteeship must file the more detailed Form LM-2. Labor organizations with less than $10,000 in total annual receipts may file the abbreviated 2-page annual report Form LM-4, if not in trusteeship.

III. WHEN TO FILE

Form LM-3 must be filed within 90 days after the end of your organization's fiscal year (12-month reporting period). The law does not authorize the U.S. Department of Labor to grant an extension of time for filing reports for any reason. The penalties for delinquency are described in Section VI of these instructions.

If your organization went out of existence during its fiscal year, a terminal financial report must be filed within 30 days after the date it ceased to exist. See Section XII of these instructions for information on filing a terminal financial report.

IV. HOW TO FILE

An Adobe Reader version of Form LM-3 is available for download from the OLMS Web site. This form has some items pre-filled and the option for digital signatures for electronic filing. You can download the Adobe Reader version Form LM-3 at www.dol.gov/olms/regs/compliance/lm3_downloadpg.htm.

On the download pages you will find a User Guide for the Adobe Reader Form LM-3 that will guide you through the process of preparing and completing the form, and provide instructions and navigation tips to help you download the form, enter information directly into the form, and add digital signatures.

If you have difficulty navigating the software, or have questions about its functions and features, call the OLMS Help Desk at: (866) 401-1109. You may also send questions via e-mail to olms-public@dol.gov.

After you have completed Form LM-3 you have two options for submitting your report. You can print it and have the officers sign it manually and mail it to the Office of Labor-Management Standards, 200 Constitution Ave., NW, Room N-1519, Washington, DC 20210-0001 or you can electronically sign and submit the form.

V. Public Disclosure

The LMRDA requires that the U.S. Department of Labor make labor organization financial reports available for inspection by the public. Reports for the year 2000 and later may be viewed and downloaded from the OLMS Web site at www.unionreports.gov. Copies of reports and union constitutions and bylaws can be ordered at the same Web site. Reports may also be examined and copies purchased at the OLMS Public Disclosure Room at:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-1519
Washington, DC 20210-0001
Telephone: 202-693-0125

VI. Officer Responsibilities And Penalties

The president and treasurer or the corresponding principal officers of the labor organization required to sign Form LM-3 are personally responsible for its filing and accuracy. Under the LMRDA, officers are subject to criminal penalties for willful failure to file a required report and for false reporting. False reporting includes making any false statement or misrepresentation of a material fact while knowing it to be false, or for knowingly failing to disclose a material fact in a required report or in the information required to be contained in it or in any information required to be submitted with it.

The reporting labor organization and the officers required to sign Form LM-3 are also subject to civil prosecution for violations of the filing requirements. Section 210 of the LMRDA (29 U.S.C. 440) provides that "whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate."

Under the CSRA and FSA and implementing regulations, false reporting and failure to report may result in administrative enforcement action and litigation. The officers responsible for signing Form LM-3 are also subject to criminal penalties for false reporting under Sections 1001 of Title 18 and 1746 of Title 28 of the United States Code.

VII. Recordkeeping

The officers required to file Form LM-3 are responsible for maintaining records which will provide in sufficient detail the information and data necessary to verify the accuracy and completeness of the report. The records must be kept for at least 5 years after the date the report is filed. Any record necessary to verify, explain, or clarify the report must be retained, including, but not limited to, vouchers, worksheets, receipts, and applicable resolutions, and any electronic documents, including recordkeeping software, used to complete, read, and file the report.

VIII. Funds To Be Reported

Your labor organization's Form LM-3 must report financial information for all funds of your organization. Include any special purpose funds or accounts, such as strike funds, vacation funds, and scholarship funds even it they are not part of your organization's general treasury. All labor organization political action committee (PAC) funds are

considered to be labor organization funds. However, to avoid duplicate reporting, PAC funds which are kept separate from your labor organization's treasury are not required to be included in your organization's Form LM-3 if publicly available reports on the PAC funds are filed with a Federal or state agency.

Your organization is required to report financial information about any "subsidiary organizations." Financial information about your organization and its subsidiary organizations may be combined on a single Form LM-3 or you may attach to your Form LM-3 report the regular annual report of the financial condition and operations of the subsidiary organization with a signed certification by an independent public accountant. See Section X of these instructions for information on reporting financial information for subsidiary organizations.

If combining the information concerning subsidiary organizations, be sure to include the requested information and amounts for the subsidiary organizations as well as for all other assets of your union in all items.

SPECIAL INSTRUCTIONS FOR CERTAIN ORGANIZATIONS

IX. Labor Organizations In Trusteeship

Any labor organization which has placed a subordinate labor organization in trusteeship is responsible for filing the subordinate's annual financial report. A trusteeship is defined in section 3(h) of the LMRDA as "any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws."

Annual financial reports filed for any labor organization in trusteeship must be filed on Form LM-2 rather than Form LM-3. The report must be signed by the president and treasurer or corresponding principal officers of the labor organization which imposed the trusteeship and by the trustees of the subordinate labor organization. Form LM-2 can be downloaded from the OLMS Web site at www.olms.dol.gov. For additional information contact any of the offices listed at the end of these instructions.

X. Labor Organizations With Subsidiary Organizations

A subsidiary organization, within the meaning of these instructions, is any separate organization of which the ownership is wholly vested in the reporting labor organization or its officers or its membership, which is governed or controlled by the officers, employees, or members of the reporting labor organization, and which is wholly financed by the reporting labor organization. A subsidiary organization is considered to be wholly financed if the initial financing was provided by the reporting labor organization even if the subsidiary organization is currently wholly or partially self-sustaining. An example of a subsidiary organization is a building corporation which holds title to a building; the labor organization owns the building corporation, selects the officers, and finances the operation of the building corporation.

If your organization has no subsidiary organization as defined above, skip to Section XI of these instructions.

A labor organization is required to report financial information for each of its subsidiary organizations using one of the following methods:

Method (1) — Consolidate the financial information for the subsidiary organization(s) and the labor organization on a single Form LM-3.

Method (2) — File, with the labor organization's Form LM-3, the regular annual report of the financial condition and operations of the subsidiary organization, accompanied by a statement signed by an independent public accountant certifying that the financial report presents fairly the financial condition and operations of the subsidiary organization and was prepared in accordance with generally accepted accounting principles. Financial information reported separately for

subsidiary organizations under this method must include the name of the subsidiary organization and the name and file number of the labor organization as shown on its Form LM-3. The financial report of the subsidiary organization must cover the same reporting period as that used by the reporting labor organization.

When method (2) is used and the subsidiary organization is an investment, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 28 (Investments) of the labor organization's Form LM-3.

When method (2) is used and the subsidiary organization is of a non-investment nature, the financial interest of the reporting labor organization in the subsidiary organization must be reported in Item 30 (Other Assets) of the labor organization's Form LM-3.

The same type of information required on Form LM-3 regarding disbursements to officers and employees and loans made by labor organizations must also be reported with respect to the subsidiary organization. In method (1), the information relating to the subsidiary organization must be combined with that of the labor organization and reported on the labor organization's Form LM-3 in Item 24 (All Officers and Disbursements to Officers) and in Item 56 (Additional Information) for Items 17 (Employees) and 18 (Loans), in the detail required by the instructions. If method (2) is used, an attachment must be submitted containing the information required by the instructions for Items 17, 18, and 24.

The information regarding loans made by the subsidiary organization must include a listing of the names of each officer, employee, or member of the labor organization and each officer or employee of the subsidiary organization whose total loan indebtedness to the subsidiary organization, to the labor organization, or to both at any time during the reporting period exceeded $250. However, if method (2) is used, the amount reported by the subsidiary organization should be only the amount owed to the subsidiary organization.

The annual financial report must also include all disbursements made by the subsidiary organization to or on behalf of its officers and officers of the labor organization. The report must also list the name and position of the subsidiary organization's employees whose total gross salaries, allowances, and other disbursements from the subsidiary organization, the reporting labor organization, and any affiliates were more than $10,000. However, if method (2) is used, only the disbursements of the subsidiary organization for its employees should be reported.

XI. Completing Form LM-3

Most pages have a "Perform Calculations" button to total and transfer data to fields in various parts of the form. You may click on one or more of these buttons as you fill out the form at any time.

You may click on the "Validate Form" button at any time to check for errors. This action will generate an "Errors Page" listing any errors that will need to be corrected before you will be able to sign the form. Clicking on the signature lines will also perform the validation function.

INFORMATION ITEMS 1-23

Answer Items 1 through 23 as instructed. Select the appropriate box for those questions requiring a "Yes" or "No" answer; do not leave both boxes blank. Enter a single "0" in the boxes for items requiring a number or dollar amount if there is nothing to report.

1. FILE NUMBER — The software will enter the labor organization's 6-digit file number here and at the top of each page of Form LM-3. This is the number you entered when you downloaded Form LM-3. If the number is incorrect, you must download another copy of the form using the correct number. If the labor organization does not have the number on file and cannot obtain the number from prior reports filed with the Department, the number can be obtained from the OLMS Web site at www.unionreports.gov, or by contacting the

nearest OLMS field office listed at the end of these instructions.

2. PERIOD COVERED — The software will enter the beginning and ending dates of the period covered by this report. These are the dates you entered when you downloaded Form LM-3. If the dates are incorrect, you must download another form using the correct dates. If the labor organization changed its fiscal year, the ending date in Item 2 should be the labor organization's new fiscal year ending date and the labor organization should indicate in Item 56 (Additional Information) that the report is for a period of less than 12 months because its fiscal year has changed. For example, if the labor organization's fiscal year ending date changes from June 30 to December 31, a report must be filed for the partial year from July 1 to December 31. Thereafter, the labor organization's annual report should cover a full 12-month period from January 1 to December 31.

3. AMENDED OR TERMINAL REPORT — Do not complete this item unless this report is an amended or terminal report. Select Item 3(a) if the labor organization is filing an amended report correcting a previously filed report. Select Item 3(b) if the labor organization has gone out of business by disbanding, merging into another labor organization, or being merged and consolidated with one or more labor organizations to form a new labor organization. Be sure the date the labor organization ceased to exist is entered in Item 2 (Period Covered) after the word "Through." See Section XII (Labor Organizations That Have Ceased to Exist) of these instructions for more information on filing a terminal report.

4. AFFILIATION OR ORGANIZATION NAME — The software accesses this information from the OLMS database and will enter the name of the national or international labor organization that granted the labor organization a charter. "Affiliates," within the meaning of these instructions, are labor organizations chartered by the same parent body, governed by the same constitution and bylaws, or having the relationship of parent and subordinate. For example, a parent body is an affiliate of all of its subordinate bodies, and all subordinate bodies of the same parent body are affiliates of each other.

If the labor organization has not reported such an affiliation, the software will enter the name of the labor organization as currently identified in the labor organization's constitution and bylaws or other organizational documents.

This item cannot be edited. If the labor organization needs to change this information, contact OLMS at (202) 693-0124.

5. DESIGNATION — The software will enter the specific designation that is used to identify the labor organization, such as Local, Lodge, Branch, Joint Board, Joint Council, District Council, etc. This field cannot be edited.

6. DESIGNATION NUMBER — The software will enter the number or other identifier, if any, by which the labor organization is known. This field cannot be edited.

7. UNIT NAME — The software will enter any additional or alternate name by which the labor organization is known, such as "Chicago Area Local." This field cannot be edited.

8. MAILING ADDRESS — The software will enter the current address where mail is most likely to reach the labor organization as quickly as possible. The first and last name of the person, if any, to whom such mail should be sent and any building and room number should be included. These fields are pre-filled from the OLMS database but can be edited by the filer.

9. PLACE WHERE RECORDS ARE KEPT — If the records required to be kept by the labor organization to verify this report are kept at the address reported in Item 8 (Mailing Address), answer "Yes." If not, answer "No" and provide in Item 56 (Additional Information) the address where the labor organization's records are kept.

10. SUBSIDIARY ORGANIZATIONS — If Item 10 is answered "Yes," provide in Item 56 the name, address, and purpose of each subsidiary organization. Indicate whether the

information concerning its financial condition and operations is included in this Form LM-3 or in a separate report. See Section X of these instructions for information on reporting subsidiary organizations.

11. TRUSTS OR FUNDS — Answer Item 11 "Yes" if your labor organization created or participated in the administration of a "trust in which a labor organization is interested" which is defined in section 3(l) of the LMRDA as "a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries."

If Item 11 is answered "Yes," provide in Item 56 the name, address, and purpose of each trust. If a report has been filed for the trust or other fund under the Employee Retirement Income Security Act of 1974 (ERISA), report in Item 56 the ERISA file number (Employer Identification Number — EIN) and plan number, if any.

12. POLITICAL ACTION COMMITTEE FUNDS — If Item 12 is answered "Yes," provide in Item 56 the full name of each separate political action committee (PAC) and list the name of any government agency, such as the Federal Election Commission or a state agency, with which the PAC has filed a publicly available report, and the relevant file number of the PAC. (PAC funds which are kept separate from your labor organization's treasury are not required to be included in your organization's Form LM-3 if publicly available reports on the PAC funds are filed with a Federal or state agency. See Section VIII of these instructions for additional information on PAC funds.)

13. ACQUISITION OR DISPOSITION OF ASSETS — If Item 13 is answered "Yes," describe in Item 56 the manner in which your organization acquired or disposed of assets, such as donating office furniture or equipment to charitable organizations, trading in assets, writing off a receivable, or giving away other tangible or intangible property of the labor organization. Include the type of asset, its value, and the identity of the recipient or donor, if any. Also report in Item 56 the cost or other basis at which any acquired assets were entered on your organization's books or the cost or other basis at which any assets disposed of were carried on your organization's books.

For assets that were traded in, enter in Item 56 the cost, book value, and trade-in allowance.

14. AUDIT OR REVIEW OF BOOKS AND RECORDS — If Item 14 is answered "Yes," indicate in Item 56 whether the audit or review was performed by an outside accountant or a parent body auditor/representative. If the audit or review was performed by an outside accountant, provide the name of the accountant or accounting firm. Report any audit or review by an outside accountant or a parent body auditor/representative in which your organization's books and records were examined to verify their accuracy and validity. The term "audit or review" does not include providing assistance in developing a bookkeeping system, providing routine bookkeeping services, or merely compiling information from your organization's books and records to prepare Form LM-3 or other financial reports. Also, do not answer Item 14 "Yes" if the audit or review was performed by an audit committee or trustees of your organization.

15. LOSSES OR SHORTAGES — If Item 15 is answered "Yes," describe the loss or shortage in detail in Item 56, including such information as the amount of the loss or shortage of funds or a description of the property that was lost, how it was lost, and to what extent, if any, there has been an agreement to make restitution or any recovery by means of repayment, fidelity bond, insurance, or other means.

16. ADDITIONAL POSITIONS OF OFFICERS — Answer Item 16 "Yes" only if an officer of your organization was paid $10,000 or more in salary, wages, and allowances by your

organization and was paid $10,000 or more in salary, wages, and allowances as an officer or employee of another labor organization or of an employee benefit plan. In calculating whether an officer was paid $10,000 or more, include allowances paid on a daily, weekly, monthly, or other periodic basis. Do not include allowances paid on the basis of mileage or meals or amounts officers received as reimbursed expenses. If Item 16 is answered "Yes," provide in Item 56 the name of each officer, the name of the other labor organization(s) or employee benefit plan(s), and the officer's position in the other labor organization(s) or employee benefit plan(s).

17. EMPLOYEES — Answer Item 17 "Yes" if any employee of your organization received more than $10,000 in gross salaries, allowances, and other direct and indirect disbursements during the reporting period (direct and indirect disbursements are defined in the instructions for Item 24). In computing the total, add together all disbursements made to each employee by your organization (including any subsidiary organization) and any affiliates. ("Affiliates" means labor organizations chartered by the same parent body, governed by the same constitution and bylaws, or having the relationship of parent and subordinate.)

If Item 17 is answered "Yes," report in Item 56 the name and position of each employee and the names of the other affiliated labor organizations which made disbursements to or on behalf of the employee. Also report in Item 56 the total disbursements made to each employee or on the employee's behalf by your organization, including all salary and allowances (before any deductions) and other disbursements (including reimbursed expenses).

18. LOANS — Answer Item 18 "Yes" if any officer, employee, or member owed your organization, together with any subsidiary organization, more than $250 at any time during the reporting period; or if your organization made a loan, regardless of amount, to any business enterprise during the reporting period. Include any direct or indirect loans whether or not evidenced by a promissory note or secured by a mortgage. An example of an indirect loan is a disbursement by your organization to an educational institution for the tuition expense of an officer, employee, or member which must be repaid to your organization by that individual.

If Item 18 is answered "Yes," report in Item 56 the name of each individual and business enterprise, the amount each individual owed at the end of the reporting period, and the amount loaned to each business enterprise during the reporting period. Also report in Item 56 the purpose, terms for repayment, and any security for each such loan.

NOTE: *Advances, including salary advances, are considered loans and must be reported in Item 26 (Loans Receivable) and Item 53 (Loans Made). However, advances to officers and employees of your organization for travel expenses necessary for conducting official business are not considered loans if the following conditions are met:*

- *the amount of an advance for a specific trip does not exceed the amount of expenses reasonably expected to be incurred for official travel in the near future, and the amount of the advance is fully repaid or fully accounted for by vouchers or paid receipts within 30 days after the completion or cancellation of the travel.*
- *the amount of a standing advance to an officer or employee who must frequently travel on official business does not unreasonably exceed the average monthly travel expenses for which the individual is separately reimbursed after the submission of vouchers or paid receipts, and the individual does not exceed 60 days without engaging in official travel.*

See the instructions for Item 24, Column (E), Item 30, and Item 46 for reporting travel advances which meet these criteria.

19. NUMBER OF MEMBERS — Enter the number of members in your organization at the end of the reporting period. Include all categories of members who pay dues. Do not include nonmember employees who make payments in lieu of dues as a condition of

employment under a union security provision in a collective bargaining agreement.

20. FIDELITY BOND — Enter the maximum amount recoverable for a loss caused by any officer, employee, or agent of your organization who handled your organization's funds. Enter "0" if your organization was not covered by a fidelity bond during the reporting period.

NOTE: *If your organization had property and annual financial receipts which totaled more than $5,000, each of your organization's officers, employees, and agents who handles funds or other property of your organization must be bonded. The amount of the bond must be at least 10% of the value of the funds handled by the individual during the last reporting period, up to a maximum bond of $500,000. The bond must be obtained from a surety company approved by the Secretary of the Treasury. If you have any questions or need more information about bonding requirements, contact the nearest OLMS field office listed at the end of these instructions.*

21. CHANGES IN CONSTITUTION AND BYLAWS OR PRACTICES/PROCEDURES — If Item 21 is answered "Yes" because your organization's constitution and bylaws were changed during the reporting period (other than rates of dues and fees), a dated copy of the new constitution and bylaws must either be submitted as an electronic attachment to the Form LM-3 the labor organization submits to OLMS, or the labor organization may submit a dated copy of the new constitution and bylaws to:

Office of Labor-Management Standards
200 Constitution Ave., NW, Room N-1519
Washington, DC 20210-0001

If your organization is governed by a uniform constitution and bylaws prescribed by your organization's parent national or international body, your organization's parent body may file the constitution and bylaws on your behalf. If your parent body files a constitution and bylaws on your behalf, answer Item 21 "Yes" and state that fact in Item 56.

If Item 21 is answered "Yes" because your organization changed any of the practices/procedures listed below during the reporting period and the practices/ procedures are not described in your organization's constitution and bylaws, your organization must file an amended Form LM-1 (Labor Organization Information Report) with its Form LM-3 to update information on file with OLMS:

- qualifications for or restrictions on membership;
- levying assessments;
- participating in insurance or other benefit plans;
- authorizing disbursement of labor organization funds;
- auditing financial transactions of the labor organization;
- calling regular and special meetings;
- authorizing bargaining demands;
- ratifying contract terms;
- authorizing strikes;
- disciplining or removing officers or agents for breaches of their trust;
- imposing fines and suspending or expelling members including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures;
- selecting officers and stewards and any representatives to other bodies composed of labor organizations' representatives;
- invoking procedures by which a member may protest a defect in the election of officers (including not only all procedures for initiating an election protest but also all procedures for subsequently appealing an adverse decision, e.g., procedures for appeals to superior or parent bodies, if any); and
- issuing work permits.

Form LM-1 can be downloaded from the OLMS Web site at www.olms.dol.gov. If you are unable to download the form, contact any of the offices listed at the end of these instructions to obtain a copy.

NOTE: *Federal employee labor organizations subject solely to the Civil Service Reform Act or Foreign Service Act are not required to*

submit an amended Form LM-1 to describe revised or changed practices/procedures.

22. NEXT REGULAR ELECTION — Enter the month and year of your organization's next regular election of general officers (president, vice president, treasurer, secretary, etc.). Do not report the date of any interim election to fill vacancies.

23. DUES AND FEES — Enter the dues and fees established by your organization. If more than one rate applies, enter the minimum and maximum rates. Enter "0" where appropriate.

Line (a): Enter the regular dues or fees or other periodic payments which a member must pay to be in good standing in your organization and enter the calendar basis for the payment (per month, per year, etc.). If your organization requires members to pay "working" dues as a part of regular dues, also report the amount or percent of "working" dues and enter the basis for the payment (per hour, per month, etc.). Include only the dues or fees of regular members and not dues or fees of members with special rates, such as apprentices, retirees, or unemployed members.

Line (b): Enter the initiation fees required from new members.

Line (c): Enter the fees other than dues required from transferred members. Such fees are those charged to persons applying for a transfer of membership to your organization from another labor organization with the same affiliation. Do not report fees charged to members transferring from one class of membership to another within your organization.

Line (d): If your organization issues work permits, enter the fees required and enter the calendar basis for the payment (per month, per year, etc.). Work permit fees are fees charged to nonmembers of your organization who work within its jurisdiction. Do not report as work permit fees those fees charged to nonmember applicants for membership pending acceptance of their membership application, or fees charged to persons applying for transfer of membership to your organization pending acceptance of their application for transfer.

FINANCIAL DETAILS

REPORT ONLY DOLLAR AMOUNTS
Report all amounts in dollars only. Round cents to the nearest dollar. Amounts ending in $.01 through $.49 should be rounded down. Amounts ending in $.50 through $.99 should be rounded up.

REPORTING CLASSIFICATIONS
Complete all items and lines on the form as given. Do not use different accounting classifications or change the wording of any item or line.

COMPLETE ALL ITEMS 24 THROUGH 55
Complete Item 24 and all items in Statement A and Statement B. Enter "0" where appropriate.

LIST OF OFFICERS AND DISBURSEMENTS TO THEM

ITEM 24. ALL OFFICERS AND DISBURSEMENTS TO OFFICERS — List all the labor organization's officers and report all salaries and other direct and indirect disbursements to officers during the reporting period. However, direct and indirect disbursements not involving the payment of some form of cash (cash, checks, money orders, etc.) should not be reported in Item 24 but must be explained in Item 56. Any direct or indirect cash disbursement required to be included in Item 24 should not be reported in other disbursement items.
NOTE: *A "direct disbursement" to an officer is a payment made by your organization to the officer in the form of cash, property, goods, services, or other things of value.*

An "indirect disbursement" to an officer is a payment made by your organization to another party for cash, property, goods, services, or other things of value received by or on behalf of the officer. "On behalf of the officer" means received by a party other than

the officer or your organization for the personal interest or benefit of the officer. Such payments include those made through a credit arrangement under which charges are made to the account of your organization and are paid by your organization.

Column (A): Enter in (A) the last name, first name, and middle initial of each person who held office in the labor organization at any time during the reporting period. Include all the labor organization's officers whether or not any salary or other disbursements were made to them or on their behalf by the labor organization. "Officer" is defined in section 3(n) of the LMRDA (29 U.S.C. 402) as "any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body."

Column (B): Enter in (B) the title of the position each officer listed held during the reporting period. If an officer held more than one position during the reporting period, list each additional position and the dates on which the officer held the position in Item 56 (Additional Information).

Column (C): Use the drop-down menu to select the status of each officer: "N" for a new officer who took office during the reporting period; "P" for a past officer who was not in office at the end of the reporting period; or "C" for a continuing officer who was in office before the reporting period and was still in office at the end of the reporting period. If any officer was not elected at a regular election in accordance with the labor organization's constitution and bylaws or other governing documents on file with OLMS, explain the manner in which the officer was chosen in Item 56 (Additional Information).

Column (D): Enter the gross salary of each officer (before tax withholdings and other payroll deductions). Include disbursements for “lost time” or time devoted to union activities.

Column (E): Enter the total of all other direct and indirect disbursements to each officer other than salary, including allowances, disbursements which were necessary for conducting official business of your organization, and disbursements essentially for the personal benefit of the officer and not necessary for conducting official business of your organization. Examples of disbursements to be reported in Column (E) include: allowances made by direct and indirect disbursements to each officer on a daily, weekly, monthly, or other periodic basis; allowances paid on the basis of mileage or meals; all expenses that were reimbursed directly to an officer; expenses for officers’ meals and entertainment; and various goods and services furnished to officers but charged to your organization.

Column (E) must also include:

- the total maintenance and operating costs of any automobile owned or leased by your organization and assigned to an officer regardless of whether the use was for official business or for the personal benefit of the officer. If more than 50% of the use of the automobile was for the personal benefit of the officer, the amount of decrease in the market value attributable to the officer’s personal use must be reported in Item 56.
- all disbursements for transportation by public carrier between the officer’s home and place of employment or for other transportation not involving the conduct of official business.
- all other direct and indirect disbursements to each officer not included elsewhere in this report. Include all direct and indirect disbursements which were essentially for the personal benefit of the officer and not necessary for conducting official business of your organization. However, disbursements for occasional non-cash gifts of insubstantial value need not be included in Column (E) if reported in Item 51 (Contributions, Gifts, and Grants).
- travel advances which are not considered loans as explained in the instructions for Item 18.

Do not report the following disbursements in Item 24:

- loans to officers which must be reported in Item 26 (Loans Receivable) and Item 53 (Loans Made);
- benefits to officers which must be reported in Item 50 (Benefits);
- reimbursements to an officer for the purchase of investments or fixed assets, such as reimbursing an officer for a file cabinet purchased for office use, which must be reported in Item 52 (Purchase of Investments and Fixed Assets) and explained in Item 56;
- indirect disbursements for temporary lodging (room rent charges only) or transportation by public carrier necessary for conducting official business while the officer is in travel status away from his or her home and principal place of employment with your organization if payment is made by your organization directly to the provider or through a credit arrangement and these disbursements are reported in Item 48 (Office and Administrative Expense); however, charges other than room rent on hotel bills must be reported in Column (E);
- disbursements made by your organization to someone other than an officer as a result of transactions arranged by an officer in which property, goods, services, or other things of value were received by or on behalf of your organization rather than the officer, such as rental of offices and meeting rooms, purchase of office supplies, refreshments and other expenses of membership banquets or meetings, and food and refreshments for the entertainment of groups other than the officers and membership on official business;
- office supplies, equipment, and facilities furnished to officers by your organization for use in conducting official business; and
- maintenance and operating costs of your organization's assets other than automobiles owned or leased by your organization and assigned to officers.

The software will enter on Line 8, Columns (D) and (E) the totals from any continuation pages for Item 24.

Column (F): The software will add Columns (D) and (E) for each of Lines 1 through 8 and enter the totals in Column (F).

The software will add Lines 1 through 8, Columns (D) through (F), and enter the totals on Line 9.

Enter on Line 10 the total amount of withheld taxes, payroll deductions, and other deductions. Disbursements for the transmittal of withheld taxes, payroll deductions, and other deductions must be reported in Item 54 (Other Disbursements). Any portion of withheld taxes or any payroll or other deductions which have not been transmitted at the end of the reporting period are liabilities of your organization and must be reported in Item 35. Payroll or other deductions retained by your labor organization (such as repayments of loans made) must be fully explained in Item 56.

The software subtracts Line 10, from Line 9, Column F, and enters the difference on Line 11 and in Item 45 (To Officers).

STATEMENT A
ASSETS AND LIABILITIES

The software will pre-fill Columns A and C (Start of Reporting Period) from your organization's report for the previous fiscal year. If the data is inaccurate, however, it can be edited manually. Be sure to explain any changes in Item 56.

ASSETS

25. CASH — Enter the total of all your organization's cash on hand and on deposit at the start and end of the reporting period in Columns (A) and (B), respectively. Include all cash on hand, such as undeposited cash, checks, and money orders; petty cash; and cash in safe deposit boxes. Cash on deposit includes funds in banks, credit unions, and other financial institutions, such as checking accounts, savings accounts, certificates of deposit, and money market accounts. Also include any interest credited to your

organization's account during the reporting period.

NOTE: *The checking account balances reported should be obtained from your organization's books as reconciled with the balances shown on bank statements.*

26. LOANS RECEIVABLE — Enter the total of all loans owed to your organization at the start and end of the reporting period in Columns (A) and (B), respectively. Include all direct and indirect loans (whether or not evidenced by promissory notes or secured by mortgages) owed to your organization by individuals, business enterprises, benefit plans, and other entities including labor organizations. An example of an indirect loan is a disbursement by your organization to an educational institution for the tuition expense of an officer, employee, or member which must be repaid to your organization by that individual. Do not include investments in corporate bonds or mortgages purchased on a block basis through a bank or similar institution which must be reported in Item 28 (Investments).

27. U.S. TREASURY SECURITIES — Enter the total value of all U.S. Treasury securities as shown on your organization's books at the start and end of the reporting period in Columns (A) and (B), respectively. If the value reported is different from the original cost, the original cost must be reported in Item 56. Other U.S. Government obligations, state and municipal bonds, and foreign government securities must be reported in Item 28 (Investments).

28. INVESTMENTS — Enter in Columns (A) and (B), respectively, the total book value at the start and end of the reporting period of all investments other than U.S. Treasury securities. The book value of these investments is the lower of cost or market value.

29. FIXED ASSETS — Enter in Columns (A) and (B), respectively, the book value at the start and end of the reporting period of all fixed assets, such as land, buildings, automobiles, and office furniture and equipment owned by your organization. The book value of fixed assets is cost less depreciation.

30. OTHER ASSETS — Enter in Columns (A) and (B), respectively, the total value as shown on your organization's books at the start and end of the reporting period of all assets (such as accounts receivable, utility deposits, or travel advances which are not considered loans as explained in the instructions for Item 18) which have not been reported in Items 25 through 29.

31. TOTAL ASSETS — The software adds Items 25 through 30, Columns (A) and (B), and enters the respective totals in Item 31.

LIABILITIES

32. ACCOUNTS PAYABLE — Enter the total amount of your organization's accounts payable at the start and end of the reporting period in Columns (C) and (D), respectively. Ordinarily, accounts payable are those obligations incurred on an open account for goods and services rendered.

33. LOANS PAYABLE — Enter in Columns (C) and (D), respectively, the total amount of all loans owed by your organization at the start and end of the reporting period, including those represented by notes. Do not include loans secured by mortgages or similar liens on real property (land or buildings) which must be reported in Item 34 (Mortgages Payable).

34. MORTGAGES PAYABLE — Enter the total amount of your organization's obligations which were secured by mortgages or similar liens on real property (land or buildings) at the start and end of the reporting period in Columns (C) and (D), respectively.

35. OTHER LIABILITIES — Enter in Columns (C) and (D), respectively, the total amount as shown on your organization's books at the start and end of the reporting period of all other liabilities not reported in Items 32 through 34.

36. TOTAL LIABILITIES — The software adds Items 32 through 35, Columns (C) and

(D), and enters the respective totals in Item 36.

37. NET ASSETS — The software subtracts Item 36 (Total Liabilities), Column (C) from Item 31 (Total Assets), Column (A) and enters the difference in Item 37, Column (C). The software also subtracts Item 36, Column (D) from Item 31, Column (B) and enters the difference in Item 37, Column (D).

STATEMENT B RECEIPTS AND DISBURSEMENTS

Under Statement B, receipts must be recorded when money is actually received by the labor organization and disbursements must be recorded when money is actually paid out by the labor organization.

The purpose of Statement B is to report the flow of cash in and out of your organization during the reporting period. Transfers between separate bank accounts or between special funds of your organization, such as vacation or strike funds, do not represent the flow of cash in and out of your organization. Therefore, these transfers should not be reported as receipts and disbursements of your organization. For example, do not report a transfer of cash from your organization's savings account to its checking account. Likewise, the use of funds reported in Item 25 (Cash) to purchase certificates of deposit and the redemption of certificates of deposit should not be reported in Statement B.

Since Statement B reports all cash flowing in and out of your organization, "netting" is not permitted. "Netting" is the offsetting of receipts against disbursements and reporting only the balance (net) as either a receipt or disbursement. For example, if an officer received $1,000 from your organization for convention expenses, used only $800 and returned the remaining $200, the $1,000 disbursement must be reported in Item 24 and the $200 receipt must be reported in Item 43. It would be incorrect to report only an $800 net disbursement to the officer.

Receipts and disbursements by an agent on behalf of your organization are considered receipts and disbursements of your organization and must be reported in the same detail as other receipts and disbursements. For example, if your organization owns a building managed by a rental agent, the agent's rental receipts and disbursements for expenses must be reported on your organization's Form LM-3. Also, if your organization's parent body or an intermediate body functions as an agent receiving and disbursing funds of your organization to third parties, these receipts and disbursements must be reported on your organization's Form LM-3.

CASH RECEIPTS

38. DUES — Enter the total dues received by your organization. Include dues received directly by your organization from members, dues received from employers through a checkoff arrangement, and dues transmitted to your organization by a parent body or other affiliate. Report the full dues received, including any portion that will later be transmitted to an intermediate or parent body as per capita tax. Also report in Item 38 payments in lieu of dues received from any nonmember employees as a condition of employment under a union security provision in a collective bargaining agreement.

If an intermediate or parent body receives dues checkoff directly from an employer on behalf of your organization, do not report in Item 38 the portion retained by that organization for per capita tax or other purposes, such as a special assessment. Any amounts retained by the intermediate body or parent body other than per capita tax must be explained in Item 56. For example, if the intermediate body or parent body retained $500 of your organization's dues checkoff as payment for supplies purchased from that body by your organization, this should be explained in Item 56 of your organization's Form LM-3 but the $500 should not be reported as a receipt or a disbursement on your organization's Form LM-3. However, if the intermediate body or parent body disbursed part of your organization's dues checkoff on your organization's behalf, this amount should be included in Item 38 and in

the appropriate disbursement item on your organization's Form LM-3. For example, if the intermediate body or parent body disbursed $500 of your organization's dues checkoff to an attorney who had provided legal services to your organization, this amount should be reported in Item 38 and as a disbursement in Item 49 (Professional Fees) of your organization's Form LM-3.

Do not report in Item 38 dues which your organization collected on behalf of other organizations for transmittal to them. For example, if your organization received dues from a member of an affiliate who worked in your organization's jurisdiction, the dues collected on the affiliate's behalf must be reported in Item 43.

39. PER CAPITA TAX — Enter the total per capita tax received by your organization if your organization is an intermediate or parent body; otherwise, enter "0" in Item 39. Include the per capita tax portion of dues received directly by your organization from members of affiliates, per capita tax received from subordinates, either directly or through intermediaries, and the per capita tax portion of dues received through a checkoff arrangement whereby local dues are remitted directly to an intermediate or parent body by employers. Do not include dues collected on behalf of subordinate organizations for transmittal to them. For example, if a parent body received dues checkoff directly from an employer and returned the local's portion of the dues, the parent body must report the dues received on behalf of the local in Item 43 (Other Receipts).

40. FEES, FINES, ASSESSMENTS, AND WORK PERMITS — Enter your organization's receipts from fees, fines, assessments, and work permits. Receipts by your organization on behalf of affiliates for transmittal to them must be reported in Item 43 (Other Receipts).

41. INTEREST AND DIVIDENDS — Enter the total amount of interest and dividends received by your organization from savings accounts, bonds, mortgages, loans, investments, and all other sources.

42. SALE OF INVESTMENTS AND FIXED ASSETS — Enter the net amount received by your organization for all investments (including U.S. Treasury securities) and fixed assets sold. Do not include amounts received from the sale or redemption of investments which were promptly reinvested (i.e., "rolled over") during the reporting period.

The amount to be excluded for each reinvestment is the lower of the following:

- the original cost of the investment sold;
- the amount reinvested when the amount received from the sale was less than the investment's original cost; or
- the amount reinvested when only a portion of the amount received from the sale was actually reinvested.

Interest and dividends received during the reporting period must be reported in Item 41.

Any portion of the amount due your organization (gross sales price less deductions for selling expenses) from sales of investments and fixed assets which has not been received by the end of the reporting period must be reported in Item 30 (Other Assets). However, if a mortgage or note is taken back, it must be reported in Item 26 (Loans Receivable).

43. OTHER RECEIPTS — Enter all receipts of your organization other than those reported in Items 38 through 42, including proceeds from the sale of supplies, loans obtained, repayments of loans made, rents, and funds collected for transmittal to third parties.

44. TOTAL RECEIPTS — The software adds Items 38 through 43 and enters the total in Item 44.

CASH DISBURSEMENTS

45. TO OFFICERS — The software enters the total reported on Line 11 of Item 24.

46. TO EMPLOYEES — Enter the total of all salaries, allowances, travel advances which are not considered loans as explained in the instructions for Item 18, and other direct and indirect disbursements (less deductions for FICA, withheld taxes, etc.) to employees of

your organization during the reporting period. Include disbursements to individuals other than officers who receive lost time payments even if your organization does not consider them to be employees or does not make any other direct or indirect disbursements to them.

NOTE: *The following worktable may be used to determine the amount to be reported in Item 46:*

A. Total Gross Salaries, Allowances, and Other
Disbursements to Employees (before withheld
taxes and other deductions)
$_____

B. Subtract: Total Withheld Taxes and Other Deductions
$_____

C. Net Disbursements to Employees
$_____

The amount on Line C should agree with the amount reported in Item 46.

47. PER CAPITA TAX — Enter your organization's total amount of per capita tax paid as a condition or requirement of affiliation with your parent national or international union, state and local central bodies, a conference, joint or system board, joint council, federation, or other labor organization.

48. OFFICE AND ADMINISTRATIVE EXPENSE — Enter your organization's total disbursements for its ordinary office and administrative expenses, for example, rent, utilities, office supplies, postage, subscriptions, fidelity bond premiums, etc.

As explained in the instructions for Item 24, Column (E), disbursements for hotel rooms or for transportation by public carrier of officers and employees on official business may be reported in Item 48 when payment is made directly to the provider or through a credit arrangement. Do not include in Item 48 salaries, allowances, or other direct and indirect disbursements to officers and employees which must be reported in Items 45 and 46.

Also report in Item 48 all taxes assessed against and paid by your organization, including your organization's FICA taxes as an employer. Do not include disbursements for the transmittal of taxes withheld from the salaries of officers and employees which must be reported in Item 54. Also, do not include indirect taxes, such as sales and excise taxes, for purchases reported in other disbursement items.

49. PROFESSIONAL FEES — Enter your organization's total disbursements for "outside" legal and other professional services (auditing, economic research, computer consulting, arbitration, etc.). Include any disbursements made for the expenses of individuals or firms providing professional services to your organization. Do not include direct and indirect disbursements to officers and employees which must be reported in Items 45 and 46.

50. BENEFITS — Enter the total of all direct and indirect benefit disbursements made by your organization. Direct benefit disbursements are those made to officers, employees, members, and their beneficiaries from your organization's funds. Indirect benefit disbursements are those made from your organization's funds to a separate and independent entity, such as a trust or insurance company, which in turn and under certain conditions will pay benefits to the covered individuals. An example of an indirect benefit disbursement is the premium on group life insurance.

51. CONTRIBUTIONS, GIFTS, AND GRANTS — Enter the total of all disbursements for contributions, gifts, and grants made by your organization.

52. PURCHASE OF INVESTMENTS AND FIXED ASSETS — Enter the total disbursements for all investments and fixed assets purchased by your organization. Do not include any unpaid balances still owed which should be reported in Item 33 (Loans Payable) or Item 34 (Mortgages Payable).

Also, do not include disbursements for reinvestment in U.S. Treasury securities and investments of amounts received from sales of U.S. Treasury securities and investments as explained in the instructions for Item 42 (Sale of Investments and Fixed Assets). The amount to be excluded from Item 52 for reinvestment must be the same as the amount which was excluded from Item 42 for reinvestment.

53. LOANS MADE — Enter the total disbursements for loans made by your organization. Include all direct and indirect loans made to individuals, business enterprises, and other organizations, regardless of amount.

NOTE: *Section 503(a) of the LMRDA prohibits labor organizations from making direct or indirect loans to any officer or employee of the labor organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000 at any time.*

54. OTHER DISBURSEMENTS — Enter all disbursements made by your organization not reported in Items 45 through 53, including fees, fines, assessments, supplies for resale, repayments of loans obtained, transmittals of funds collected for third parties, educational and publicity expenses, withholding taxes, and payments for the account of affiliates and other third parties.

55. TOTAL DISBURSEMENTS — The software adds Items 45 through 54 and enters the total in Item 55.

NOTE: *The following worktable may be used to determine that the figures for receipts, disbursements, and cash are correctly reported on your organization's Form LM-3:*

A. Cash at Start of Reporting Period — Item 25, Column (A)
$_____

B. Add: Total Receipts — Item 44
$_____

C. Total of Lines A and B
$_____

D. Subtract: Total Disbursements — Item 55
$_____

E. Cash at End of Period .
$_____

If Line E does not equal the amount reported in Item 25, Column (B), there is an error in your organization's report which should be corrected.

56. ADDITIONAL INFORMATION — Use Item 56 to provide additional information as indicated on Form LM-3 and in Section XII of these instructions. Enter the number of the item to which the information relates in the Item Number column if the software has not entered the number.

57-58. SIGNATURES — Electronically submitted forms must be signed digitally. To complete the electronic signature option you must have purchased an electronic digital signature. This digital signature enables you to electronically sign your report so that you can submit it to OLMS. For information on obtaining a digital signature please visit www.dol.gov/olms/regs/compliance/digital-signatures.htm. If the duties of the principal executive or principal financial officer are performed by an officer other than the president or treasurer, the report may be signed by the other officer. If the report is signed by an officer other than the president or treasurer, enter the correct title in Item 57 or 58 from the drop down box, and explain in Item 56 why the president or treasurer did not sign the report. Before signing the form, enter the date the report was signed and the telephone number at which the signatories conduct official business; you do not have to report a private, unlisted telephone number.

For a form that is printed and mailed to OLMS, have the officers sign it manually and mail it to the Office of Labor-Management Standards, 200 Constitution Ave., NW, Room N-1519, Washington, DC 20210-0001. Original signatures are required on the printed Form

LM-3 filed with OLMS; stamped or mechanical signatures are not acceptable. If the duties of the principal executive or principal financial officer are performed by an officer other than the president or treasurer, the report may be signed by the other officer. If the report is signed by an officer other than the president or treasurer, cross out the printed title, enter the correct title in Item 57 or 58, and explain in Item 56 why the president or treasurer did not sign the report. Enter the date the report was signed and the telephone number at which the signatories conduct official business; you do not have to report a private, unlisted telephone number.

XII. Labor Organizations That Have Ceased To Exist

If your organization has gone out of existence as a reporting labor organization, the last president and treasurer or the officials responsible for winding up the affairs of your organization must file a terminal financial report for the period from the beginning of the fiscal year to the date of termination. A terminal financial report must be filed if your organization has gone out of business by disbanding, merging into another organization, or being merged and consolidated with one or more labor organizations to form a new labor organization. A terminal financial report is not required if your organization changed its affiliation but continues to function as a separate reporting labor organization.

The terminal financial report may be filed on Form LM-3 if your organization filed its previous annual report on Form LM-3 and your organization's total annual receipts, as defined in Section II of these instructions, were less than $250,000 for the part of the last fiscal year during which your organization existed. (If total annual receipts were more than this limit, your organization must use Form LM-2 to file its terminal financial report.) Your organization's terminal financial report may be filed electronically or may be printed, manually signed, and submitted to the U.S. Department of Labor, Office of Labor-Management Standards, 200 Constitution Avenue, NW, Room N-1519, Washington, DC 20210-0001, within 30 days after the date of termination.

To complete a terminal report on Form LM-3, follow the instructions in Section XI and, in addition:

- Enter the date your organization ceased to exist in Item 2 after the word "Through."
- Select Item 3(b) indicating that your organization ceased to exist during the reporting period and that this is your organization's terminal Form LM-3.
- Enter "3(b)" in the Item Number column in Item 56 and provide a detailed statement of the reason your organization ceased to exist. Also report in Item 56 plans for the disposition of your organization's cash and other assets, if any (for example, transfer of cash and assets to the parent body). Provide the name and address of the person or organization that will retain the records of the terminated organization. If your organization merged with another labor organization, report that organization's name, address, and 6-digit file number.

Contact the nearest OLMS field office listed below if you have questions about filing a terminal report.

OLMS Field Offices

Staff is available to answer questions at OLMS offices in the following cities.

Atlanta, GA
Birmingham, AL
Boston, MA
Buffalo, NY
Chicago, IL
Cincinnati, OH
Cleveland, OH
Dallas, TX
Denver, CO
Detroit, MI
Grand Rapids, MI
Guaynabo, PR
Honolulu, HI
Houston, TX
Kansas City, MO
Los Angeles, CA
Miami, FL
Milwaukee, WI
Minneapolis, MN
Nashville, TN
New Haven, CT
New Orleans, LA
New York, NY

Newark, NJ
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
St. Louis, MO
San Francisco, CA
Seattle, WA
Tampa, FL
Washington, DC

Consult local telephone directory listings under United States Government, Labor Department, Office of Labor-Management Standards, for the address and phone number of your nearest field office. Contact information for OLMS field offices is also available at www.dol.gov/olms/contacts/lmskeyp.htm.

Public reporting burden for this collection of information is estimated to average 10 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. Reporting of this information is mandatory and is required by the Labor-Management Reporting and Disclosure Act of 1959, as amended, for the purpose of public disclosure. As this is public information, there are no assurances of confidentiality. If you have any comments regarding this estimate or any other aspect of this information collection, including suggestions for reducing this burden, please send them to the U.S. Department of Labor, Office of Labor-Management Standards, Division of Interpretations and Standards, Room N-5609, 200 Constitution Avenue, NW, Washington, DC 20210.

INSTRUCTIONS FOR FORM LM-4 LABOR ORGANIZATION ANNUAL REPORT

(11/2010)

GENERAL INSTRUCTIONS

I. WHO MUST FILE

Every labor organization subject to the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), the Civil Service Reform Act (CSRA), or the Foreign Service Act (FSA) must file a financial report, Form LM-2, LM-3, or LM-4, each year with the Office of Labor-Management Standards (OLMS) of the U.S. Department of Labor. These laws cover labor organizations that represent employees who work in private industry, employees of the U.S. Postal Service, and most Federal government employees. Labor organizations that represent or include only state, county, or municipal government employees are not covered by these laws and, therefore, are not required to file. If you have a question about whether your organization is required to file, contact the nearest OLMS field office listed at the end of these instructions.

II. WHAT FORM TO FILE

Labor organizations with total annual receipts of less than $10,000 may file the abbreviated 2-page annual report Form LM-4, if not in trusteeship as defined in Section VIII of these instructions. The term “total annual receipts” means all financial receipts of the labor organization during its fiscal year, regardless of the source, including receipts of any subsidiaries and any special funds.

Labor organizations with $10,000 or more in total annual receipts cannot use Form LM-4. These labor organizations must file either Form LM-3 or Form LM-2. For information on these forms, visit www.olms.dol.gov, e-mail olms-public@dol.gov, or contact any of the offices listed at the end of these instructions.

III. WHEN TO FILE

Form LM-4 must be filed within 90 days after the end of your organization’s fiscal year (12-month reporting period). The law does not authorize the U.S. Department of Labor to grant an extension of time for filing reports for any reason. The penalties for delinquency are described in Section VI of these instructions.

If your organization went out of existence during its fiscal year, a terminal financial report must be filed within 30 days after the date it ceased to exist. See Section X of these instructions for information on filing a terminal financial report.

IV. HOW TO FILE

An Adobe Reader version of Form LM-4 is available for download from the OLMS Web site. This form has some items pre-filled and the option for digital signatures for electronic filing. You can download the Adobe Reader version Form LM-4 at www.dol.gov/olms/regs/compliance/lm4_downloadpg.htm

On the download pages you will find a User Guide for the Adobe Reader Form LM-4 that will guide you through the process of preparing and completing the form, and provide instructions and navigation tips to help you download the form,

enter information directly into the form, and add digital signatures.

If you have difficulty navigating the software, or have questions about its functions and features, call the OLMS Help Desk at: (866) 401-1109. You may also send questions via e-mail to olms-public@dol.gov.

After you have completed Form LM-4 you have two options for submitting your report. You can print it and have the officers sign it manually and mail it to the Office of Labor-Management Standards, 200 Constitution Ave., NW, Room N-1519, Washington, DC 20210-0001 or you can electronically sign and submit the form.

V. Public Disclosure

The LMRDA requires that the U.S. Department of Labor make labor organization financial reports available for inspection by the public. Reports for the year 2000 and later may be viewed and downloaded from the OLMS Web site at www.unionreports.gov. Copies of reports and union constitutions and bylaws can be ordered at the same Web site. Reports may also be examined and copies purchased at the OLMS Public Disclosure Room at:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-1519
Washington, DC 20210-0001
Telephone: 202-693-0125

VI. Officer Responsibilities And Penalties

The president and treasurer or the corresponding principal officers of the labor organization required to sign Form LM-4 are personally responsible for its filing and accuracy. Under the LMRDA, officers are subject to criminal penalties for willful failure to file a required report and for false reporting. False reporting includes making any false statement or misrepresentation of a material fact while knowing it to be false, or knowingly failing to disclose a material fact in a required report or in the information required to be contained in it or in any information required to be submitted with it.

The reporting labor organization and the officers required to sign Form LM-4 are also subject to civil prosecution for violations of the filing requirements. Section 210 of the LMRDA (29 U.S.C. 440) provides that "whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate."

Under the CSRA and FSA and implementing regulations, false reporting and failure to report may result in administrative enforcement action and litigation. The officers responsible for signing Form LM-4 are also subject to criminal penalties for false reporting under Sections 1001 of Title 18 and 1746 of Title 28 of the United States Code.

VII. Recordkeeping

The officers required to file Form LM-4 are responsible for maintaining records which will provide in sufficient detail the information and data necessary to verify the accuracy and completeness of the report. The records must be kept for at least 5 years after the date the report is filed. Any record necessary to verify, explain, or clarify the report must be retained, including, but not limited to, vouchers, worksheets, receipts, and applicable resolutions, and any electronic documents, including recordkeeping software, used to complete, read, and file the report.

VIII. Labor Organizations In Trusteeship

Any labor organization which has placed a subordinate labor organization in trusteeship is responsible for filing the subordinate's annual financial report. A trusteeship is defined in section 3(h) of the LMRDA as "any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws."

Annual financial reports filed for any labor organization in trusteeship must be filed on Form LM-2 rather than Form LM-4. The report must be signed by the president and treasurer or corresponding principal officers of the labor organization which imposed the trusteeship and by the trustees of the subordinate labor organization. Form LM-2 can be downloaded from the OLMS Web site at www.olms.dol.gov. For additional information contact any of the offices listed at the end of these instructions.

IX. Completing Form LM-4

Opening the Form LM-4 from either the Web site or as a saved file should launch Adobe and open the form.

Items 1, 2, and 4-8 are "pre-filled" items. These fields were filled in by the software based on information you entered when you accessed and downloaded the form from our Web site. With the exception of Item 8, you cannot edit these fields.

You may click on the "Validate Form" button at any time to check for errors. This action will generate an "Errors Page" listing any errors that will need to be corrected before you will be able to sign the form. Clicking on the signature lines will also perform the validation function.

ITEMS 1 - 21

Answer Items 1 through 21 as instructed. Select the appropriate box for those questions requiring a "Yes" or "No" answer; do not leave both boxes blank. Enter a single "0" in the boxes for items requiring a number or dollar amount if there is nothing to report.

1. FILE NUMBER — The software will enter the labor organization's 6-digit file number here and at the top of each page of Form LM-4. This is the number you entered when you downloaded Form LM-4. If the number is incorrect, you must download another copy of the form using the correct number. If the labor organization does not have the number on file and cannot obtain the number from prior reports filed with the Department, the number can be obtained from the OLMS Web site at www.unionreports.gov or by contacting the nearest OLMS field office listed at the end of these instructions.

2. PERIOD COVERED — The software will enter the beginning and ending dates of the period covered by this report. These are the dates you entered when you downloaded Form LM-4. If the dates are incorrect, you must download another form using the correct dates.

If the labor organization changed its fiscal year, the ending date in Item 2 should be the labor organization's new fiscal year ending date and the labor organization should indicate in Item 19 (Additional Information) that the report is for a period of less than 12 months because its fiscal year has changed. For example, if the labor organization's fiscal year ending date changes from June 30 to December 31, a report must be filed for the partial year from July 1 to December 31. Thereafter, the labor organization's annual report should cover a full 12-month period from January 1 to December 31.

3. AMENDED OR TERMINAL REPORT — Do not complete this item unless the report is an amended or terminal report. Select Item 3(a) if the labor organization is filing an amended report correcting a previously filed report. Select Item 3(b) if the labor organization has gone out of business by disbanding, merging into another labor organization, or being merged and consolidated with one or more labor organizations to form a new labor organization, and this is the labor organization's terminal report. Be sure the date the labor organization ceased to exist is entered in Item 2 (Period Covered) after the word "Through." See Section X of these instructions for more information on filing a terminal report.

4. AFFILIATION OR ORGANIZATION NAME — The software will access this information from the OLMS database and enter the name of the national or international labor organization that granted the labor organization a charter. "Affiliates," within the meaning of these instructions, are labor organizations chartered by the same parent body, governed by the same constitution and bylaws, or having a relationship of parent and subordinate. For example, a parent body is an affiliate of all its subordinate bodies, and all subordinate bodies of the same parent body are affiliates of each other.

If the labor organization has not reported such an affiliation, the software will enter the name of the labor organization as currently identified in the labor organization's constitution and bylaws or other organizational documents.

This item cannot be edited. If the labor organization needs to change this information, contact OLMS at (202) 693-0124.

5. DESIGNATION — The software will enter the designation that specifically identifies the labor organization, such as Local, Lodge, Branch, Joint Board, Joint Council, District Council, etc. This field cannot be edited.

6. DESIGNATION NUMBER — The software will enter the number or other identifier, if any, by which the labor organization is known. This field cannot be edited.

7. UNIT NAME — The software will enter any additional or alternate name by which the labor organization is known, such as "Chicago Area Local." This field cannot be edited.

8. MAILING ADDRESS — The software will enter the current address where mail will most surely and quickly reach the labor organization. The first and last name of the person, if any, to whom such mail should be sent and any building and room number should be included. These fields are pre-filled from the OLMS database but can be edited by the filer.

9. CHANGES IN CONSTITUTION AND BYLAWS OR PRACTICES/PROCEDURES — If the labor organization answered "Yes" to Item 9 because the labor organization's constitution and bylaws were changed during the reporting period (other than rates of dues and fees), a dated copy of the new constitution and bylaws must either be submitted as an electronic attachment to the Form LM-4 the labor organization submits to OLMS, or the labor organization may submit a dated copy of the new constitution and bylaws to:

Office of Labor-Management Standards
200 Constitution Ave., NW, Room N-1519
Washington, DC 20210-0001

If the labor organization is governed by a uniform constitution and bylaws prescribed by the labor organization's parent national or international body, the labor organization's parent body may file the constitution and bylaws on the labor organization's behalf. If the parent body files a constitution and bylaws on the labor organization's behalf, answer Item 9 "Yes" and state that fact in Item 19 (Additional Information).

If Item 9 is answered "Yes" because the labor organization changed any of the practices/procedures listed below during the reporting period and the practices/ procedures are not described in the labor organization's constitution and bylaws, the labor organization must file an amended Form LM-1 (Labor Organization Information Report) with its Form LM-4 to update information on file with OLMS:

- qualifications for or restrictions on membership;
- levying assessments;
- participating in insurance or other benefit plans;
- authorizing disbursement of labor organization funds;
- auditing financial transactions of the labor organization;
- calling regular and special meetings;
- authorizing bargaining demands;
- ratifying contract terms;
- authorizing strikes;
- disciplining or removing officers or agents for breaches of their trust;
- imposing fines and suspending or expelling members including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures;
- selecting officers and stewards and any representatives to other bodies composed of labor organizations' representatives;
- invoking procedures by which a member may protest a defect in the election of officers (including not only procedures for initiating an election protest but also all procedures for subsequently appealing an adverse decision, e.g., procedures for appeals to superior or parent bodies, if any); and
- issuing work permits.

Form LM-1 can be downloaded from the OLMS Web site at www.olms.dol.gov. If you are unable to download the form, contact any of the offices listed at the end of these instructions to obtain a copy.

NOTE: *Federal employee labor organizations subject solely to the Civil Service Reform Act or Foreign Service Act are not required to submit an amended Form LM-1 to describe revised or changed practices/procedures.*

10. CHANGES IN RATES OF DUES AND FEES — Answer Item 10 "Yes" if the labor organization changed its rates of dues and fees during the reporting period. If Item 10 is answered "Yes," report the rates of dues and fees in Item 19 (Additional Information). If more than one rate applies, report the minimum and maximum rates. Also report the calendar basis for payment (per month, per year, etc.).

Dues and fees include initiation fees charged to new members, fees (other than dues) from transferred members, fees for work permits, and regular dues or fees. Include only the dues and fees of regular members and not the dues and fees of members with special rates, such as apprentices, retirees, or unemployed members.

Answer "No" if the labor organization did not change its rates of dues and fees during the reporting period.

11. LOSSES OR SHORTAGES — Answer Item 11 "Yes" if any loss or shortage of funds or other property of the labor organization was discovered during the reporting period whether or not there has been repayment or an agreement to make restitution. If Item 11 is answered "Yes," describe the loss or shortage in detail in Item 19 (Additional Information) including such information as the amount of the loss or shortage of funds or a description of the property that was lost, how it was lost, and to what extent, if any, there has been an agreement to make restitution or any recovery by means of repayment, fidelity bond, insurance, or other means. Answer "No" if no losses or shortages were discovered.

12. FIDELITY BOND — Answer Item 12 "Yes" if the labor organization was insured by a fidelity bond against losses through fraud or dishonesty during the reporting period. If Item 12 is answered "Yes," enter the maximum amount recoverable for a loss caused by any officer, employee, or agent of the labor organization who handled the labor organization's funds. Answer "No" if the labor organization was not insured by a fidelity bond during the reporting period.

NOTE: *Section 502(a) of the LMRDA requires every officer, employee, or agent of a labor organization (which has property and annual financial receipts over $5,000 in value) who handles funds or other property of the organization to be bonded. The amount of the bond must be at least 10% of the value of the funds handled by the individual during the last reporting period. The bond must be obtained from a surety company approved by the Secretary of the Treasury. If you have any questions or need more information about bonding requirements, contact the nearest OLMS field office listed at the end of these instructions.*

13. NUMBER OF MEMBERS — Enter the number of members in the labor organization at the end of the reporting period. Include all categories of members who pay dues. Do not include nonmember employees who make payments in lieu of dues as a condition of employment under a union security provision in a collective bargaining agreement.

14. ASSETS — Enter the total value of all the labor organization's assets at the end of the reporting period including, for example, cash on hand and in banks, property, loans owed to the labor organization, investments, office furniture, automobiles, and anything else owned by the labor organization. Enter "0" if the labor organization had no assets at the end of the reporting period.

15. LIABILITIES — Enter the total amount of all the labor organization's liabilities at the end of the reporting period including, for example, unpaid bills, loans owed, total amount of mortgages owed, and other debts of your organization. Enter "0" if the labor organization had no liabilities at the end of the reporting period.

16. RECEIPTS — Enter the total amount of all receipts of the labor organization during the reporting period including, for example, dues, fees, fines, assessments, interest, dividends, rent, money from the sale of assets, and loans received by the labor organization. Also include payments in lieu of dues received from any nonmember employees as a condition of employment under a union security provision in a collective bargaining agreement. Enter "0" if the labor organization had no receipts during the reporting period.

NOTE: *If the labor organization's annual receipts were $10,000 or more, the labor organization is not eligible to file Form LM-4 and must report on Form LM-2 or Form LM-3 as explained in Section II of these instructions.*

17. DISBURSEMENTS — Enter the total amount of all disbursements made by the labor organization during the reporting period including, for example, net payments to officers and employees, per capita tax and any other fees or assessments which the labor organization paid to

any other organization, payments for administrative expenses, loans made by the labor organization, and taxes paid. Enter "0" if the labor organization made no disbursements during the reporting period.

18. PAYMENTS TO OFFICERS AND EMPLOYEES — Enter the total amount of all payments to officers and employees made by the labor organization during the reporting period. The amount should include, for example, gross salaries (before tax withholdings and other payroll deductions); lost time pay; monthly, weekly, or daily allowances; and disbursements for conducting official business of the labor organization as well as disbursements which were essentially for the personal benefit of the officer or employee. Enter "0" if the labor organization made no payments to officers or employees during the reporting period.

NOTE: *Section 503(a) of the LMRDA prohibits labor organizations from making direct or indirect loans to any officer or employee of the labor organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000 at any time.*

19. ADDITIONAL INFORMATION — Use Item 19 to provide additional information as indicated in Items 9, 10, 11, 20, and 21 and in Section X of these instructions. Enter the number of the item to which the information relates in the Item Number column if the software has not entered the number.

20 - 21. SIGNATURES — The completed Form LM-4 which is filed with OLMS must be signed by both the president and treasurer or corresponding principal officers of the labor organization. You have the option to electronically sign and submit the form. In order to complete the electronic signature option you must have purchased an electronic digital signature. This digital signature enables you to electronically sign your report so that you can submit it to OLMS. For information on obtaining a digital signature please visit www.dol.gov/olms/regs/compliance/digital-signatures.htm. If the duties of the principal executive or principal financial officer are performed by an officer other than the president or treasurer, the report may be signed by the other officer. If the report is signed by an officer other than the president or treasurer, enter the correct title in Item 20 or 21 from the drop down box, and explain in Item 19 why the president or treasurer did not sign the report. Before signing the form, enter the date the report was signed and the telephone number at which the signatories conduct official business; you do not have to report a private, unlisted telephone number.

For a form that is printed and mailed to OLMS have the officers sign it manually and mail it to the Office of Labor-Management Standards, 200 Constitution Ave., NW, Room N-1519, Washington, DC 20210-0001. Original signatures are required on the printed Form LM-4 filed with OLMS; stamped or mechanical signatures are not acceptable. If the duties of the principal executive or principal financial officer are performed by an officer other than the president or treasurer, the report may be signed by the other officer. If the report is signed by an officer other than the president or treasurer, cross out the printed title, enter the correct title in Item 20 or 21, and explain in Item 19 why the president or treasurer did not sign the report. Enter the date the report was signed and the telephone number at which the signatories conduct official business; you do not have to report a private, unlisted telephone number.

X. Labor Organizations Which Have Ceased To Exist

If the labor organization has gone out of existence as a reporting labor organization, the last president and treasurer or the officials responsible for winding up the affairs of the labor organization must file a terminal financial report for the period from the beginning of the fiscal year to the date of termination. A terminal financial report must be filed if the labor organization has gone out of business by disbanding, merging into another organization, or being merged and consolidated with one or more labor organizations to form a new labor organization. A terminal financial report is not required if the labor organization changed its affiliation but continues to function as a separate reporting labor organization.

The terminal financial report may be filed on Form LM-4 if the labor organization filed its previous annual report on Form LM-4 and the labor organization's total annual receipts, as defined in Section II of these instructions, were less than $10,000 for the part of the last fiscal year during which the labor organization existed. (If total

annual receipts were $10,000 or more, the labor organization must use Form LM-2 or LM-3 to file its terminal financial report as explained in Section II of these instructions.) The labor organization's terminal financial report may be filed electronically or may be printed, manually signed, and submitted to the U.S. Department of Labor, Office of Labor-Management Standards, 200 Constitution Avenue, NW, Room N-1519, Washington, DC 20210-0001, within 30 days after the date of termination.

To complete a terminal report on Form LM-4, follow the instructions in Section IX and, in addition:

- Enter the date your organization ceased to exist in Item 2 after the word "Through."
- Select Item 3(b) indicating that your organization ceased to exist during the reporting period and that this is your organization's terminal Form LM-4.
- Enter "3(b)" in the Item Number column in Item 19 (Additional Information) and provide a detailed statement of the reason the labor organization ceased to exist. Also report in Item 19 plans for the disposition of the labor organization's cash and other assets, if any (for example, transfer of cash and assets to the parent body). Provide the name and address of the person or organization that will retain the records of the terminated organization. If your organization merged with another labor organization, give that organization's name, address and 6-digit file number.

Contact the nearest OLMS field office listed below if you have questions about filing a terminal report.

OLMS Field Offices

Staff is available to answer questions at OLMS offices in the following cities.

Atlanta, GA
Birmingham, AL
Boston, MA
Buffalo, NY
Chicago, IL
Cincinnati, OH
Cleveland, OH
Dallas, TX
Denver, CO
Detroit, MI
Grand Rapids, MI
Guaynabo, PR
Honolulu, HI
Houston, TX
Kansas City, MO
Los Angeles, CA
Miami, FL
Milwaukee, WI
Minneapolis, MN
Nashville, TN
New Haven, CT
New Orleans, LA
New York, NY
Newark, NJ
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
St. Louis, MO
San Francisco, CA
Seattle, WA
Tampa, FL
Washington, DC

Consult local telephone directory listings under United States Government, Labor Department, Office of Labor-Management Standards, for the address and phone number of your nearest field office. Contact information for OLMS field offices is also available at www.dol.gov/olms/contacts/lmskeyp.htm.

Signed in Washington, DC, this 9th day of November 2010.

John Lund,

Director, Office of Labor-Management Standards.

[FR Doc. 2010–29226 Filed 11–30–10; 8:45 am]

BILLING CODE C

Federal Register

Wednesday,
December 1, 2010

Part V

Environmental Protection Agency

40 CFR Parts 72, 78, and 98

Mandatory Reporting of Greenhouse Gases: Injection and Geologic Sequestration of Carbon Dioxide; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 72, 78, and 98

[EPA–HQ–OAR–2009–0926; FRL–9232–6]

RIN 2060–AP88

Mandatory Reporting of Greenhouse Gases: Injection and Geologic Sequestration of Carbon Dioxide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating a regulation to require greenhouse gas monitoring and reporting from facilities that conduct geologic sequestration of carbon dioxide and all other facilities that conduct injection of carbon dioxide. This rule does not require control of greenhouse gases, rather it requires only monitoring and reporting of greenhouse gases.

DATES: The final rule is effective on December 31, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2009–0926. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For technical information and implementation materials, please go to the website *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.* To submit a question, select Rule Help Center, and then select Contact Us. You may also contact Mark de Figueiredo, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9928; fax number: (202) 343–2202.

SUPPLEMENTARY INFORMATION: *Regulated Entities.* The Administrator has determined that this action is subject to the provisions of Clean Air Act (CAA) section 307(d). *See* CAA section 307(d)(1)(V) (the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine"). These regulations will affect owners or operators of carbon dioxide (CO_2) injection wells. Regulated categories and entities include those listed in Table 1 of this preamble:

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	NAICS	Examples of affected facilities
CO_2 Enhanced Oil and Gas Recovery Projects.	211	Oil and gas extraction projects using CO_2 enhanced oil and gas recovery.
Acid Gas Injection Projects	211111 or 211112	Projects that inject acid gas containing CO_2 underground.
Geologic Sequestration Projects	N/A	CO_2 geologic sequestration projects.

Table 1 of this preamble is not intended to be exhaustive but rather provides a guide for readers regarding facilities likely to be affected by this action. Table 1 of this preamble lists the types of facilities that EPA is now aware could be potentially affected by the reporting requirements. Other types of facilities not listed in the table could also be subject to reporting requirements. To determine whether you are affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 98, subpart A and the relevant criteria in the sections related to the injection and geologic sequestration (GS) of CO_2 (*i.e.,* subparts RR and UU). If you have questions regarding the applicability of this action to a particular facility, consult the website person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Some facilities that are affected by this final rule are required to report under multiple source categories. Table 2 of this preamble has been developed as a guide to help potential CO_2 injection and GS reporters subject to the final rule identify the source categories (by subpart) that they may need to (1) consider in their facility applicability determination, and/or (2) include in their reporting. The table should only be seen as a guide. Additional subparts in 40 CFR part 98 may be relevant for a given reporter. Similarly, not all listed subparts are relevant for all reporters.

TABLE 2—SOURCE CATEGORIES AND RELEVANT SUBPARTS

Source category (and main applicable subpart)	Other subparts recommended for review to determine applicability
Geologic Sequestration of Carbon Dioxide (40 CFR part 98, subpart RR)	40 CFR part 98, subpart C. 40 CFR part 98, subpart W. 40 CFR part 98, subpart PP.
Injection of Carbon Dioxide (40 CFR part 98, subpart UU)	40 CFR part 98, subpart C. 40 CFR part 98, subpart W. 40 CFR part 98, subpart PP.

What is the effective date? The final rule is effective on December 31, 2010. Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register.** EPA is issuing this final rule under section 307(d)(1) of the Clean Air Act,

which states: "The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies." Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the purposes underlying APA section 553(d) in making this rule effective on December 31, 2010. Section 5 U.S.C. 553(d)(3) allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." As explained below, EPA finds that there is good cause for this rule to become effective on or before December 31, 2010, even if this results in an effective date fewer than 30 days from date of publication in the **Federal Register**.

While this action is being signed prior to December 1, 2010, there is likely to be a significant delay in the publication of this rule as it contains equations and charts, and is relatively long in length. As an example, EPA signed a shorter technical amendments package related to the same underlying reporting rule on October 7, 2010, and it was not published until October 28, 2010, 75 FR 66434, three weeks later.

The purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Where, as here, the final rule will be signed and made available on the EPA Web site more than 30 days before the effective date, but where the publication is likely to be delayed due to the complexity and length of the rule, that purpose is still met. Moreover, EPA determined that facilities that are subject to this rule already collect data on CO_2 that is received. Facilities may use best available monitoring methods for calculating the mass of CO_2 received through the first quarter of 2011. Facilities subject to subpart RR that were issued a final Underground Injection Control (UIC) permit authorizing the injection of CO_2 into the subsurface on or before December 31, 2010 are required to submit a proposed monitoring, reporting, and verification (MRV) plan to EPA by June 30, 2011 and are allowed to request one extension of up to an additional 180 days in which to submit their proposed MRV plan. This will provide facilities a substantial additional period to adjust their behavior to the requirements of the final rule. Accordingly, we find good cause exists to make this rule effective on or before December 31, 2010, consistent with the purposes of 5 U.S.C. 553(d)(3).[1]

Judicial Review.

Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by January 31, 2011. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. This section also provides a mechanism for EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of this rule." Any person seeking to make such a demonstration to EPA should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20004, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

3–D three-dimensional
AGA American Gas Association
AMA active monitoring area
ANSI American National Standards Institute
API American Petroleum Institute
ASME American Society of Mechanical Engineers
CAA Clean Air Act
CBI confidential business information
CCS carbon dioxide capture and geologic sequestration
CFR Code of Federal Regulations
CO_2 carbon dioxide
DOE Department of Energy
EAB Environmental Appeals Board
EIA Economic Impact Analysis
EPA Environmental Protection Agency
EO Executive Order
ER enhanced oil and gas recovery
GHG greenhouse gas
GS geologic sequestration
ICR Information Collection Request
IRS Internal Revenue Service
MMA maximum monitoring area
MRV monitoring, reporting, and verification
NAESB North American Energy Standards Board
NAICS North American Industry Classification System
NTTAA National Technology Transfer and Advancement Act
OAR Office of Air and Radiation
OMB Office of Management and Budget
OW Office of Water
QA/QC quality assurance/quality control
R&D research and development
RFA Regulatory Flexibility Act
SBREFA Small Business Regulatory Enforcement Fairness Act
SDWA Safe Drinking Water Act
TSD technical support document
UIC Underground Injection Control
US United States
UMRA Unfunded Mandates Reform Act of 1995
USDW underground source of drinking water
VEF Vulnerability Evaluation Framework

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[1] We recognize that this rule could be published at least 30 days before December 31, 2010, which would negate the need for this good cause finding, and we plan to request expedited publication of this rule in order to decrease the likelihood of a printing delay. However, as we cannot know the date of publication in advance of signing this rule, we are proceeding with this good cause finding for an effective date on or before December 31, 2010.

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I. Background

A. Organization of This Preamble

This preamble is divided into four sections, as detailed in the *Table of Contents.* This section describes the layout of the preamble and provides a brief summary of each section.

The first section of this preamble contains the basic background information about the origin of this rule, including a discussion of how it relates to the finalized requirements for suppliers of CO_2 under 40 CFR part 98, subpart PP. It also contains information on EPA's legal authority and how this rule relates to the UIC program, the Interagency Task Force on Carbon Capture and Storage and other Federal GS initiatives, as well as other GS information collection and reporting efforts.

The second section of this preamble provides an overview of the GHG Reporting Program and summarizes changes to the general provisions of the GHG Reporting Program. It also provides a summary of this final rule on key design elements such as: Source category definition, reporting threshold, GHGs to report, GHG calculations and monitoring, data reporting, and recordkeeping requirements. In addition, it describes the major changes made since the proposal and provides a brief summary of public comments and EPA's responses thereto.

The third section of this preamble provides the summary of the cost impacts, economic impacts, and benefits of this rule and discusses comments on the regulatory impacts analysis.

Finally, the last section of this preamble discusses the various statutory and executive order requirements applicable to this final rulemaking.

B. Background on the Final Rule

This action finalizes monitoring and reporting requirements for injection and geologic sequestration of carbon dioxide.

On April 12, 2010, EPA proposed this rule amending 40 CFR part 98. 40 CFR part 98 provides the regulatory framework for the GHG Reporting Program. The GHG Reporting Program requires reporting of GHG emissions and other relevant information from certain source categories in the United States. The GHG Reporting Program, which became effective on December 29, 2009, includes reporting requirements for facilities and suppliers in 34 subparts. For more detailed background information on the GHG Reporting Program, see the preamble to the final part 98 rule establishing that program (74 FR 56260, October 30, 2009) and the preamble to the Part 98 rule expanding that program from 30 to 34 subparts (75 FR 39736, July 12, 2010).

Subpart PP of the GHG Reporting Program requires the reporting of CO_2 supplied to the economy. During the public comment period on the part 98 rule establishing that requirement, EPA received comments that CO_2 geologically sequestered should be considered in the GHG Reporting Program. (For further information on relevant comments received in 40 CFR part 98, subpart PP, see "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subpart PP: Suppliers of Carbon Dioxide" in Docket EPA–HQ–OAR–2008–0508.) In the final rule promulgating 40 CFR part 98, subpart PP, EPA committed to taking action to collect such data in the near future.

This final rule amends 40 CFR part 98 to add reporting requirements covering facilities that conduct geologic sequestration of CO_2 (40 CFR part 98, subpart RR) and all other facilities that conduct injection of CO_2 (40 CFR part 98, subpart UU).[2] GS is the long-term containment of a CO_2 stream in subsurface geologic formations. This data will, among other things, inform Agency decisions under the CAA related to the use of carbon dioxide capture and geologic sequestration (CCS) for mitigating GHG emissions.

Subpart RR information will enable EPA to monitor the growth and efficacy of GS (and therefore CCS) as a GHG mitigation technology over time and to evaluate relevant policy options. Furthermore, where enhanced oil and gas recovery (ER) projects are reporting under 40 CFR part 98, subpart RR, EPA will be able to evaluate ER as a non-emissive end use. Under 40 CFR part 98, subpart UU, EPA will be able to reconcile information obtained from this rule with data obtained from 40 CFR part 98, subpart PP on CO_2 supplied to the economy.

This rule was proposed by EPA on April 12, 2010. One public hearing was held on April 19, 2010, and the 60-day public comment period ended June 11, 2010. This final rule takes into consideration comments received during the comment period and finalizes the monitoring and reporting requirements for facilities conducting GS and all other facilities conducting CO_2 injection.

This final rule does not address whether data reported under 40 CFR part 98, subparts RR or UU will be released to the public or will be treated as CBI. EPA published a proposed rule on confidentiality determination on July 7, 2010 (75 FR 39094) that addressed this issue. In that action, EPA proposed which specific data elements may be released to the public and which would be treated as CBI. EPA received several comments on that proposal, and is in the process of considering these comments.

C. Legal Authority

EPA is promulgating this rule under its existing CAA authority; specifically, authorities provided in CAA section 114. As discussed in detail in Sections I.C and II.Q of the preamble to the final part 98 rule establishing the GHG Reporting Program (74 FR 56260, October 30, 2009), CAA section 114 provides EPA with the authority to require the information mandated by this rule because such data will inform and are relevant to EPA's implementation of a wide variety of CAA provisions. Under CAA section 114(a)(1), the Administrator may require emissions sources, persons subject to the CAA, manufacturers of emission control or process equipment, or persons whom the Administrator believes may have necessary information to monitor and report emissions and provide such other information as the Administrator requests for the purposes of carrying out any provision of the CAA (except for a

[2] EPA has moved all definitions, requirements, and procedures for facilities conducting CO_2 injection only (which both EPA and commenters have referred to as "Tier 1" facilities for simplicity) into a new subpart, 40 CFR part 98, subpart UU, and retained all definitions, requirements, and procedures related to facilities conducting GS (which both EPA and commenters have referred to as "Tier 2" facilities for simplicity) in 40 CFR part 98, subpart RR.

provision of title II with respect to motor vehicles). EPA may gather information for a variety of purposes, including for the purpose of assisting in the development of implementation plans or of emissions standards under CAA section 111, determining compliance with implementation plans or such standards, or more broadly for "carrying out any provision" of the CAA.

D. Relationship to Underground Injection Control Regulations Under the Safe Drinking Water Act

The Agency maintains a high-level of coordination across EPA offices and regions on GS activities and regulatory development. EPA's Office of Air and Radiation (OAR) and Office of Water (OW) work closely to promote safe and effective implementation of GS technologies while ensuring protection of human health and the environment. OAR and OW have closely coordinated this rulemaking under CAA authority and the rulemaking under Safe Drinking Water Act (SDWA) authority establishing Federal requirements under the UIC program for Class VI wells (hereafter referred to as the UIC Class VI rule).

EPA's UIC program was established in the 1970s to prevent endangerment of underground sources of drinking water (USDWs) from injection of various fluids, including CO_2 for ER, oil field fluids, water stored for drinking water supplies, and municipal and industrial waste. The UIC program, which is authorized by Part C of SDWA (42 U.S.C. 300h *et seq.*), is designed to prevent the movement of such fluid into USDWs by addressing the potential pathways through which injected fluids can migrate and potentially endanger USDWs. In 2008, EPA proposed to amend the UIC program to establish a new class of injection well—Class VI—to cover the underground injection of CO_2 for the purpose of GS, or long-term storage of CO_2 (73 FR 43492, July 25, 2008). For a summary of the UIC program and more details on the final UIC Class VI rule, please see the UIC Geologic Sequestration of Carbon Dioxide Web site.[3]

EPA designed the reporting requirements under 40 CFR part 98, subpart RR with careful consideration of UIC requirements, including Class VI, to minimize overlap between the two programs. There are two areas of potential overlap (see Table 3 of this preamble). The first overlap is the requirement that owners or operators report the quantity of CO_2 injected. The UIC Class VI rule requires owners or operators to continuously monitor the amount of CO_2 injected and submit semi-annual reports on the monthly amount injected. The UIC program requires information on the amount injected to ensure appropriate CO_2 injection operations. Subpart RR requires facilities to collect data on the amount injected over a quarter and submit annual reports on the annual amount of CO_2 injected. Data on the amount of CO_2 injected is a component of the 40 CFR part 98, subpart RR mass balance approach[4] used to quantify the amount of CO_2 sequestered. EPA determined that quarterly data collection and annual reporting under 40 CFR part 98, subpart RR was necessary in order to harmonize data with other subparts of the GHG Reporting Program. Facilities reporting under 40 CFR part 98, subpart RR may use flow meters used to comply with the flow monitoring and reporting provisions in their UIC permit.

The second overlap is a monitoring plan for detecting air emissions. While requirements under the UIC program are focused on demonstrating that USDWs are not endangered as a result of CO_2 injection into the subsurface, requirements under the GHG Reporting Program through 40 CFR part 98, subpart RR will enable EPA to verify the quantity of CO_2 that is geologically sequestered and to assess the efficacy of GS as a mitigation strategy. Subpart RR achieves this by requiring facilities conducting GS to develop and implement a MRV plan[5] to detect and quantify leakage of injected CO_2 to the surface in the event leakage occurs and to report the amount of CO_2 geologically sequestered using a mass balance approach, regardless of the class of UIC permit that a facility holds.

The monitoring required by 40 CFR part 98, subpart RR for quantification purposes is complementary to and builds on UIC permit requirements. In particular, the UIC Class VI permit requires a comprehensive site characterization that includes an assessment of the geologic, hydrogeologic, geochemical, and geomechanical properties of the proposed GS site to ensure that GS wells are located in suitable formations. The UIC Class VI permit also requires computational modeling of the Area of Review, and a periodic re-evaluation of this Area of Review based on robust modeling and monitoring of the CO_2 stream, injection pressures, integrity of the injection well, groundwater quality and geochemistry, and the position of the CO_2 plume and pressure front throughout injection. These requirements can provide the basis for the MRV plan submitted to EPA for 40 CFR part 98, subpart RR. Therefore, EPA will accept a UIC Class VI permit to satisfy certain MRV plan requirements; however, the reporter must include additional information to outline how monitoring will achieve detection and quantification of CO_2 in the event surface leakage occurs.

The UIC Class VI rule also allows for surface air and soil gas monitoring at the discretion of the UIC Director as a means of identifying CO_2 leaks that may pose a risk to USDWs and informing emergency notification of a Class VI owner or operator and UIC Director in the event of a USDW endangerment. If the UIC Director determines that it is appropriate to require surface air or soil gas monitoring for USDW protection, the UIC Director must approve the use of monitoring employed under 40 CFR part 98, subpart RR so long as the owner or operator is able to demonstrate USDW protection pursuant to requirements at 40 CFR 146.90(h)(3).

TABLE 3—COMPARISON OF REPORTING REQUIREMENTS UNDER SUBPART RR WITH UIC CLASS VI REGULATIONS

Reporting requirement	Subpart RR	UIC Class VI
Quantity of CO_2 received	Yes	N/A.
Quantity of CO_2 injected	Yes	Yes.
Equipment leaks and vented emissions from surface equipment between flow meters and the wellhead	Yes	N/A.

[3] *http://water.epa.gov/type/groundwater/uic/wells_sequestration.cfm.*

[4] The subpart RR mass balance equation for quantifying the amount of CO_2 that is geologically sequestered includes variables on injected CO_2; equipment leaks and vented CO_2 emissions from surface equipment between the flow meters and the wellhead; CO_2 produced and/or remaining with produced oil, gas or other fluids; and CO_2 leakage to the surface. For more information, see Section II.B of this preamble.

[5] The subpart RR MRV plan includes delineation of monitoring areas, identification and assessment of potential surface leakage pathways, a strategy for detecting and quantifying surface leakage of CO_2 if leakage occurs, an approach for establishing the expected baselines, and a summary of considerations for calculating site-specific variables for the mass balance equation, such as calculating CO_2 in produced fluids. For more information, see Section II.B of this preamble.

TABLE 3—COMPARISON OF REPORTING REQUIREMENTS UNDER SUBPART RR WITH UIC CLASS VI REGULATIONS—Continued

Reporting requirement	Subpart RR	UIC Class VI
Quantity of CO_2 produced with oil or natural gas (ER) or other fluids	Yes	N/A.
Percentage of CO_2 estimated to remain with oil (ER) or other fluids	Yes	N/A.
Quantity of CO_2 emitted from the subsurface	Yes	N/A.
Quantity of CO_2 sequestered in the subsurface	Yes	N/A.
Cumulative mass of CO_2 sequestered in the subsurface	Yes	N/A.
Monitoring plan for detecting air emissions	Yes	Yes.[1]
Monitoring plan for quantifying air emissions	Yes	N/A.

[1] UIC Class VI rule allows for surface air/soil gas monitoring for USDW protection at the discretion of the UIC Director.

EPA has determined that the requirements of these two rules complement one another by concurrently ensuring USDW protection, as required under SDWA, and requiring reporting of CO_2 surface emissions under 40 CFR part 98, subpart RR. EPA is committed to working closely within the agency to coordinate implementation of the UIC and GHG Reporting programs, reduce burden on reporters, provide timely access to verified emissions data, establish mechanisms to efficiently share data, and harmonize data systems to the extent possible.

E. Relationship to the Interagency Task Force on Carbon Capture and Storage and Other Federal Geologic Sequestration Initiatives

On February 3, 2010, President Obama established an Interagency Task Force on Carbon Capture and Storage (CCS Task Force). The CCS Task Force, co-chaired by EPA and the Department of Energy (DOE), developed a plan to overcome the barriers to the widespread, cost-effective deployment of CCS within ten years, with a goal of bringing five to ten commercial demonstration projects online by 2016. The CCS Task Force's plan was delivered to President Obama in August 2010.

The CCS Task Force explored incentives for commercial CCS adoption and addressed financial, economic, technological, legal, institutional, social, or other barriers to deployment. For example, the CCS Task Force examined Federal regulatory activities that address the safety, efficacy, and environmental soundness of GS. The CCS Task Force also considered how best to coordinate existing administrative authorities and programs, including those involving international collaboration, as well as identified areas where additional administrative authority may be necessary. The CCS Task Force recommended that EPA finalize this rule. For more information, please see EPA's CCS Task Force Web site.[6]

F. Relationship to Other Geologic Sequestration Information Collection and Reporting Efforts

EPA reviewed and took into account several existing domestic and international reporting and monitoring programs in designing this rule. For additional information, please see Section I.F of the notice of proposed rulemaking (75 FR 18581, April 12, 2010).

Also as discussed in the notice of proposed rulemaking, EPA notes that the Internal Revenue Service (IRS) published IRS Notice 2009–83[7] to provide guidance regarding eligibility for the Internal Revenue Code section 45Q credit for CO_2 sequestration, computation of the section 45Q tax credit, reporting requirements for taxpayers claiming the section 45Q tax credit, and rules regarding adequate security measures for secure GS. As clarified in the IRS guidance, taxpayers claiming the section 45Q tax credit must follow the appropriate UIC requirements. The guidance also clarifies that taxpayers claiming section 45Q tax credit must follow the MRV procedures that are being finalized under 40 CFR part 98, subpart RR in this final rule.

II. Summary of Final Rule

A. Summary of Changes to the General Provisions of the Greenhouse Gas Reporting Program

This action amends certain requirements in 40 CFR part 98, subpart A (General Provisions).

Changes to Applicability. In this action, EPA is amending Table A–3 in 40 CFR 98.2(a)(1) to include the geologic sequestration of CO_2 and injection of CO_2 source categories.

B. Summary of the Reporting Requirements for Geologic Sequestration of Carbon Dioxide (Subpart RR)

Reporting requirements for facilities conducting GS are found in 40 CFR part 98, subpart RR. These facilities are required to report the amount of CO_2 received, develop and implement an EPA-approved MRV plan, and report the amount of CO_2 sequestered using a mass balance approach, by subtracting total CO_2 emissions from CO_2 injected in the reporting year. Other facilities injecting CO_2 underground report under 40 CFR part 98, subpart UU.

1. Subpart RR Source Category Definition

The 40 CFR part 98, subpart RR source category consists of any well or group of wells that inject a CO_2 stream for long-term containment into a subsurface geologic formation.[8] All wells permitted as Class VI by the UIC program meet the definition of this source category. Facilities conducting ER are not subject to 40 CFR part 98, subpart RR unless they choose to opt-in to the requirements of this subpart or hold a UIC Class VI permit.

Research and development (R&D) projects are exempt from reporting requirements under 40 CFR part 98, subpart RR provided they meet the eligibility requirements. A project is eligible for the exemption if it investigates or will investigate practices, monitoring techniques, or injection verification, or if it is engaged in other applied research that focuses on enabling safe and effective long-term containment of a CO_2 stream in subsurface geologic formations, including research and injection tests conducted as a precursor to a larger more permanent long-term storage operation. Small and large-scale projects meeting the criteria for an exemption, such as the current Regional Carbon

[6] *http://www.epa.gov/climatechange/policy/ccs_task_force.html.*

[7] Available at: *http://www.irs.gov/irb/2009–44_IRB/ar11.html#d0e1860.*

[8] Note that R&D projects that are exempted from subpart RR report under Subpart UU—see discussion below.

Sequestration Partnership projects supported by the Office of Fossil Energy at the DOE, would be considered R&D for the purposes of this exemption from reporting for the duration of the R&D activity. Other DOE supported GS R&D projects may also satisfy the eligibility requirements for the exemption. In addition, short duration CO_2 injection projects conducted to identify local amenability to long term storage will be exempted from 40 CFR part 98, subpart RR for the duration of such injection testing. This includes cases where an operator is using a short duration CO_2 injection test to assess local geologic conditions and validate the injectivity potential of a particular site prior to developing that site for commercial scale geologic storage of carbon dioxide. Demonstration projects can apply for the exemption, but will be measured against the same criteria established in 40 CFR 98.440(d). Projects that are not R&D projects, such as commercial GS operations, are not eligible for the exemption.

To receive an R&D exemption, the project representative must submit to the Administrator information on the planned duration of CO_2 injection for research, the planned annual CO_2 injection volumes during this time period, the purposes of the project, the source and type of funding for the project, and the class and duration of UIC permit, or, for an offshore facility not subject to SDWA, a description of the legal instrument authorizing GS.

The Administrator will determine if a project meets the definition of research and development project within 60 days of receipt of the submission of a request for exemption. In making this determination, the Administrator will take into account any information that the reporter submits demonstrating that the planned duration of CO_2 injection for the project and the planned annual CO_2 injection volumes during the duration of the project are consistent with the purpose of the research and development project. This rule allows for administrative appeals of the Administrator's R&D determination, as provided for in 40 CFR part 78.

Facilities that qualify for a GS R&D exemption from 40 CFR part 98, subpart RR are not exempted from any other source category of the GHG Reporting Program including 40 CFR part 98, subpart UU. For other source categories of the GHG Reporting Program, R&D is defined at 40 CFR 98.6.

2. Subpart RR Reporting Threshold

All facilities that meet the 40 CFR part 98, subpart RR source category definition must report (*i.e.,* there is no reporting threshold). However, reporters that receive a subpart RR R&D exemption are no longer subject to subpart RR, but rather report CO_2 received under subpart UU. The cease reporting provisions of § 98.2(i) do not apply to subpart RR. Rather, once a facility is subject to the requirements of this subpart, including facilities that opt-in to 40 CFR part 98, subpart RR, the owner or operator must continue for each year thereafter to comply with all requirements of this subpart, including the requirement to submit annual reports, until the Administrator has issued a final decision on an owner or operator's request to discontinue reporting. The request to discontinue reporting must include either a copy of the applicable UIC program Director's authorization of site closure, or a demonstration that the injected CO_2 stream is not expected to migrate in a manner likely to result in surface leakage. Before the reporter can discontinue reporting, but after injection has ceased, EPA expects that in most cases there will be minimal burden in monitoring and reporting unless a surface leak is detected.

3. Subpart RR GHGs to Report

Facilities covered by this source category must report the mass of CO_2 received; the mass of CO_2 injected; the mass of CO_2 produced (*i.e.,* mixed with produced oil, gas, or other fluids); the mass of CO_2 emitted from surface leakage; the mass of CO_2 equipment leaks and vented CO_2 emissions from sources between the injection flow meter and the injection wellhead or between the production flow meter and the production wellhead; and the mass of CO_2 sequestered in subsurface geologic formations (this is calculated from the other quantities).

4. Subpart RR GHG Calculations and Monitoring

Facilities covered by this source category must calculate the annual mass of CO_2 received. Starting from the date specified in the EPA-approved MRV plan, facilities must also use a mass balance approach to calculate the mass of CO_2 geologically sequestered. First, facilities must calculate the annual mass of CO_2 injected. From the annual mass of CO_2 injected, facilities must subtract the mass of CO_2 emitted from surface leakage, using the site-specific procedures in their MRV plan, and the mass of CO_2 emitted as equipment leaks or vented emissions from applicable surface equipment, using the procedures specified in 40 CFR part 98, subpart W of the GHG Reporting Program. All GS projects with equipment leak or vented emissions from surface equipment applicable to the GS mass balance equation should use the procedures specified in subpart W, regardless of whether such projects are associated with the oil and gas industry. Facilities that are producing, oil, gas, or other fluids must additionally subtract the mass of CO_2 produced. Calculation procedures are provided at 40 CFR 98.443.

5. Subpart RR Geologic Sequestration Monitoring, Reporting, and Verification (MRV) Plans

Facilities must develop an MRV plan, submit the MRV plan to EPA, receive an approved MRV plan from EPA, implement the EPA-approved plan, and submit annual reports.

The MRV plan must include five major components:

X Delineation of the maximum monitoring area (MMA) and the active monitoring area (AMA).

X Identification and evaluation of the potential surface leakage pathways and an assessment of the likelihood, magnitude, and timing, of surface leakage of CO_2 through these pathways in the MMA.

X A strategy for detecting and quantifying any surface leakage of CO_2 in the event leakage occurs.

X An approach for establishing the expected baselines for monitoring CO_2 surface leakage.

X A summary of considerations made to calculate site-specific variables for the mass balance equation.

First, the MRV plan must include a delineation of the MMA and the AMA. The MMA includes the extent of the free phase CO_2 plume over the lifetime of the project plus a buffer zone of one-half mile. Potential surface leakage pathways must be identified and assessed in the MMA. The AMA is the area that will be monitored over a specified time interval chosen by the reporter, which must be greater than one year. All of the area in the MMA will eventually be covered by one or more AMAs. The first time interval will begin from the date determined in your MRV plan through the date at which the MRV plan calls for the first expansion of the AMA. For each subsequent time interval, a new AMA must be determined. This allows operators to phase in monitoring so that during any given time interval, only that part of the MMA in which leakage might occur needs to be monitored. The boundary of the AMA in each time interval is established by superimposing two areas. The first is the area projected to contain the free phase CO_2 plume at the end of the specified time interval plus an all around buffer zone of at least

one-half mile, or greater if known leakage pathways extend laterally more than one-half mile. The second is the area projected to contain the free phase CO_2 plume five years beyond the specified time interval.[9]

Second, the MRV plan must include identification and evaluation of potential surface leakage pathways within the MMA and an assessment of the likelihood, magnitude, and timing, of surface leakage of CO_2 through these pathways. Possible conduits for CO_2 leakage include faults, fractures, and abandoned wells.[10]

Third, the MRV plan must describe the strategy for detecting and quantifying surface leakage of CO_2 in the event leakage occurs. It should include a description of the approach for determining whether surface leakage has occurred, an explanation of how CO_2 surface leaks will be distinguished from the baseline, and the approach for quantifying detected and verified surface leakage. The expected performance of the selected leakage detection monitoring system or technical specifications should also be described in the MRV plan. If a surface leak is detected, the reporter should have a strategy in place to verify that a surface leak has occurred, confirm the location and source of the surface leak, and then apply some combination of direct measurement and estimation to quantify the surface leak.

Fourth, the MRV plan should include an approach for establishing expected baselines. The primary goal of establishing expected baselines is so that the Reporter can discern whether the results of monitoring are attributable to leakage of injected CO_2 or from another cause (e.g. natural variability). The MRV plan leakage detection and quantification strategy may include monitoring a selection of indicator parameters to detect potential CO_2 leakages. These indicator parameters may be environmental such as subsurface pressure, soil CO_2 flux rates, etc., or operational, such as the injection pressure and the annular pressure in the well. To judge whether a set of measured parameter values obtained during GS operations may indicate CO_2 leakage, reporters should know what those parameter values would be expected to be in the absence of leaks. The MRV plan should describe how the baselines will be determined, how they will be measured or calculated, how they could be used to detect monitoring anomalies, and the operating conditions and their variability.

Fifth, the MRV plan should include a description of monitoring and calculation methodologies to calculate equipment leaks and vented emissions from surface equipment between the flow meters and either injection or production wellheads, and the quantity of CO_2 that is produced with oil or other fluids.

EPA will send a notice of receipt to the reporter within 15 days to acknowledge that EPA has received the MRV plan submission. EPA will determine if the MRV plan is complete within 45 days of the notice of receipt and will notify the reporter whether the plan is complete or incomplete. If incomplete, the reporter must submit an updated MRV plan within 45 days of EPA notification unless otherwise specified by EPA.

Once EPA determines that the MRV plan is complete, technical review will commence. After 60 days of technical review, EPA will send the reporter a request for additional information including clarifying technical questions, if necessary. The reporter will be encouraged to provide a response to this request within 15 days, however EPA recognizes that there may be circumstances where additional time is needed for the reporter to collect the information requested.

Following this iterative process, EPA will issue a final MRV plan as submitted, or with revisions. EPA will post the approved MRV plan on a public Web site, subject to any limitations or requirements in its CBI determination (see Section I.B of this preamble). Any reporter, or interested person, objecting to EPA's final decision, may appeal it to EPA's Environmental Appeals Board.

Facilities must re-submit the MRV plan for EPA approval if a material change was made to monitoring and/or operational parameters that was not anticipated in the original plan, if the facility's UIC permit class changes, or if an EPA review of the annual report determines that it is necessary. Examples of material changes include but are not limited to a large change in the volume of CO_2 injected; the construction of new injection wells not referred to in the MRV plan; failures of the monitoring system to perform as expected due to inadequate monitoring system sensitivity, performance, location, or baseline; changes to surface land use that affects baseline or operational conditions; observed plume location that differs significantly from the predicted plume area used for developing the monitoring plan; a change in the MMA or AMAs; or a change in monitoring technology that would result in coverage or detection capability different from what is specified in the MRV plan. As an example of a facility's UIC permit class changing, the UIC Class VI rule provides that UIC Class II ER projects must seek a UIC Class VI permit when there is an increased risk to USDWs compared to UIC Class II operations. Please see 40 CFR 144.19 of the UIC Class VI rule for a list of risk-based criteria that the UIC Director shall use to determine if the owner or operator of a UIC Class II ER project must apply for and obtain a UIC Class VI permit. This list of criteria may also be used by Class II ER project owners and operators to self-determine if they need to apply for and obtain a UIC Class VI permit. If a facility's UIC permit were to change from Class II to Class VI, it would be required to submit a revised MRV plan to EPA for approval.

6. Subpart RR Data Reporting

In addition to the information summarized at "Subpart RR GHGs to Report" in this section of the preamble, facilities must report the source of the CO_2 received and the cumulative amount of CO_2 geologically sequestered since the facility first reported under subpart RR. All facilities must also report concentration, facilities using mass flow meters must report mass flow information, facilities using volumetric flow meters must report volumetric flow information, and facilities using containers must measure the mass or volume of the containers. They are required to report a description of the monitoring program that was implemented, including descriptions of monitoring anomalies and surface leakage, if any. Finally, for EPA verification purposes, they are required to report for each injection well the class of UIC permit and well identification number used for the UIC permit.

Subpart RR requires reporting of CO_2 equipment leaks and vented CO_2 emissions to the extent they are a component of the GS mass balance. Subpart RR does not require reporting of CO_2 equipment leaks and vented CO_2 emissions from all surface equipment located within the facility (*e.g.,* operational emissions not related to the CO_2 being injected); however, GS projects that produce oil or natural gas may be required to report CO_2 equipment leaks and vented CO_2 emissions in the petroleum and natural

[9] In some cases, the actual footprint of the free phase CO_2 plume and the area that is projected to contain the free phase CO_2 plume after five years may be the same. The one-half mile or greater area provides a buffer zone in the case that upward migration of a CO_2 leak moves laterally as it approaches the surface.

[10] As discussed in Section I.D. of this preamble, UIC requirements can provide the basis for the MRV plan submitted to EPA for 40 CFR part 98, subpart RR.

gas system subpart, 40 CFR part 98, subpart W as part of either offshore or onshore petroleum and natural gas production.

7. Subpart RR Recordkeeping

Facilities must retain quarterly records of CO_2 received; injected CO_2; produced CO_2; CO_2 emitted by surface leakage; CO_2 emitted as equipment leaks and vented emissions from equipment located on the surface between the flow meter used to measure the injection quantity and the injection wellhead and between the flow meter used to measure the production quantity and the production wellhead; and any other records as outlined for retention in the facility MRV plan for 3 years per 40 CFR 98.3(g).

8. Subpart RR Administrative Appeals

Under this final rule, final decisions of the Administrator under part 98, subpart RR are appealable to EPA's Environmental Appeals Board under the regulations that are set forth in part 78 (40 CFR part 78). Part 78 is revised to accommodate such appeals. Specifically, the list in 40 CFR 78.1 of the types of final decisions that can be appealed under 40 CFR part 78 is expanded to cover final decisions of the Administrator under 40 CFR part 98, subpart RR. This list includes, but is not limited to, the following specific types of decisions under subpart RR, a determination of eligibility for an R&D exemption under 40 CFR 98.440(d)(4), the approval or disapproval of a request for discontinuation of reporting under 40 CFR 98.441(b)(2), and the approval or disapproval of a MRV plan under 40 CFR 98.448(c).

Further, 40 CFR 78.3 is revised to allow for petitions for administrative appeal of decisions of the Administrator under 40 CFR part 98, subpart RR. Under the general approach in the existing part 78, an "interested person" (in addition to the official representative of owners and operators involved in a matter) may petition for an administrative appeal of a final decision of the Administrator. The "interested person" definition, which is located in part 72 of the Acid Rain Program regulations, is expanded to take into account final decisions of the Administrator under part 98. In particular, EPA is revising the "interested person" definition by replacing specific references to the Acid Rain Program and draft permits with broader references to any decision by the Administrator and the Administrator's process of making that decision. As a result of this revision and the revisions of 40 CFR part 78, a person who does not own or operate a facility covered by a final decision under 40 CFR part 98, subpart RR will need to submit his or her name to be included by the Administrator on an "interested persons list" in order to be able to appeal—by filing a petition for an administrative appeal—that final decision.

In addition, 40 CFR 78.4 is expanded to state that filings on behalf of owners and operators of a facility subject to 40 CFR part 98, subpart RR must be signed by the designated representative of the owners and operators.

C. Summary of the Reporting Requirements for Injection of Carbon Dioxide (Subpart UU)

Reporting requirements for all other facilities conducting CO_2 injection are found in 40 CFR part 98, subpart UU. Facilities conducting GS and reporting under 40 CFR part 98, subpart RR are not required to report under 40 CFR part 98, subpart UU.

1. Subpart UU Source Category Definition

The 40 CFR part 98, subpart UU source category consists of any other well or group of wells that inject a CO_2 stream into the subsurface. This includes any wells used to enhance oil and gas recovery and GS R&D projects that are exempted from 40 CFR part 98, subpart RR monitoring and reporting requirements. If you report under 40 CFR part 98, subpart RR for a well or group of wells, you are not required to report under 40 CFR part 98, subpart UU for that well or group of wells.

2. Subpart UU Reporting Threshold

All facilities that inject CO_2 underground must report under this subpart (except those in subpart RR), regardless of the amount of emissions from the facility or the amount of CO_2 injected. Reporters can cease subpart UU reporting pursuant to the provisions at 40 CFR 98.2(i) that allow facilities to cease GHG reporting to EPA; with respect to subpart UU, any reference to CO_2 emissions in 40 CFR 98.2(i) means CO_2 received.

3. Subpart UU GHGs to Report

Facilities covered by this source category must report the annual mass of CO_2 received.

4. Subpart UU GHG Calculations and Monitoring

Facilities covered by this source category must calculate the annual mass of CO_2 received using the calculation procedures for either mass or volumetric flow meters. Where CO_2 is received in containers, facilities must use the calculation procedures for determining the mass or volume of contents in containers.

5. Subpart UU Data Reporting

In addition to reporting the mass of CO_2 received, facilities must report the source of the CO_2. All facilities must also report concentration, facilities using mass flow meters must report mass flow information, facilities using volumetric flow meters must report volumetric flow information, and facilities using containers must measure the mass or volume of the containers.

6. Subpart UU Recordkeeping

Facilities must retain quarterly records of CO_2 received for 3 years per 40 CFR 98.3(g).

D. Summary of the Major Changes Since Proposal

The major changes in this rule since the original proposal are identified in the following list. The rationale for these and any other changes to the rule can be found in this section or in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subparts RR and UU: Injection and Geologic Sequestration of Carbon Dioxide."

X EPA has moved all definitions, requirements, and procedures for facilities conducting CO_2 injection only (which both EPA and commenters have referred to as "Tier 1" facilities for simplicity) into a new subpart, 40 CFR part 98, subpart UU, and retained all definitions, requirements, and procedures related to facilities conducting GS (which both EPA and commenters have referred to as "Tier 2" facilities for simplicity) in 40 CFR part 98, subpart RR.

X EPA has removed the requirement that facilities report the amount of CO_2 injected in 40 CFR part 98, subpart UU (Tier 1) but retained requirements that facilities subject to this subpart report the amount of CO_2 received and the source of CO_2 if known.

X EPA has established procedures for calculating CO_2 received in containers.

X In 40 CFR part 98, subpart RR, EPA has established eligibility requirements for a GS R&D project to be exempt from 40 CFR part 98, subpart RR.

X In 40 CFR part 98, subpart RR, EPA has retained the requirement that facilities report the equipment leaks and vented emissions for surface equipment that could be included in the GS mass balance but removed the requirement for reporting equipment leaks and

vented emissions for all other surface equipment.

X In 40 CFR part 98, subpart RR, EPA has added an MRV plan requirement for the delineation of the areas that will be monitored.

X In 40 CFR part 98, subpart RR, EPA has clarified the requirements for an addendum to the annual report and renamed it the monitoring report.

X EPA has amended 40 CFR part 78 to include administrative appeals procedures for EPA decisions made under 40 CFR part 98, subpart RR, such as decisions relating to eligibility for the R&D exemption under 40 CFR 98.440(d)(4), decisions relating to a request for discontinuation of reporting under 40 CFR 98.441(b)(2), or MRV plan decisions under 40 CFR 98.448(c).

E. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. A large number of comments on CO_2 injection and sequestration were received covering numerous topics. Responses to significant comments received can be found in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subparts RR and UU: Injection and Geologic Sequestration of Carbon Dioxide."

1. Legal Authority

Comment: EPA received a number of comments regarding its legal authority to require the proposed reporting from facilities conducting CO_2 injection or GS. Some commenters argued that EPA has over-reached its CAA statutory authority, stating that the CAA authorizes the regulation of air emissions, not CO_2 injection or GS. One commenter asserted that EPA is overstepping its authority under CAA section 114 by requiring indefinite and broad monitoring and reporting, and that none of EPA's stated purposes in the preamble to the proposal provide adequate justification for the proposed data collection requirements, imposition of new measurement protocols, or installation of new instrumentation. Some commenters also asserted that the fiscal year 2008 Appropriations Act constrains the scope of EPA's information gathering to GHG emissions, which does not include CO_2 injection or GS. Some commenters asserted that the proposal was within EPA's authority under the CAA.

Response: EPA is promulgating this rule under the authority provided in CAA section 114. We disagree that we do not have statutory authority to promulgate this rule. The Administrator may gather information under CAA section 114, as long as that information is for purposes of carrying out any provision of the CAA. The information submitted to EPA as a result of this rule will, among other things, inform policy decisions under the CAA related to the use of CCS for mitigating GHG emissions. This data will prove valuable to the Agency in several areas, including reconciling 40 CFR part 98, subpart UU data on CO_2 received with CO_2 supply data to better understand the amount of CO_2 supply that is used for CO_2 injection and GS, monitoring the growth and efficacy of GS over time, and evaluating ER as a potentially non-emissive end use.

EPA is not citing the fiscal year 2008 Consolidated Appropriations Act as the statutory basis for this action. Furthermore, we do not agree that the appropriations language constrains EPA's ability to collect the information under this action. Please also refer to Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Volume No.: 9, Legal Issues (Docket ID No. EPA–HQ–OAR–2008–0508) for similar comments received in developing the rule establishing the GHG Reporting Program.

2. Definition of Source Category

Comment: EPA received many comments about the definition of source category and GS facility. At least one commenter recommended setting a clearer distinction between CO_2 injection without GS (Tier 1) and CO_2 injection with GS (Tier 2). This commenter and others recommended a further distinction within the GS group—GS with ER and GS without ER. In addition, several commenters either requested clarification of or demonstrated a misunderstanding of whether particular provisions of the proposed rule, such as the GS R&D exemption and proposed discontinuation of reporting provisions, would apply to all CO_2 injection, to CO_2 injection with GS only, or to CO_2 injection without GS only.

Furthermore, several commenters were confused by the definition of GS facility in the regulatory text and found it to be redundant, complicated, unclear, or vague. At least two commenters urged EPA not to change the definition of facility found in 40 CFR 98.6 of the GHG Reporting Program General Provisions, while other commenters appeared to support a subpart RR-specific facility definition but raised questions or provided comment about which structures or equipment would be within the GS facility. Some commenters requested edits or additions to the list of activities at 40 CFR 98.440(d) that are not included in the source category.

Response: EPA agrees with commenters that the structure of proposed 40 CFR 98.440 could be made clearer. It was never EPA's intention to override the definition of facility in 40 CFR 98.6; rather EPA intended to create a defined term "GS facility" to provide clarity about which facilities under the 40 CFR part 98, subpart RR source category would be subject to both "Tier 2" and "Tier 1" requirements. To harmonize 40 CFR part 98, subpart RR with the rest of the GHG Reporting Program as intended and to maximize clarity, the defined term "GS facility" is not included in the final rule. In this action, EPA has deleted the term "GS facility" from the regulatory text and has reframed any necessary information as part of the definition of "source category." The owner or operator of a group of CO_2 injection wells will determine the boundaries of the facility by following the definition in 40 CFR 98.6. EPA has provided several examples in the General Technical Support Document (TSD)[11] to illustrate how a facility would be delineated under various operational configurations.

In order to effectuate the original intent of the "GS facility" term, and in light of comments expressing confusion between the "Tier 1" and "Tier 2" requirements, EPA is retaining procedures and requirements for facilities conducting GS (Tier 2) in 40 CFR part 98, subpart RR and is moving all procedures and requirements for all other facilities conducting CO_2 injection (Tier 1) into a new 40 CFR part 98, subpart UU in this action. EPA has concluded that this organizational change allows for two source category definitions while clearly distinguishing the two sets of provisions and procedures. EPA notes that this new organizational structure is merely formalizing the structure that EPA and commenters have been using to date informally.

EPA considered but did not create a third source category as proposed in some comments for GS projects with ER. EPA has concluded that the provisions, procedures, and requirements in 40 CFR part 98, subpart RR apply equally to all GS projects—whether they conduct ER or not. It is most practical to cover both types of projects with one subpart.

In this final action, EPA removed from the regulatory text the list of

[11] General Technical Support Document for Injection and Geologic Sequestration of Carbon Dioxide: Subparts RR and UU (see docket ID No. EPA–HQ–OAR–2009–0926).

activities that are not included in the source category. Based on experience with implementation questions from reporters to the rest of the GHG Reporting Program, EPA has concluded that this list does not provide regulatory clarity and instead creates confusion. Without this list the regulatory text is clear that the operations covered under 40 CFR part 98, subparts RR and UU are wells that inject CO_2 underground. EPA does not need to explicitly provide a list of operations that do not meet this definition. EPA has found that operators may mistakenly conclude that they are exempt from 40 CFR part 98, subpart RR or UU reporting requirements if they conduct an activity on the list, even if they also operate wells that inject CO_2 underground. To avoid this confusion, EPA had deleted the list from the regulatory text and is clarifying here that operators conducting any of the following activities need not be concerned with these activities when determining applicability to or reporting under 40 CFR part 98, subpart RR or UU: above ground CO_2 storage, CO_2 transportation or distribution, CO_2 purification, compression, or processing, CO_2 capture, and CO_2 end-uses other than underground injection. EPA notes that these activities may meet the definition of another source category in the GHG Reporting Program.

3. Geologic Sequestration Research and Development (GS R&D)

Comment: EPA received a range of comments relating to exempting GS R&D projects. Some commenters supported the R&D exemption while others opposed it because they believe these projects can provide valuable information on the efficacy of GS as a climate mitigation approach. These commenters also noted that these projects are currently gathering data which would provide EPA an early opportunity to evaluate the appropriateness and application of monitoring methods. Some commenters suggested that GS R&D projects be provided an option to opt-in to GS reporting requirements. One group of commenters recommended that EPA exempt GS R&D projects on a case-by-case basis.

Response: EPA agrees with commenters that collecting data from all GS projects, including R&D, would provide useful information about the efficacy of GS and monitoring techniques and approaches to quantify leakage. However, the Agency recognizes that GS is an emerging climate mitigation approach and there are likely to be some projects that are investigating practices, monitoring techniques, injection verification, or are engaged in other applied research that will facilitate the development and adoption of GS, and that these projects would benefit from being exempted from this subpart. Therefore the Agency is retaining a GS R&D exemption, with some modifications from the proposed rule. See Section II.B of the preamble for a summary of the R&D exemption process.

Comment: Many commenters noted that restricting the proposed exemption to federally funded projects was too stringent, that R&D can also be supported by states, academia, or the private sector, and argued that GS R&D projects should not be defined based on the source of funding.

Response: EPA agrees with commenters that there are non-Federal funding sources that could fund GS R&D projects and that Federal funding should not be the basis for an R&D exemption. Other sources of funding for GS R&D include State and academic sources. Funding might also come from the R&D budget of a private sector entity. However, in order for EPA to have basic information about projects operating under an R&D exemption, projects must provide information on the source and type of funding as part of their submission in support of the exemption.

Comment: Many commenters suggested that EPA consider a threshold for exempting R&D projects. These commenters noted that a threshold would allow for reduced regulatory burden and that collecting data from projects below the threshold would yield little value for EPA.

Response: EPA found that it would be challenging to define a threshold for GS R&D projects because project size could vary depending on the R&D goals and other factors such as availability and source of CO_2. As stated above, EPA is establishing an exemption for R&D projects that are investigating practices, monitoring techniques, injection verification, or are engaged in other applied research, that will enable safe and effective long-term containment of a CO_2 stream in subsurface geologic formations, including research conducted as a precursor to long-term storage.

Comment: Some commenters recommended that GS R&D projects be required to comply with "Tier 1" requirements, while a few commenters suggested that EPA exempt both Tier 1 and Tier 2 requirements for GS R&D projects.

Response: EPA agrees with comments recommending that GS R&D projects report "Tier 1" data. Projects that qualify for a GS R&D exemption under 40 CFR part 98, subpart RR are not required to develop an MRV plan or report the GS mass balance information required of facilities conducting GS. However, these projects are required to report basic information on CO_2 received under subpart UU. EPA determined that GS R&D projects already collect such data and that the burden of reporting such data would be minimal.

4. Reporting Requirements

Comment: EPA received many comments about the proposed "Tier 1" reporting requirements. Many commenters from the ER industry in particular urged EPA to remove all "Tier 1" reporting requirements for CO_2 injection projects without GS. These commenters expressed concern that collecting any information from business-as-usual ER would lead to a misunderstanding of the CO_2 material balance at such operations. Many stated that data on total CO_2 injected in particular would have no bearing on future policy decisions about GHG emissions and should not be collected. Many commenters conceded that data on the quantity of "new" CO_2 received could be collected if EPA insisted on collecting some data from "Tier 1" sources, presumably because it could potentially inform future climate change policy decisions. At least one commenter offered that by collecting data on the quantity of "new" CO_2 received, EPA could reasonably estimate the amount of CO_2 retained underground.

On the other end of the spectrum, one set of comments echoed that the "Tier 1" reporting requirements as proposed would be insufficient for an accurate CO_2 material balance, and recommended expanding "Tier 1" reporting requirements rather than narrowing or removing them. This set of comments recommended that data on CO_2 recycled from each project be collected so that EPA could get a full understanding of the ER industry. These commenters advocated for collection of quantity data from "Tier 1" reporters, arguing that ER operations dominate CO_2 end-users and the data will be necessary to understand the disposition of CO_2 supply reported under 40 CFR part 98, subpart PP of the GHG Reporting Program. Meanwhile, at least three commenters offered that the proposed "Tier 1" reporting requirements would be adequate to meet EPA's stated needs and that no additional data reporting should be required in the final regulation.

Response: In this final rule, EPA is retaining some of the proposed "Tier 1"

reporting requirements for CO_2 injection facilities. EPA is requiring reporting under 40 CFR part 98, subpart UU (previously referred to as "Tier 1" facilities) of CO_2 received (a term that EPA is defining in this final action for what commenters described as "new" CO_2). EPA is not requiring reporting on total CO_2 injection under 40 CFR part 98, subpart UU. Reporting on total CO_2 injection will be required for facilities conducting GS under 40 CFR part 98, subpart RR (previously referred to as "Tier 2" facilities). EPA has concluded that data on CO_2 received is critical for EPA to better understand the disposition of CO_2 supply reported in 40 CFR part 98, subpart PP. Furthermore, EPA recognizes that the geology of an oil and gas reservoir can create a barrier to trap CO_2 underground and that many projects in the ER industry could successfully verify and report the geologic sequestration of CO_2 with an EPA-approved MRV plan. By collecting data on CO_2 received at these facilities, EPA will better understand the scope and size of a potentially non-emissive end-use.

Due to the comments received on this issue, EPA considered adding recycled CO_2 to the proposed Tier 1 data requirements. Ultimately, EPA concluded that a CO_2 material balance is most informative to the Agency from GS projects that verify the quantity of CO_2 geologically sequestered by implementing their EPA-approved MRV plans. Though the collection of either a partial or full set of data from 40 CFR part 98, subpart UU facilities would have given EPA additional data regarding ER operations, it could have also caused confusion amongst reporters and the public about which facilities are estimating and reporting geologic sequestration. By requiring mass balance inputs from GS projects only and by splitting the proposed rule into two subparts, EPA is making clear in this action that the quantity of CO_2 geologically sequestered can only be verified and reported to EPA by developing and implementing an EPA-approved MRV plan and reporting GS under 40 CFR part 98, subpart RR.

For clarification, EPA reworded the proposed term "CO_2 transferred onsite from offsite" to "CO_2 received" because EPA identified at least one configuration where CO_2 would be supplied to an injection well from an adjacent plant that is part of the same facility (per the definition of facility in 40 CFR 98.6). CO_2 received from a natural source within the same field or basin in which it is injected is also included as CO_2 received.

5. Reporting Threshold

Comment: EPA proposed "all in" requirements and sought comment on whether and how to establish a threshold. A few of the comments EPA received agreed with EPA's all-in reporting approach, noting that data from all facilities is significant at this early stage in the GS industry, that at this point there is not enough data to determine a sensible threshold level, that the amount of CO_2 injected in one year is not a good indicator of the amount of CO_2 injected in the following year, and that EPA needs a comprehensive picture of the industry. One comment characterized no threshold for "Tier 1" reporting as reasonable because of the associated low burden.

Other comments opposed the all-in reporting threshold stating that it would burden a higher number of facilities than was necessary. These comments provided a variety of possible approaches and thresholds for EPA to consider including a threshold of 100,000 metric tons per year of "new" CO_2 received, an injection threshold of 25,000 metric tons per year, an injection threshold of 100,000 metric tons of CO_2 per year, an injection threshold of 2–3 million metric tons per year, and an emission threshold of 25,000 metric tons of CO_2 per year.

Response: EPA agreed with commenters who supported an all-in threshold because it would result in the most comprehensive tracking and reporting. Collecting information on all projects is important, especially at this early stage in the GS industry. As demonstrated by the range of suggested thresholds provided by commenters, there is no one obvious sensible threshold. The amount of CO_2 injected in one year is not a good indicator of the amount of CO_2 injected in the following year and there are no monitoring standards or data available to determine the amount of CO_2 emitted. In this final rule, EPA is requiring reporting from all facilities that meet the 40 CFR part 98, subpart UU (previously referred to as "Tier 1" facilities) source category definition and from all facilities that meet the 40 CFR part 98, subpart RR (previously referred to as "Tier 2" facilities) source category definition. EPA is not establishing a reporting threshold for these facilities. Reporters can cease subpart UU reporting pursuant to the provisions at 40 CFR 98.2(i) that allow facilities to cease GHG reporting to EPA; with respect to subpart UU, any reference to CO_2 emissions in 40 CFR 98.2(i) means CO_2 received. The cease reporting requirements of § 98.2(i) do not apply to subpart RR; the owner or operator must continue to comply with all requirements until the Administrator has issued a final decision on the owner or operator's request to discontinue reporting.

As noted in the proposal, an all-in reporting threshold will allow the Agency to comprehensively track all CO_2 supply (as reported in Suppliers of CO_2, 40 CFR part 98, subpart PP) that is received for injection underground. This approach is consistent with the all-in requirements in the GHG Reporting Program for some suppliers of petroleum, natural gas, and coal-to-liquid products (40 CFR part 98, subparts LL, MM, and NN),[12] producers of industrial gases (40 CFR part 98, subpart OO), and suppliers of CO_2 (40 CFR part 98, subpart PP).

With respect to 40 CFR part 98, subpart UU, EPA has estimated the cost for facilities conducting CO_2 injection to comply with the minimum reporting requirements and has determined that the burden will be small, given the equipment and data collection efforts already in place at ER projects. With respect to 40 CFR part 98, subpart RR, the Agency notes that GS R&D projects are exempt from 40 CFR part 98, subpart RR once EPA confirms their eligibility for the exemption. EPA has concluded that these two features will ensure that projects receiving and injecting small amounts of CO_2 are not disproportionately burdened by the reporting requirements in this final rule.

6. Equipment Leaks and Vented Emissions

Comment: EPA proposed that all facilities subject to "Tier 2" requirements would be required to report fugitive and vented CO_2 emissions from the surface components located within the facility, unless already reported under 40 CFR part 98, subpart W (petroleum and natural gas systems). A few commenters were concerned about overlap in reporting requirements and recommended that EPA require the reporting of fugitive and vented CO_2 emissions from equipment associated with oil and gas production solely under 40 CFR part 98, subpart W and limit the reporting under 40 CFR part 98, subpart RR to fugitive and vented emissions from equipment associated with GS operations for which emissions were not already being reported under 40 CFR part 98, subpart

[12] In a recently proposed rulemaking (75 FR 48744, August 11, 2010), EPA proposed to establish a threshold for Local Distribution Companies in subpart NN.

W. A number of commenters disagreed with EPA's proposed reporting requirements for fugitive and vented CO_2 emissions and suggested that EPA scale back or eliminate such reporting, while one commenter supported such reporting requirements. Four commenters stated that fugitive and vented emissions would be trivial when compared to the amount of CO_2 injected, and three commenters stated that such reporting would unwarrantedly shift CO_2 into a hazardous air pollutant-like category. One commenter suggested that reporting of fugitive and vented emissions would be germane where applicable to the GS mass balance equation. One commenter supported EPA's proposed requirements for the reporting of fugitive and vented CO_2 emissions.

Response: EPA proposed to require the reporting of fugitive CO_2 emissions (referred to in this final action as CO_2 equipment leakage) and vented CO_2 emissions in order to better understand the volume of CO_2 equipment leakage and vented CO_2 emissions from such facilities as compared to the amount of CO_2 sequestered. However, EPA has concluded that the information that would be generated from such a reporting requirement is not necessary for computing the mass balance of the amount of CO_2 sequestered.

In the notice of proposed rulemaking, EPA proposed that CO_2 equipment leakage and vented CO_2 emissions be included in the GS mass balance calculation if the emissions occur downstream of the CO_2 injection flow meter or upstream of the production flow meter. EPA is retaining this reporting requirement in 40 CFR part 98, subpart RR because such data are important in order to provide a proper accounting of the amount of CO_2 that is geologically sequestered. In this action, EPA is requiring reporting of equipment leakage and vented emissions with respect to equipment located on the surface between the flow meter used to measure injection quantity and the injection wellhead and between the production wellhead and the flow meter used to measure production quantity.

Emissions not related to the mass balance calculation do not need to be reported under subpart RR. Such emissions may need to be reported under subpart W if the facility is required to report under this subpart.

7. MRV Plan Requirements

Comment: EPA received many comments supporting the Agency's proposal that reporters develop a site-specific MRV plan, but some commenters stated that more detail was needed about how MRV plans would be evaluated by EPA.

Response: EPA has set out the basic components for MRV plans in Section II.B of this preamble. EPA has clarified the definition of the area where potential leakage pathways should be identified and characterized, and how monitoring could be phased in over time as CO_2 is injected. This is reflected in the regulatory text at 40 CFR 98.448(a). EPA has also refined the requirements for what should be included in the annual report, and in what cases the reporter would need to resubmit an MRV plan for EPA approval.

EPA's approach allows for site-specific flexibility for MRV plans and does not prescribe particular monitoring technologies. The approach also allows the owner or operator to leverage the site characterization, risk assessment, and/or monitoring required by other authorities as the foundation for demonstrating compliance with the MRV plan requirements of 40 CFR part 98, subpart RR. EPA recognizes the merit in providing greater clarity on the evaluation criteria, but notes that the geology and other conditions among facilities conducting GS vary. EPA has provided information in the General TSD on the technical evaluation of MRV plans, including illustrative examples describing the types of information that may be included in the MRV plan to fulfill the regulatory requirements at 40 CFR 98.448. This includes delineating the monitoring area, both the maximum area that the CO_2 plume is predicted to cover and how monitoring can be phased in over this area; selecting leakage detection systems that are suitable for the site; determining and verifying that a leak has occurred; identifying baseline conditions; and quantifying a CO_2 leak once a leak has been verified.

Comment: EPA received many comments about the procedural aspects of MRV plan approval. Some commenters stated that CO_2 injection should not be allowed until MRV plans are approved. Many commenters urged the Agency to allow for public involvement.

Response: EPA has set out the general MRV plan approval process in Section II.B of this preamble. EPA has designed MRV plan requirements under 40 CFR part 98, subpart RR so that facilities will not need to disrupt or delay normal operations. However, EPA clarifies that facilities will report the amounts of CO_2 geologically sequestered under 40 CFR part 98, subpart RR after they implement an EPA-approved MRV plan.

EPA agrees with commenters that there should be a process for public involvement. Therefore, EPA plans to post approved MRV plans to a public Web site, to the extent consistent with any confidentiality determination. "Interested persons" can then appeal EPA decisions on MRV plans to the Environmental Appeals Board (EAB) through the appeals process described in 40 CFR part 78. An "interested person" may be any person who—in connection with the Administrator's process of making his or her decision—submitted comments, testified at a public hearing, submitted objections, or otherwise submitted his or her name to be included by the Administrator in an interested persons list. In the case of MRV plans, an interested person who wishes to appeal an EPA decision should submit his or her name to be included in the interested persons list. EPA will provide the public instruction on joining the interested persons list for 40 CFR part 98, subpart RR. More information on the administrative appeals process can be found in Section II.B of this preamble and in "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subparts RR and UU: Injection and Geologic Sequestration of Carbon Dioxide." Though there is no formal public comment process prior to approval of individual MRV plans in today's rule, EPA believes the administrative appeals process provides an opportunity for involvement by any member of the public who is concerned about the provisions of an approved plan. Further, if future GS policies or programs are promulgated as a result of the data collected through today's rule for which a formal public notice and comment period would be appropriate, EPA will establish a public notice and comment period for such a policy or program at that time.

EPA has provided further information in the General TSD about the procedural aspects of MRV plan approval.

Comment: EPA received many comments about the role of a UIC permit with respect to MRV plan requirements. Most commenters emphasized the need for coordination between the UIC program and 40 CFR part 98, subpart RR. Some commenters stated that any class of UIC permit is enough for purposes of the MRV plan. Others noted that the MRV plan should build off of the UIC permit and that comprehensive monitoring for the purposes of verifying quantities of CO_2 sequestered cannot occur under SDWA alone.

Response: EPA maintains a high-level of coordination across EPA offices and regions on GS activities and regulatory

development. EPA's OAR and OW work closely to promote safe and effective implementation of GS technologies while ensuring protection of human health and the environment. EPA agrees with commenters that the UIC program provides the foundation for the safe sequestration of CO_2 by helping to ensure that injected fluids remain isolated in the subsurface and away from underground sources of drinking water, thereby serving to reduce the risk of CO_2 leakage to the atmosphere. A facility's UIC permit may be used to demonstrate that certain MRV plan requirements have been fulfilled. However, provisions are needed that go beyond what is required of UIC permits in order to quantify leakages, if any. See Section I.D of this preamble for a more detailed discussion of 40 CFR part 98, subpart RR and UIC Class VI requirements.

III. Economic Impacts of the Final Rule

This section of the preamble examines the costs and economic impacts of the final rule for CO_2 injection and GS, including the estimated costs and benefits of the rule, and the estimated economic impacts of the rule on affected entities, including estimated impacts on small entities. Complete detail of the economic impacts of the rule can be found in the text of the Economic Impact Analysis (EIA) (EPA–HQ–OAR–2009–0926). This section also contains a brief summary of major comments and responses.

A. How were compliance costs estimated?

1. Summary of Method Used To Estimate Compliance Costs

EPA estimated costs of complying with the rule and the total incremental annual cost of compliance. A base case is created assuming relevant monitoring costs required under UIC requirements (including the UIC Class VI rule). Then incremental reporting from geologic storage sites were evaluated in terms of required technologies, practices, and costs.

The estimated costs include capital and operating and maintenance (O&M), including labor costs. The cost of drilling and equipping wells represents a large component of sequestration costs. Examples of other costs include seismic data acquisition, periodic sampling and testing of the injected CO_2.

The estimated costs are based on hypothetical or pro-forma sites for various types of projects such as R&D GS projects, commercial saline formation projects, and ER GS projects. The geologic and engineering assumptions for these pro-forma projects are the same as those used by the EPA Office of Water in the UIC Class VI rule. The costs are presented in 2008 dollars.

The capital costs are annualized using an interest rate of 7 percent with projects lasting 4 years, 10 years or 40 years. Next, annual O&M costs are added to the annualized capital costs to determine total annual direct costs. Finally, a 20 percent overhead and general and administrative cost factor is added to obtain total annual costs. These are then divided by the amount assumed to be injected each year in the pro-forma project to arrive at total costs per metric ton of CO_2 injected. These per-ton costs are then used to estimate total annual costs for the level of injection expected in the activity baseline.

2. Summary of Comments and Responses

Comment: A majority of the comments received on the compliance costs of the reporting rule focused on facility level costs for monitoring and reporting. One commenter stated that EPA underestimated labor costs in the economic analysis of the rule.

Response: EPA discussed and presented information for the costs and economic impacts of the proposed rule, including the estimated costs and benefits of the proposed rule, and the estimated economic impacts of the proposed rule on affected entities, including estimated impacts on small entities. Complete detail of the economic impacts of the rule can be found in Section 4 of the EIA. EPA's cost estimation methods reflect accepted engineering practices and publicly available cost and price data. For example, EPA used wage rates and overhead factors from the Department of Labor's Bureau of Labor Statistics.[13]

B. What are the costs of the rule?

1. Summary of Costs

The total annualized costs incurred under the rule by these entities will be approximately $1.1 million (2008$), as illustrated in Table 4 of this preamble. This is based on projects that are currently injecting or will be injecting CO_2 by 2012, and includes costs for 1 saline GS facility reporting under subpart RR, and 92 CO_2 injection facilities reporting under subpart UU. There are 9 R&D projects that incur costs to apply for a waiver under subpart RR, these same facilities are assumed to receive a waiver for the reporting requirements under subpart RR and are included in the subpart UU baseline of 92 projects. The public sector burden estimate is $344,000 for program implementation and verification activities. This may underestimate the total public sector burden depending on the extent to which DOE R&D projects funded with public dollars transition to commercial GS and consequently incur costs associated with monitoring, reporting and verification. Given uncertainties related to project adoption and the costs of the reporting program, EPA considered two other cost scenarios (one higher and one lower than the reference cost scenario) in order to assess a range of potential economic impacts on affected entities, as illustrated in Table 5 of this preamble. The three cost scenarios vary in terms of assumptions about which monitoring devices would be used at a facility conducting GS and how often sampling and measurement would take place. Because each facility conducting GS will have unique characteristics that may result in the selection of different monitoring techniques, a range of assumptions was used about the percents of sites that would be expected to use each device or technique. Complete detail on the cost scenarios is provided in Section 4.5.1 of the final Economic Impact Analysis (EIA) (EPA–HQ–OAR–2009–0926).

[13] Bureau of Labor Statistics. *http://www.bls.gov/bls/wages.htm.*

TABLE 4—NATIONAL ANNUALIZED MANDATORY REPORTING COSTS ESTIMATES (2008$): SUBPARTS RR AND UU

Type	Number of projects	Metric tons CO_2 received per year	Reference	
			First year (thousand, 2008$)	Second year (thousand, 2008$)
R&D (RR)	9	5,320,000	$36	$36
Facilities Conducting GS (Saline) (RR)	1	1,842,885	318	240
Additional Facilities Conducting GS (ER opt in) (RR) [a]	0	0	0	0
Facilities Conducting CO_2 Injection (no GS) (UU) [b]	92	48,735,442	410	410
Private Sector, Total All Projects	93	50,578,327	764	686
Private Sector, Average ($/ton)			0.02	0.01
Public Sector, Total			344	344
National Total			1,107	1,030

a. Because reporting for ER facilities is optional, EPA has not included projections of ER reporters in the primary analysis. In the alternate costs scenarios EPA has analyzed costs assuming either a medium or high level of opt-in.
b. Includes UIC Class II ER Facilities.

TABLE 5—ANNUALIZED REPORTING COSTS PER PROJECT (2008$): SUBPARTS RR AND UU

Type	Reference		Alternative cost scenarios			
			Low		High	
	First year ($1,000)	Second year ($1,000)	First year ($1,000)	Second year ($1,000)	First year ($1,000)	Second year ($1,000)
R&D (RR)	$4	$4	$4	$4	$4	$4
Facilities Conducting GS (Saline) (RR)	318	240	96	18	490	413
Facilities Conducting GS (ER opt in) (RR)	2,124	2,005	1,893	1,773	2,271	2,151
Facilities Conducting CO_2 Injection (No GS) (UU)	4	4	4	4	4	4

2. Summary of Comments and Responses

Comment: EPA received comments on source specific cost data reflected in the engineering cost analysis presented in the EIA, Section 4 (EPA–HQ–OAR–2009–0926). Some commenters asked EPA to not overly burden entities that may be required to report, and questioned whether the proposed reporting program was duplicative with other EPA regulations on underground injection.

Response: EPA considered all relevant comments regarding source specific cost data developed in the engineering cost analysis and used in the EIA. In some cases, we revised our cost estimates, and in some cases we revised monitoring and reporting requirements in ways that reduced burden. Please see source specific comments and responses in Section II.E of this preamble and "Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments, Subparts RR and UU: Injection and Geologic Sequestration of Carbon Dioxide."

EPA has determined the selected option for the mandatory GHG reporting rule strikes a balance between impacts on small entities, consistency with other programs, costs incurred by the reporting entities, and emissions coverage. Section 5 of the final EIA (EPA–HQ–OAR–2009–0926) provides cost comparisons for each alternative evaluated.

C. What are the economic impacts of the rule?

1. Summary of Economic Impacts

EPA assessed how the regulatory program may influence the profitability of companies by comparing the monitoring program costs to total sales (*i.e.,* a "sales" test). Given limited data on commercial GS operations, EPA restricted the analysis to ER operations (approximately 90 percent of the fields). To do this, EPA divided the average annualized mandatory reporting costs per field by the estimated revenue for a representative field. Sales test ratios are between 3.1 to 4.0 percent for facilities conducting GS (ER opt in). The number of ER operations that would choose to report as facilities conducting GS (ER opt in) is unknown and EPA could not identify any information or analysis to estimate this quantity. As a result, EPA considered two additional scenarios to represent medium and high levels of ER project opt ins. Section 5.2.1 of the final Economic Impact Analysis (EIA) (EPA–HQ–OAR–2009–0926) details the scenario analysis and projected national cost estimates. In contrast, facilities conducting ER CO_2 injection (no GS) sales test ratios are below 0.01 percent, as illustrated in Table 6 of this preamble.

TABLE 6—SALES TEST FOR A REPRESENTATIVE COMMERCIAL ER FIELD OPERATION

[2008$]

	Cost-to-sales ratios (CSRs)		
		Alternative cost scenarios	
	Reference	Low	High
Facilities Conducting GS (ER opt in) (RR)	3.7%	3.3%	4.0%
Facilities Conducting CO_2 Injection (No GS) (UU)	<0.1%	<0.1%	<0.1%

2. Summary of Comments and Responses

Comment: EPA received a number of comments on the overall economic impacts of the proposed rule. Some commenters stated that the economic impacts are understated as total national costs could be significantly higher if there is large scale deployment of CCS. Other commenters stated that large increases in operating costs resulting from mandatory reporting of GHGs could prevent projects from moving forward.

Response: As described previously, EPA conducted a thorough analysis of available information and reviewed comments submitted on this issue, and we have determined that this analysis provides a reasonable characterization of costs for facilities in each subpart, under current law, and that the documentation provides adequate explanation of how the costs were estimated. EPA has estimated the total national cost of the reporting program based on current laws and regulations. Accordingly, one would not expect large scale deployment of CCS in the absence of a comprehensive climate policy that required or otherwise incentivized GS. In response to comments that total national costs would be higher given large scale deployment of CCS, EPA has augmented the scenario analyzing costs assuming future climate policy in Section 5.2.2 of the final EIA. Given the potential for future deployment of CCS technologies, EPA considered two additional scenarios of the number of large scale saline aquifer GS (commercial saline) project deployment by 2050: low (5 projects), medium (9 projects), and high (54 projects). The low scenario is based on the low end of the range of deployment targeted by the CCS Task Force. The medium scenario is based on large scale saline project deployment projected in the cost analysis prepared for the UIC Class VI final rule. The high scenario is based on EPA modeling of the projected deployment of CCS under the American Power Act. The national first year annual cost estimates increase by $1.3 million under the low outcome; $2.5 million under the medium outcome, and $16.8 million under the high outcome. In addition to the scenarios above, EPA also considered scenarios of the number of ER operations that would choose to report as facilities conducting GS (ER opt in) in Section 5.2.1 of the final EIA. In the medium scenario, all anthropogenic CO_2 projects (16) choose to report as facilities conducting GS (ER opt in) (Subpart RR). In the high scenario, all anthropogenic CO_2 projects (16) and fifty percent of other CO_2 projects (32) choose to report as facilities conducting GS (ER opt in) (Subpart RR). The national cost estimate is $35 million under the medium ER opt in outcome (first year) and $33 million in subsequent years. The national cost estimate is $103 million under the high ER opt in outcome (first year) and $97 million in subsequent years.

To understand these numbers in context, EPA used the estimates of cost by facility type shown in Table 5. The large scale saline aquifer GS (commercial saline) projects in the American Power Act scenario are assumed to be facilities that conduct GS, with an estimated cost of $318,000 for the first year and $240,000 for subsequent years. The ER opt in scenario used the 'Facilities Conducting GS (ER opt in)' project cost, with an estimated cost of $2.1 million for the first year and $2.0 million for the subsequent year. The basis for these cost estimates is explained in detail in Section 4 of the EIA (EPA–HQ–OAR–2009–0926). The principal driver in the difference in national costs for these scenarios is the type of project assumed to be reporting.

EPA used the same first year, subsequent year methodology for these cost scenarios that was used in the core national cost analysis. This assumes that the number of projects in a given scenario all opt in or begin required reporting in year 1. This assumption overestimates the national cost under these scenarios, as it is more likely that projects will opt in or begin required reporting over a long period of time.

D. What are the impacts of the rule on small businesses?

1. Summary of Impacts on Small Businesses

As required by the RFA and the Small Business Regulatory Enforcement and Fairness ACT (SBREFA), EPA assessed the potential impacts of the rule on small entities (small businesses, governments, and non-profit organizations). (See Section IV.C of this preamble for definitions of small entities.)

After considering the economic impact of the rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. Currently EPA has determined that small ER operations will most likely be UIC Class II ER projects that do not opt in to subpart RR. As shown in Table 6 of this preamble, the average ratio of annualized reporting program costs to revenues of a typical ER operation likely owned by a representative small enterprise and reporting under subpart UU was less than 0.1 percent.

Although this rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless took several steps to reduce the impact of this rule on small entities. For example, EPA's monitoring and reporting requirements are built off of the UIC program. In addition, EPA is requiring equipment and methods that may already be in use by a facility for compliance with its UIC permit. Also, EPA is requiring annual reporting instead of more frequent reporting.

E. What are the benefits of the rule for society?

EPA examined the potential benefits of this rule. EPA's previous analysis of the GHG Reporting Program discussed the benefits of a reporting system with respect to policy making relevance, transparency issues, and market efficiency. Instead of a quantitative analysis of the benefits, EPA conducted a systematic literature review of existing studies, including government, consulting, and scholarly reports.

The greatest benefit of mandatory reporting of industry GHG emissions to government will be realized in developing future GHG policies.

Benefits to industry of GHG emissions monitoring include the value of having independent, verifiable data to present to the public to demonstrate appropriate environmental stewardship, and a better understanding of their emission levels and sources to identify opportunities to reduce emissions. Such monitoring allows for inclusion of standardized GHG data into environmental management systems, providing the necessary information to achieve and disseminate their environmental achievements.

Standardization will also be a benefit to industry. Once facilities invest in the institutional knowledge and systems to report emissions, the cost of monitoring should fall and the accuracy of the accounting should improve. A standardized reporting program will also allow for facilities to benchmark themselves against similar facilities to understand better their relative standing within their industry.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the EO. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

EPA prepared an analysis of the potential costs and benefits associated with this action in the EIA (EPA–HQ–OAR–2009–0926). A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here. In the EIA, EPA has identified the regulatory options considered, their costs, and the emissions that would likely be reported under each option, and explained the selection of the option chosen for the rule. The costs of the rule are reported in Section 4 of the EIA, and the economic impacts and qualitative benefits assessment are reported in Section 5 of the EIA. Overall, EPA has concluded that the costs of the Injection and Geologic Sequestration of Carbon Dioxide Reporting Rule are justified by the potential benefits of more comprehensive information about CO_2 injection. In the absence of new climate policy, the total annualized cost of the rule will be approximately $1.1 million (in 2008$) during the first year of the program and $1.0 million in subsequent years (including $344,000 of programmatic costs to the Agency). The baseline used to calculate these costs assume 1 facility conducting GS reporting under subpart RR and 92 facilities conducting CO_2 injection reporting under subpart UU. This national cost estimate is described in detail in Section 5.2 of the final EIA.

B. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2372.02.

EPA has identified the following goals of the GHG reporting system:

X Obtain data that is of sufficient quality that it can be used to analyze and inform the development of a range of future climate change policies and potential regulations.

X Create reporting requirements that are, to the extent possible and appropriate, consistent with existing GHG reporting programs in order to reduce reporting burden for all parties involved.

The information from CO_2 injection and geologic sequestration facilities will allow EPA to make well-informed decisions about whether and how to use the CAA to regulate these facilities and encourage voluntary reductions. Because EPA does not yet know the specific policies that will be adopted, the data reported through the mandatory reporting system should be of sufficient quality to inform policy and program development. Also, consistent with the Appropriations Act, the reporting rule covers a broad range of sectors of the economy including sites that inject and store CO_2.

This information collection is mandatory and will be carried out under CAA section 114. Information identified and marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. However, emissions information collected under CAA section 114 generally cannot be claimed as CBI and will be made public.[14]

The projected cost and hour burden for non-Federal respondents is $7.0 million and 9,416 hours per year. The estimated average burden per response is 56.6 hours; the frequency of response is annual for all respondents that must comply with the rule's reporting requirements, except for electricity-generating units that are already required to report quarterly under 40 CFR part 75 (acid rain program); and the estimated average number of likely respondents per year is 93. The cost burden to respondents resulting from the collection of information includes the total capital and start-up cost annualized over the equipment's expected useful life (averaging $717,000 per year) a total operation and maintenance component (averaging $5.3 million per year), and a labor cost component (averaging $1.0 million per year). Burden is defined at 5 CFR part 1320.3(b). Although not included in the primary economic analysis, the costs and burdens to the ER opt ins were estimated using an alternate cost scenario and in this section EPA is giving its best estimates of likely costs and burdens, including to voluntary reporters, as required by the Paperwork Reduction Act. These cost numbers differ from those shown elsewhere in the EIA for this final rule because ICR costs represent the average cost over the first three years of the rule, but costs are reported elsewhere in the EIA for the first year of the rule and for subsequent years of the rule. Also, the ICR focuses on respondent burden only, while the EIA for this final rule includes EPA Agency costs as well. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a

[14] Although CBI determinations are usually made on a case-by-case basis, on July 7, 2010, EPA published a proposed rule (75 FR 39094) relating to CBI determinations for the data collected under the GHG Reporting Program (40 CFR part 98).

substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this rule will not have a significant economic impact on a substantial number of small entities. Currently EPA has determined that small ER operations will most likely be facilities conducting CO_2 injection only, including UIC Class II ER projects, which are only required to report under subpart UU. The average ratio of annualized reporting program costs to revenues of a typical ER operation likely owned by representative small enterprises is less than 1 percent.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless took several steps to reduce the impact of this rule on small entities. For example, monitoring and reporting requirements are built off of the UIC program. In addition, EPA is requiring equipment and methods that may already be in use by a facility for compliance with its UIC permit. Also, EPA is requiring annual reporting instead of more frequent reporting.

During rule implementation, EPA will maintain an "open door" policy for stakeholders to ask questions about the rule or provide suggestions to EPA about the types of compliance assistance that will be useful to small businesses. EPA intends to develop a range of compliance assistance tools and materials and conduct extensive outreach for this final rule.

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under CAA section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Overall, EPA estimates that the total annualized costs of this final rule are approximately $1.1 million (in 2008$) during the first year of the program and $1.0 million in subsequent years (including $344,000 of programmatic costs to the Agency). Thus, this final rule is not subject to the requirements of CAA sections 202 or 205 of the UMRA.

This final rule is also not subject to the requirements of CAA section 203 of the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Facilities subject to this final rule include facilities that inject CO_2 for enhanced recovery, and those that sequester CO_2. None of the facilities currently known to undertake these activities are owned by small governments.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the EO to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in EO 13132.

This regulation applies to public- or private-sector facilities that inject CO_2 underground. Few government facilities would be affected. This regulation applies directly to facilities that inject CO_2 underground. It does not apply to governmental entities unless the government entity owns a facility that injects and/or sequesters CO_2 underground. This regulation also does not limit the power of States or localities to collect GHG data and/or regulate GHG emissions. Thus, EO 13132 does not apply to this final rule. However, as it is EPA's policy to promote communication between the Agency and State and local governments, EPA specifically solicited comments on the proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (59 FR 22951, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications."

This action does not have Tribal implications, as specified in EO 13175 (65 FR 67249, November 9, 2000). This regulation applies directly to facilities that inject and/or sequester CO_2 underground. EPA analyzed the facilities expected to be affected by this rule and did not find that any facilities expected to be affected by the rule are likely to be owned by tribal governments. In addition, EPA did not hear from any Tribal governments contradicting this analysis. Thus, EO 13175 does not apply to this final rule.

Although EO 13175 does not apply to this final rule, EPA sought opportunities to provide information to Tribal governments and representatives during development of the GHG reporting rule. In consultation with EPA's American Indian Environment Office, EPA's outreach plan included tribes. EPA conducted several conference calls with Tribal organizations during the proposal phase of the GHG reporting rule. For example, EPA staff provided information to tribes through conference calls with multiple Tribal working groups and organizations at EPA that interact with tribes and through individual calls with two Tribal board members of the Climate Registry (TCR). In addition, EPA prepared a short article on the GHG reporting rule that appeared on the front page of a Tribal newsletter—Tribal Air News—that was distributed to EPA/Office of Air Quality Planning & Standards' network of Tribal organizations. EPA gave a presentation on various climate efforts, including the GHG Reporting Program, at the National Tribal Conference on Environmental Management on June 24–26, 2008. In addition, EPA had copies of a short information sheet distributed at a meeting of the National Tribal Caucus.

See the "Summary of EPA Outreach Activities for Developing the GHG reporting rule," in Docket No. EPA–HQ–OAR–2008–0508–055 for a complete list of Tribal contacts. EPA participated in a conference call with Tribal air coordinators in April 2009 and prepared a guidance sheet for Tribal governments on the proposed GHG reporting rule. It was posted on the GHG Reporting Program website and published in the Tribal Air Newsletter.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks, and it is not an economically significant regulatory action under EO 12866.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not a "significant energy action" as defined in EO 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, EPA has concluded that this rule is not likely to have any adverse energy effects. This final rule relates to monitoring, reporting and recordkeeping at facilities that inject and/or sequester CO_2 underground and does not impact energy supply, distribution or use. Oil and gas operations that use CO_2-ER are only required to report under subpart UU, unless they opt into subpart RR to establish that CO_2 is being geologically sequestered. Therefore, we conclude that this rule is not likely to have any adverse effects on energy supply, distribution, or use.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, with explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking involves technical standards. EPA developed no new measuring device standard. Rather we allow the use of an appropriate standard method published by a consensus-based standards organization if such a method exists; or an industry standard practice.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that the final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The final rule does not affect the level of protection provided to human health or the environment because it is a rule addressing information collection and reporting procedures only.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the U.S. prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective December 31, 2010.

List of Subjects

40 CFR Part 72

Acid rain, Administrative practice and procedure, Air pollution control, Electric utilities, Intergovernmental relations, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur dioxide.

40 CFR Part 78

Acid rain, Administrative practice and procedure, Air pollution control, Electric utilities, Intergovernmental relations, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur dioxide.

40 CFR Part 98

Environmental protection, Administrative practice and procedure, Greenhouse gases, Air pollution control, Reporting and recordkeeping requirements.

Dated: November 22, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons stated in the preamble, parts 72, 78, and 98 of title 40, chapter I, of the Code of Federal Regulations are amended as follows:

PART 72—[AMENDED]

■ 1. The authority citation for part 72 is revised to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7410, 7411, 7426, 7601, *et seq.*

■ 2. Section 72.2 is amended by revising the definition for "interested person" to read as follows:

§ 72.2 Definitions.

* * * * *

Interested person means, with regard to a decision of the Administrator, any person who submitted comments or testified at a public hearing pursuant to an opportunity for comment provided by the Administrator as part of the process of making such decision, who submitted objections pursuant to an opportunity for objections provided by the Administrator as part of the process of making such decision, or who submitted (to the Administrator and in a format specified by the Administrator) his or her name to be placed on a list of persons interested in such decision. The Administrator may update the list of interested persons from time to time by requesting additional written indication of continued interest from the persons listed and may delete from the list the name of any person failing to respond as requested.

* * * * *

PART 78—[AMENDED]

■ 3. The authority citation for part 78 continues to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7410, 7411, 7426, 7601, *et seq.*

■ 4. Section 78.1 is amended by:
■ a. Removing, in paragraph (a)(1), the words "or part 97 of this chapter" and adding, in their place, the words "part 97 of this chapter, or subpart RR of part 98."
■ b. Adding and reserving paragraphs (b)(13) through (b)(16).
■ c. Adding paragraph (b)(17) to read as follows.

§ 78.1 Purpose and scope.

* * * * *

(b) * * *

(13)–(16) [Reserved]

(17) Under subpart RR of part 98 of this chapter,

(i) A determination of eligibility for research and development exemption under § 98.440(d) of this chapter.

(ii) The approval or disapproval of a request for discontinuation of reporting under § 98.441(b) of this chapter.

(iii) The approval or disapproval of a geologic sequestration monitoring, reporting, and verification (MRV) plan under § 98.448(c) and § 98.448(d) of this chapter.

* * * * *

■ 5. Section 78.3 is amended by:
■ a. Adding and reserving paragraph (a)(10).
■ b. Adding paragraph (a)(11).
■ c. In paragraph (b)(3)(i), removing the words "paragraph (a)(1) and (2)" and adding, in their place, the words "paragraphs (a)(1), (a)(2), (a)(10), and (a)(11)".
■ d. Adding and reserving paragraph (d)(11).
■ e. Adding paragraph (d)(12).

§ 78.3 Petition for administrative review and request or evidentiary hearing.

(a) * * *

(10) [Reserved]

(11) The following persons may petition for administrative review of a decision of the Administrator that is made under subpart RR of part 98 of this chapter:

(i) The owner or operator of a facility covered by the decision.

(ii) Any interested person with regard to the decision.

* * * * *

(d) * * *

(11) [Reserved]

(12) Any provision or requirement of subpart RR of part 98 of this chapter.

■ 6. Section 78.4 is amended by:
■ a. Adding and reserving paragraphs (a)(1) introductory text, (a)(1)(i), (a)(1)(ii), and (a)(1)(iii).
■ b. Adding paragraph (a)(1)(iv).
■ c. Adding and reserving paragraph (a)(2).

§ 78.4 Filings.

(a) * * *

(1) [Reserved]

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) Any filings on behalf of owners and operators of a facility covered by subpart RR of part 98 of this chapter shall be signed by the designated representative.

(2) [Reserved]

* * * * *

PART 98—[AMENDED]

■ 7. The authority citation for part 98 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart A—[Amended]

■ 8. Table A–3 to subpart A is amended by adding entries to the end of the table for "Geologic sequestration of carbon dioxide" and "Injection of carbon dioxide" to read as follows:

TABLE A–3 OF SUBPART A—SOURCE CATEGORY LIST FOR § 98.2(a)(1)

Source Categories [a] Applicable in 2010 and Future Years
* * * * *
Additional Source Categories [a] Applicable in 2011 and Future Years
* * * * *
Geologic sequestration of carbon dioxide (subpart RR).
Injection of carbon dioxide (subpart UU).

[a] Source categories are defined in each applicable subpart.

■ 9. Part 98 is amended by adding subpart RR to read as follows:

Subpart RR—Geologic Sequestration of Carbon Dioxide

Sec.
98.440 Definition of the source category.
98.441 Reporting threshold.
98.442 GHGs to report.
98.443 Calculating CO_2 geologic sequestration.
98.444 Monitoring and QA/QC requirements.
98.445 Procedures for estimating missing data.
98.446 Data reporting requirements.
98.447 Records that must be retained.
98.448 Geologic sequestration monitoring, reporting, and verification (MRV) plan.
98.449 Definitions.

Subpart RR—Geologic Sequestration of Carbon Dioxide

§ 98.440 Definition of the source category.

(a) The geologic sequestration of carbon dioxide (CO_2) source category comprises any well or group of wells that inject a CO_2 stream for long-term containment in subsurface geologic formations.

(b) This source category includes all wells permitted as Class VI under the Underground Injection Control program.

(c) This source category does not include a well or group of wells where a CO_2 stream is being injected in subsurface geologic formations to enhance the recovery of oil or natural gas unless one of the following applies:

(1) The owner or operator injects the CO_2 stream for long-term containment in subsurface geologic formations and has chosen to submit a proposed monitoring, reporting, and verification (MRV) plan to EPA and received an approved plan from EPA.

(2) The well is permitted as Class VI under the Underground Injection Control program.

(d) *Exemption for research and development projects.* Research and development projects shall receive an exemption from reporting under this subpart for the duration of the research and development activity.

(1) *Process for obtaining an exemption.* If you are a research and development project, you must submit the information in paragraph (d)(2) of this section to EPA by the time you would be otherwise required to submit an MRV plan under § 98.448. EPA will use this information to verify that the project is a research and development project.

(2) *Content of submission.* A submission in support of an exemption as a research and development project must contain the following information:

(i) The planned duration of CO_2 injection for the project.

(ii) The planned annual CO_2 injection volumes during this time period.

(iii) The research purposes of the project.

(iv) The source and type of funding for the project.

(v) The class and duration of Underground Injection Control permit or, for an offshore facility not subject to the Safe Drinking Water Act, a description of the legal instrument authorizing geologic sequestration.

(3) *Determination by the Administrator.*

(i) The Administrator shall determine if a project meets the definition of research and development project within 60 days of receipt of the submission of a request for exemption. In making this determination, the Administrator shall take into account any information you submit demonstrating that the planned duration of CO_2 injection for the project and the planned annual CO_2 injection volumes during the duration of the project are

consistent with the purpose of the research and development project.

(ii) Any appeal of the Administrator's determination is subject to the provisions of part 78 of this chapter.

(iii) A project that the Administrator determines is not eligible for an exemption as a research and development project must submit a proposed MRV plan to EPA within 180 days of the Administrator's determination. You may request one extension of up to an additional 180 days in which to submit the proposed MRV plan.

§ 98.441 Reporting threshold.

(a) You must report under this subpart if any well or group of wells within your facility injects any amount of CO_2 for long-term containment in subsurface geologic formations. There is no threshold.

(b) *Request for discontinuation of reporting.* The requirements of § 98.2(i) do not apply to this subpart. Once a well or group of wells is subject to the requirements of this subpart, the owner or operator must continue for each year thereafter to comply with all requirements of this subpart, including the requirement to submit annual reports, until the Administrator has issued a final decision on an owner or operator's request to discontinue reporting.

(1) *Timing of request.* The owner or operator of a facility may submit a request to discontinue reporting any time after the well or group of wells is plugged and abandoned in accordance with applicable requirements.

(2) *Content of request.* A request for discontinuation of reporting must contain either paragraph (b)(2)(i) or (b)(2)(ii) of this section.

(i) For wells permitted as Class VI under the Underground Injection Control program, a copy of the applicable Underground Injection Control program Director's authorization of site closure.

(ii) For all other wells, and as an alternative for wells permitted as Class VI under the Underground Injection Control program, a demonstration that current monitoring and model(s) show that the injected CO_2 stream is not expected to migrate in the future in a manner likely to result in surface leakage.

(3) *Notification.* The Administrator will issue a final decision on the request to discontinue reporting within a reasonable time. Any appeal of the Administrator's final decision is subject to the provisions of part 78 of this chapter.

§ 98.442 GHGs to report.

You must report:

(a) Mass of CO_2 received.

(b) Mass of CO_2 injected into the subsurface.

(c) Mass of CO_2 produced.

(d) Mass of CO_2 emitted by surface leakage.

(e) Mass of CO_2 equipment leakage and vented CO_2 emissions from surface equipment located between the injection flow meter and the injection wellhead.

(f) Mass of CO_2 equipment leakage and vented CO_2 emissions from surface equipment located between the production flow meter and the production wellhead.

(g) Mass of CO_2 sequestered in subsurface geologic formations.

(h) Cumulative mass of CO_2 reported as sequestered in subsurface geologic formations in all years since the facility became subject to reporting requirements under this subpart.

§ 98.443 Calculating CO_2 geologic sequestration.

You must calculate the mass of CO_2 received using CO_2 received equations (Equations RR–1 to RR–3 of this section), unless you follow the procedures in § 98.444(a)(4). You must calculate CO_2 sequestered using injection equations (Equations RR–4 to RR–6 of this section), production/recycling equations (Equations RR–7 to RR–9 of this section), surface leakage equations (Equation RR–10 of this section), and sequestration equations (Equations RR–11 and RR–12 of this section). For your first year of reporting, you must calculate CO_2 sequestered starting from the date set forth in your approved MRV plan.

(a) You must calculate and report the annual mass of CO_2 received by pipeline using the procedures in paragraphs (a)(1) or (a)(2) of this section and the procedures in paragraph (a)(3) of this section, if applicable.

(1) For a mass flow meter, you must calculate the total annual mass of CO_2 in a CO_2 stream received in metric tons by multiplying the mass flow by the CO_2 concentration in the flow, according to Equation RR–1 of this section. You must collect these data quarterly. Mass flow and concentration data measurements must be made in accordance with § 98.444.

$$CO_{2T,r} = \sum_{p=1}^{4} (Q_{r,p} - S_{r,p}) * C_{CO_{2,p,r}} \qquad \text{(Eq. RR-1)}$$

Where:

$CO_{2T,r}$ = Net annual mass of CO_2 received through flow meter r (metric tons).

$Q_{r,p}$ = Quarterly mass flow through a receiving flow meter r in quarter p (metric tons).

$S_{r,p}$ = Quarterly mass flow through a receiving flow meter r that is redelivered to another facility without being injected into your well in quarter p (metric tons).

$C_{CO2,p,r}$ = Quarterly CO_2 concentration measurement in flow for flow meter r in quarter p (wt. percent CO_2, expressed as a decimal fraction).

p = Quarter of the year.

r = Receiving flow meter.

(2) For a volumetric flow meter, you must calculate the total annual mass of CO_2 in a CO_2 stream received in metric tons by multiplying the volumetric flow at standard conditions by the CO_2 concentration in the flow and the density of CO_2 at standard conditions, according to Equation RR–2 of this section. You must collect these data quarterly. Volumetric flow and concentration data measurements must be made in accordance with § 98.444.

$$CO_{2T,r} = \sum_{p=1}^{4} (Q_{r,p} - S_{r,p}) * D * C_{CO_{2,p,r}} \qquad \text{(Eq. RR-2)}$$

Where:

$CO_{2T,r}$ = Net annual mass of CO_2 received through flow meter r (metric tons).

$Q_{r,p}$ = Quarterly volumetric flow through a receiving flow meter r in quarter p at standard conditions (standard cubic meters).

$S_{r,p}$ = Quarterly volumetric flow through a receiving flow meter r that is redelivered to another facility without being injected into your well in quarter p (standard cubic meters).
D = Density of CO_2 at standard conditions (metric tons per standard cubic meter): 0.0018682.
$C_{CO2,p,r}$ = Quarterly CO_2 concentration measurement in flow for flow meter r in quarter p (vol. percent CO_2, expressed as a decimal fraction).
p = Quarter of the year.
r = Receiving flow meter.

(3) If you receive CO_2 through more than one flow meter, you must sum the mass of all CO_2 received in accordance with the procedure specified in Equation RR–3 of this section.

$$CO_2 = \sum_{r=1}^{R} CO_{2T,r} \quad \text{(Eq. RR-3)}$$

Where:
CO_2 = Total net annual mass of CO_2 received (metric tons).
$CO_{2T,r}$ = Net annual mass of CO_2 received (metric tons) as calculated in Equation RR–1 or RR–2 for flow meter r.
r = Receiving flow meter.

(b) You must calculate and report the annual mass of CO_2 received in containers using the procedures in paragraphs (b)(1) or (b)(2) of this section.

(1) If you are measuring the mass of contents in a container under the provisions of § 98.444(a)(2)(i), you must calculate the CO_2 received for injection in containers using Equation RR–1 of this section.

Where:
$CO_{2T,r}$ = Net annual mass of CO_2 received in containers r (metric tons).
$C_{CO2,p,r}$ = Quarterly CO_2 concentration measurement of contents in containers r in quarter p (wt. percent CO_2, expressed as a decimal fraction).
$Q_{r,p}$ = Quarterly mass of contents in containers r in quarter p (metric tons).
$S_{r,p}$ = Quarterly mass of contents in containers r redelivered to another facility without being injected into your well in quarter p (metric tons).
p = Quarter of the year.
r = Containers.

(2) If you are measuring the volume of contents in a container under the provisions of § 98.444(a)(2)(ii), you must calculate the CO_2 received for injection in containers using Equation RR–2 of this section.

Where:
$CO_{2T,r}$ = Net annual mass of CO_2 received in containers r (metric tons).
$C_{CO2,p,r}$ = Quarterly CO_2 concentration measurement of contents in containers r in quarter p (vol. percent CO_2, expressed as a decimal fraction).
$Q_{r,p}$ = Quarterly volume of contents in containers r in quarter p (standard cubic meters).
$S_{r,p}$ = Quarterly mass of contents in containers r redelivered to another facility without being injected into your well in quarter p (metric tons).
D = Density of the CO_2 received in containers at standard conditions (metric tons per standard cubic meter):0.0018682.
p = Quarter of the year.
r = Containers.

(c) You must report the annual mass of CO_2 injected in accordance with the procedures specified in paragraphs (c)(1) through (c)(3) of this section.

(1) If you use a mass flow meter to measure the flow of an injected CO_2 stream, you must calculate annually the total mass of CO_2 (in metric tons) in the CO_2 stream injected each year in metric tons by multiplying the mass flow by the CO_2 concentration in the flow, according to Equation RR–4 of this section. Mass flow and concentration data measurements must be made in accordance with § 98.444.

$$CO_{2,u} = \sum_{p=1}^{4} Q_{p,u} * C_{CO_{2,p,u}} \quad \text{(Eq. RR-4)}$$

Where:
$CO_{2,u}$ = Annual CO_2 mass injected (metric tons) as measured by flow meter u.
$Q_{p,u}$ = Quarterly mass flow rate measurement for flow meter u in quarter p (metric tons per quarter).
$C_{CO2,p,u}$ = Quarterly CO_2 concentration measurement in flow for flow meter u in quarter p (wt. percent CO_2, expressed as a decimal fraction).
p = Quarter of the year.
u = Flow meter.

(2) If you use a volumetric flow meter to measure the flow of an injected CO_2 stream, you must calculate annually the total mass of CO_2 (in metric tons) in the CO_2 stream injected each year in metric tons by multiplying the volumetric flow at standard conditions by the CO_2 concentration in the flow and the density of CO_2 at standard conditions, according to Equation RR–5 of this section. Volumetric flow and concentration data measurements must be made in accordance with § 98.444.

$$CO_{2,u} = \sum_{p=1}^{4} Q_{p,u} * D * C_{CO_{2,p,u}} \quad \text{(Eq. RR-5)}$$

Where:
$CO_{2,u}$ = Annual CO_2 mass injected (metric tons) as measured by flow meter u.
$Q_{p,u}$ = Quarterly volumetric flow rate measurement for flow meter u in quarter p at standard conditions (standard cubic meters per quarter).
D = Density of CO_2 at standard conditions (metric tons per standard cubic meter): 0.0018682.
$C_{CO2,p,u}$ = CO_2 concentration measurement in flow for flow meter u in quarter p (vol. percent CO_2, expressed as a decimal fraction).
p = Quarter of the year.
u = Flow meter.

(3) To aggregate injection data for all wells covered under this subpart, you must sum the mass of all CO_2 injected through all injection wells in accordance with the procedure specified in Equation RR–6 of this section.

$$CO_{2I} = \sum_{u=1}^{U} CO_{2,u} \quad \text{(Eq. RR-6)}$$

Where:
CO_{2I} = Total annual CO_2 mass injected (metric tons) through all injection wells.
$CO_{2,u}$ = Annual CO_2 mass injected (metric tons) as measured by flow meter u.
u = Flow meter.

(d) You must calculate the annual mass of CO_2 produced from oil or gas production wells or from other fluid wells for each separator that sends a stream of gas into a recycle or end use system in accordance with the procedures specified in paragraphs (d)(1) through (d)(3) of this section. You must account only for wells that produce the CO_2 that was injected into the well or wells covered by this source category.

(1) For each gas-liquid separator for which flow is measured using a mass flow meter, you must calculate annually the total mass of CO_2 produced from an oil or other fluid stream in metric tons that is separated from the fluid by multiplying the mass gas flow by the CO_2 concentration in the gas flow, according to Equation RR–7 of this section. You must collect these data quarterly. Mass flow and concentration data measurements must be made in accordance with § 98.444.

$$CO_{2,w} = \sum_{p=1}^{4} Q_{p,w} * C_{CO_{2,p,w}} \quad \text{(Eq. RR-7)}$$

Where:

$CO_{2,w}$ = Annual CO_2 mass produced (metric tons) through separator w.

$Q_{p,w}$ = Quarterly gas mass flow rate measurement for separator w in quarter p (metric tons).

$C_{CO2,p,w}$ = Quarterly CO_2 concentration measurement in flow for separator w in quarter p (wt. percent CO_2, expressed as a decimal fraction).

p = Quarter of the year.

w = Separator.

(2) For each gas-liquid separator for which flow is measured using a volumetric flow meter, you must calculate annually the total mass of CO_2 produced from an oil or other fluid stream in metric tons that is separated from the fluid by multiplying the volumetric gas flow at standard conditions by the CO_2 concentration in the gas flow and the density of CO_2 at standard conditions, according to Equation RR–8 of this section. You must collect these data quarterly. Volumetric flow and concentration data measurements must be made in accordance with § 98.444.

$$CO_{2,w} = \sum_{p=1}^{4} Q_{p,w} * D * C_{CO_{2,p,w}} \quad \text{(Eq. RR-8)}$$

Where:

$CO_{2,w}$ = Annual CO_2 mass produced (metric tons) through separator w.

$Q_{p,w}$ = Volumetric gas flow rate measurement for separator w in quarter p at standard conditions (standard cubic meters).

D = Density of CO_2 at standard conditions (metric tons per standard cubic meter): 0.0018682.

$C_{CO2,p,w}$ = CO_2 concentration measurement in flow for separator w in quarter p (vol. percent CO_2, expressed as a decimal fraction).

p = Quarter of the year.

w = Separator.

(3) To aggregate production data, you must sum the mass of all of the CO_2 separated at each gas-liquid separator in accordance with the procedure specified in Equation RR–9 of this section. You must assume that the total CO_2 measured at the separator(s) represents a percentage of the total CO_2 produced. In order to account for the percentage of CO_2 produced that is estimated to remain with the produced oil or other fluid, you must multiply the quarterly mass of CO_2 measured at the separator(s) by a percentage estimated using a methodology in your approved MRV plan.

$$CO_{2P} = (1+X) * \sum_{w=1}^{W} CO_{2,w} \quad \text{(Eq. RR-9)}$$

Where:

CO_{2P} = Total annual CO_2 mass produced (metric tons) through all separators in the reporting year.

$CO_{2,w}$ = Annual CO_2 mass produced (metric tons) through separator w in the reporting year.

X = Entrained CO_2 in produced oil or other fluid divided by the CO_2 separated through all separators in the reporting year (weight percent CO_2, expressed as a decimal fraction).

w = Separator.

(e) You must report the annual mass of CO_2 that is emitted by surface leakage in accordance with your approved MRV plan. You must calculate the total annual mass of CO_2 emitted from all leakage pathways in accordance with the procedure specified in Equation RR–10 of this section.

$$CO_{2E} = \sum_{x=1}^{X} CO_{2,x} \quad \text{(Eq. RR-10)}$$

Where:

CO_{2E} = Total annual CO_2 mass emitted by surface leakage (metric tons) in the reporting year.

$CO_{2,x}$ = Annual CO_2 mass emitted (metric tons) at leakage pathway x in the reporting year.

x = Leakage pathway.

(f) You must report the annual mass of CO_2 that is sequestered in subsurface geologic formations in the reporting year in accordance with the procedures specified in paragraphs (f)(1) and (f)(2) of this section.

(1) If you are actively producing oil or natural gas or if you are producing any other fluids, you must calculate the annual mass of CO_2 that is sequestered in the underground subsurface formation in the reporting year in accordance with the procedure specified in Equation RR–11 of this section.

$$CO_2 = CO_{2I} - CO_{2P} - CO_{2E} - CO_{2FI} - CO_{2FP} \quad \text{(Eq. RR-11)}$$

Where:

CO_2 = Total annual CO_2 mass sequestered in subsurface geologic formations (metric tons) at the facility in the reporting year.

CO_{2I} = Total annual CO_2 mass injected (metric tons) in the well or group of wells covered by this source category in the reporting year.

CO_{2P} = Total annual CO_2 mass produced (metric tons) in the reporting year.

CO_{2E} = Total annual CO_2 mass emitted (metric tons) by surface leakage in the reporting year.

CO_{2FI} = Total annual CO_2 mass emitted (metric tons) as equipment leakage or vented emissions from equipment located on the surface between the flow meter used to measure injection quantity and the injection wellhead, for which a calculation procedure is provided in subpart W of this part.

CO_{2FP} = Total annual CO_2 mass emitted (metric tons) as equipment leakage or vented emissions from equipment located on the surface between the production wellhead and the flow meter used to measure production quantity, for which a calculation procedure is provided in subpart W of this part.

(2) If you are not actively producing oil or natural gas or any other fluids, you must calculate the annual mass of

CO_2 that is sequestered in subsurface geologic formations in the reporting year in accordance with the procedures specified in Equation RR–12 of this section.

$$CO_2 = CO_{2I} - CO_{2E} - CO_{2FI} \qquad \text{(Eq. RR-12)}$$

Where:

CO_2 = Total annual CO_2 mass sequestered in subsurface geologic formations (metric tons) at the facility in the reporting year.

CO_{2I} = Total annual CO_2 mass injected (metric tons) in the well or group of wells covered by this source category in the reporting year.

CO_{2E} = Total annual CO_2 mass emitted (metric tons) by surface leakage in the reporting year.

CO_{2FI} = Total annual CO_2 mass emitted (metric tons) as equipment leakage or vented emissions from equipment located on the surface between the flow meter used to measure injection quantity and the injection wellhead.

§ 98.444 Monitoring and QA/QC requirements.

(a) *CO_2 received.*

(1) Except as provided in paragraph (a)(4) of this section, you must determine the quarterly flow rate of CO_2 received by pipeline by following the most appropriate of the following procedures:

(i) You may measure flow rate at the receiving custody transfer meter prior to any subsequent processing operations at the facility and collect the flow rate quarterly.

(ii) If you took ownership of the CO_2 in a commercial transaction, you may use the quarterly flow rate data from the sales contract if it is a one-time transaction or from invoices or manifests if it is an ongoing commercial transaction with discrete shipments.

(iii) If you inject CO_2 received from a production process unit that is part of your facility, you may use the quarterly CO_2 flow rate that was measured at the equivalent of a custody transfer meter following procedures provided in subpart PP of this part. To be the equivalent of a custody transfer meter, a meter must measure the flow of CO_2 being transported to an injection well to the same degree of accuracy as a meter used for commercial transactions.

(2) Except as provided in paragraph (a)(4) of this section, you must determine the quarterly mass or volume of contents in all containers if you receive CO_2 in containers by following the most appropriate of the following procedures:

(i) You may measure the mass of contents of containers summed quarterly using weigh bills, scales, or load cells.

(ii) You may determine the volume of the contents of containers summed quarterly.

(iii) If you took ownership of the CO_2 in a commercial transaction, you may use the quarterly mass or volume of contents from the sales contract if it is a one-time transaction or from invoices or manifests if it is an ongoing commercial transaction with discrete shipments.

(3) Except as provided in paragraph (a)(4) of this section, you must determine a quarterly concentration of the CO_2 received that is representative of all CO_2 received in that quarter by following the most appropriate of the following procedures:

(i) You may sample the CO_2 stream at least once per quarter at the point of receipt and measure its CO_2 concentration.

(ii) If you took ownership of the CO_2 in a commercial transaction for which the sales contract was contingent on CO_2 concentration, and if the supplier of the CO_2 sampled the CO_2 stream in a quarter and measured its concentration per the sales contract terms, you may use the CO_2 concentration data from the sales contract for that quarter.

(iii) If you inject CO_2 from a production process unit that is part of your facility, you may report the quarterly CO_2 concentration of the CO_2 stream supplied that was measured following the procedures provided in subpart PP of this part.

(4) If the CO_2 you receive is wholly injected and is not mixed with any other supply of CO_2, you may report the annual mass of CO_2 injected that you determined following the requirements under paragraph (b) of this section as the total annual mass of CO_2 received instead of using Equation RR–1 or RR–2 of this subpart to calculate CO_2 received.

(5) You must assume that the CO_2 you receive meets the definition of a CO_2 stream unless you can trace it through written records to a source other than a CO_2 stream.

(b) *CO_2 injected.*

(1) You must select a point or points of measurement at which the CO_2 stream(s) is representative of the CO_2 stream(s) being injected. You may use as the point or points of measurement the location(s) of the flow meter(s) used to comply with the flow monitoring and reporting provisions in your Underground Injection Control permit.

(2) You must measure flow rate of CO_2 injected with a flow meter and collect the flow rate quarterly.

(3) You must sample the injected CO_2 stream at least once per quarter immediately upstream or downstream of the flow meter used to measure flow rate of that CO_2 stream and measure the CO_2 concentration of the sample.

(c) *CO_2 produced.*

(1) The point of measurement for the quantity of CO_2 produced from oil or other fluid production wells is a flow meter directly downstream of each separator that sends a stream of gas into a recycle or end use system.

(2) You must sample the produced gas stream at least once per quarter immediately upstream or downstream of the flow meter used to measure flow rate of that gas stream and measure the CO_2 concentration of the sample.

(3) You must measure flow rate of gas produced with a flow meter and collect the flow rate quarterly.

(d) *CO_2 equipment leakage and vented CO_2.* If you have equipment located on the surface between the flow meter used to measure injection quantity and the injection wellhead or between the flow meter used to measure production quantity and the production wellhead, you must follow the monitoring and QA/QC requirements specified in subpart W of this part for the equipment.

(e) *Measurement devices.*

(1) All flow meters must be operated continuously except as necessary for maintenance and calibration.

(2) You must calibrate all flow meters used to measure quantities reported in § 98.446 according to the calibration and accuracy requirements in § 98.3(i).

(3) You must operate all measurement devices according to one of the following. You may use an appropriate standard method published by a consensus-based standards organization if such a method exists or an industry standard practice. Consensus-based standards organizations include, but are not limited to, the following: ASTM International, the American National Standards Institute (ANSI), the American Gas Association (AGA), the American Society of Mechanical Engineers (ASME), the American Petroleum Institute (API), and the North

American Energy Standards Board (NAESB).

(4) You must ensure that any flow meter calibrations performed are National Institute of Standards and Technology (NIST) traceable.

(f) *General.*

(1) If you measure the concentration of any CO_2 quantity for reporting, you must measure according to one of the following. You may use an appropriate standard method published by a consensus-based standards organization if such a method exists or an industry standard practice.

(2) You must convert all measured volumes of CO_2 to the following standard industry temperature and pressure conditions for use in Equations RR–2, RR–5 and RR–8 of this subpart: Standard cubic meters at a temperature of 60 degrees Fahrenheit and at an absolute pressure of 1 atmosphere.

(3) For 2011, you may follow the provisions of § 98.3(d)(1) through (2) for best available monitoring methods only for parameters required by paragraphs (a) and (b) of § 98.443 rather than follow the monitoring requirements of paragraph (a) of this section. For purposes of this subpart, any reference to the year 2010 in § 98.3(d)(1) through (2) shall mean 2011.

§ 98.445 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG quantities calculations is required. Whenever the monitoring procedures cannot be followed, you must use the following missing data procedures:

(a) A quarterly flow rate of CO_2 received that is missing must be estimated as follows:

(1) Another calculation methodology listed in § 98.444(a)(1) must be used if possible.

(2) If another method listed in § 98.444(a)(1) cannot be used, a quarterly flow rate value that is missing must be estimated using a representative flow rate value from the nearest previous time period.

(b) A quarterly mass or volume of contents in containers received that is missing must be estimated as follows:

(1) Another calculation methodology listed in § 98.444(a)(2) must be used if possible.

(2) If another method listed in § 98.444(a)(2) cannot be used, a quarterly mass or volume value that is missing must be estimated using a representative mass or volume value from the nearest previous time period.

(c) A quarterly CO_2 concentration of a CO_2 stream received that is missing must be estimated as follows:

(1) Another calculation methodology listed in § 98.444(a)(3) must be used if possible.

(2) If another method listed in § 98.444(a)(3) cannot be used, a quarterly concentration value that is missing must be estimated using a representative concentration value from the nearest previous time period.

(d) A quarterly quantity of CO_2 injected that is missing must be estimated using a representative quantity of CO_2 injected from the nearest previous period of time at a similar injection pressure.

(e) For any values associated with CO_2 equipment leakage or vented CO_2 emissions from surface equipment at the facility that are reported in this subpart, missing data estimation procedures should be followed in accordance with those specified in subpart W of this part.

(f) The quarterly quantity of CO_2 produced from subsurface geologic formations that is missing must be estimated using a representative quantity of CO_2 produced from the nearest previous period of time.

(g) You must estimate the mass of CO_2 emitted by surface leakage that is missing as required by your approved MRV plan.

(h) You must estimate other missing data as required by your approved MRV plan.

§ 98.446 Data reporting requirements.

In addition to the information required by § 98.3(c), report the information listed in this section.

(a) If you receive CO_2 by pipeline, report the following for each receiving flow meter:

(1) The total net mass of CO_2 received (metric tons) annually.

(2) If a volumetric flow meter is used to receive CO_2 report the following unless you reported yes to paragraph (a)(5) of this section:

(i) The volumetric flow through a receiving flow meter at standard conditions (in standard cubic meters) in each quarter.

(ii) The volumetric flow through a receiving flow meter that is redelivered to another facility without being injected into your well (in standard cubic meters) in each quarter.

(iii) The CO_2 concentration in the flow (volume percent CO_2 expressed as a decimal fraction) in each quarter.

(3) If a mass flow meter is used to receive CO_2 report the following unless you reported yes to paragraph (a)(5) of this section:

(i) The mass flow through a receiving flow meter (in metric tons) in each quarter.

(ii) The mass flow through a receiving flow meter that is redelivered to another facility without being injected into your well (in metric tons) in each quarter.

(iii) The CO_2 concentration in the flow (weight percent CO_2 expressed as a decimal fraction) in each quarter.

(4) If the CO_2 received is wholly injected and not mixed with any other supply of CO_2, report whether you followed the procedures in § 98.444(a)(4).

(5) The standard or method used to calculate each value in paragraphs (a)(2) through (a)(3) of this section.

(6) The number of times in the reporting year for which substitute data procedures were used to calculate values reported in paragraphs (a)(2) through (a)(3) of this section.

(7) Whether the flow meter is mass or volumetric.

(8) A numerical identifier for the flow meter.

(b) If you receive CO_2 in containers, report:

(1) The mass (in metric tons) or volume at standard conditions (in standard cubic meters) of contents in containers received in each quarter.

(2) The concentration of CO_2 of contents in containers (volume or wt. percent CO_2 expressed as a decimal fraction) in each quarter.

(3) The mass (in metric tons) or volume (in standard cubic meters) of contents in containers that is redelivered to another facility without being injected into your well in each quarter.

(4) The net mass of CO_2 received (in metric tons) annually.

(5) The standard or method used to calculate each value in paragraphs (b)(1) and (b)(2) of this section.

(6) The number of times in the reporting year for which substitute data procedures were used to calculate values reported in paragraphs (b)(1) and (b)(2) of this section.

(c) If you use more than one receiving flow meter, report the total net mass of CO_2 received (metric tons) through all flow meters annually.

(d) The source of the CO_2 received according to the following categories:

(1) CO_2 production wells.

(2) Electric generating unit.

(3) Ethanol plant.

(4) Pulp and paper mill.

(5) Natural gas processing.

(6) Gasification operations.

(7) Other anthropogenic source.

(8) Discontinued enhanced oil and gas recovery project.

(9) Unknown.

(e) Whether you began data collection according to your approved MRV plan in a reporting year prior to this annual report submission.

(f) If you report yes in paragraph (e) of this section, report the following. If

this is your first year of reporting, report the following starting on the date you began data collection according to your approved MRV plan.

(1) For each injection flow meter (mass or volumetric), report:

(i) The mass of CO_2 injected (metric tons) annually.

(ii) The CO_2 concentration in flow (volume or weight percent CO_2 expressed as a decimal fraction) in each quarter.

(iii) If a volumetric flow meter is used, the volumetric flow rate at standard conditions (in standard cubic meters) in each quarter.

(iv) If a mass flow meter is used, the mass flow rate (in metric tons) in each quarter.

(v) A numerical identifier for the flow meter.

(vi) Whether the flow meter is mass or volumetric.

(vii) The standard used to calculate each value in paragraphs (f)(1)(i) through (f)(1)(iv) of this section.

(viii) The number of times in the reporting year for which substitute data procedures were used to calculate values reported in paragraphs (f)(1)(ii) through (f)(1)(iv) of this section.

(ix) The location of the flow meter.

(2) The total CO_2 injected (metric tons) in the reporting year as calculated in Equation RR–6 of this subpart.

(3) For CO_2 equipment leakage and vented CO_2 emissions, report the following:

(i) The mass of CO_2 emitted (in metric tons) annually as equipment leakage or vented emissions from equipment located on the surface between the flow meter used to measure injection quantity and the injection wellhead.

(ii) The mass of CO_2 emitted (in metric tons) annually as equipment leakage or vented emissions from equipment located on the surface between the production wellhead and the flow meter used to measure production quantity.

(4) For each separator flow meter (mass or volumetric), report:

(i) CO_2 mass produced (metric tons) annually.

(ii) CO_2 concentration in flow (volume or weight percent CO_2 expressed as a decimal fraction) in each quarter.

(iii) If a volumetric flow meter is used, volumetric flow rate at standard conditions (standard cubic meters) in each quarter.

(iv) If a mass flow meter, mass flow rate (metric tons) in each quarter.

(v) A numerical identifier for the flow meter.

(vi) Whether the flow meter is mass or volumetric.

(vii) The standard used to calculate each value in paragraphs (f)(4)(ii) through (f)(4)(iv) of this section.

(viii) The number of times in the reporting year for which substitute data procedures were used to calculate values reported in paragraphs (f)(4)(ii) through (f)(4)(iv) of this section.

(5) The entrained CO_2 in produced oil or other fluid divided by the CO_2 separated through all separators in the reporting year (weight percent CO_2 expressed as a decimal fraction) used as the value for X in Equation RR–9 of this subpart and as determined according to your EPA-approved MRV plan.

(6) Annual CO_2 produced in the reporting year as calculated in Equation RR–9 of this subpart.

(7) For each leakage pathway through which CO_2 emissions occurred, report:

(i) A numerical identifier for the leakage pathway.

(ii) The CO_2 (metric tons) emitted through that pathway in the reporting year.

(8) Annual CO_2 mass emitted (metric tons) by surface leakage in the reporting year as calculated by Equation RR–10 of this subpart.

(9) Annual CO_2 (metric tons) sequestered in subsurface geologic formations in the reporting year as calculated by Equation RR–11 or RR–12 of this subpart.

(10) Cumulative mass of CO_2 (metric tons) reported as sequestered in subsurface geologic formations in all years since the well or group of wells became subject to reporting requirements under this subpart.

(11) Date that the most recent MRV plan was approved by EPA and the MRV plan approval number that was issued by EPA.

(12) An annual monitoring report that contains the following components:

(i) A narrative history of the monitoring efforts conducted over the previous calendar year, including a listing of all monitoring equipment that was operated, its period of operation, and any relevant tests or surveys that were conducted.

(ii) A description of any changes to the monitoring program that you concluded were not material changes warranting submission of a revised MRV plan under § 98.448(d).

(iii) A narrative history of any monitoring anomalies that were detected in the previous calendar year and how they were investigated and resolved.

(iv) A description of any surface leakages of CO_2, including a discussion of all methodologies and technologies involved in detecting and quantifying the surface leakages and any assumptions and uncertainties involved in calculating the amount of CO_2 emitted.

(13) If a well is permitted under the Underground Injection Control program, for each injection well, report:

(i) The well identification number used for the Underground Injection Control permit.

(ii) The Underground Injection Control permit class.

(14) If an offshore well is not subject to the Safe Drinking Water Act, for each injection well, report any well identification number and any identification number used for the legal instrument authorizing geologic sequestration.

§ 98.447 Records that must be retained.

(a) You must follow the record retention requirements specified by § 98.3(g). In addition to the records required by § 98.3(g), you must retain the records specified in paragraphs (a)(1) through (7) of this section, as applicable. You must retain all required records for at least 3 years.

(1) Quarterly records of CO_2 received, including mass flow rate of contents of containers (mass or volumetric) at standard conditions and operating conditions, operating temperature and pressure, and concentration of these streams.

(2) Quarterly records of produced CO_2, including mass flow or volumetric flow at standard conditions and operating conditions, operating temperature and pressure, and concentration of these streams.

(3) Quarterly records of injected CO_2 including mass flow or volumetric flow at standard conditions and operating conditions, operating temperature and pressure, and concentration of these streams.

(4) Annual records of information used to calculate the CO_2 emitted by surface leakage from leakage pathways.

(5) Annual records of information used to calculate the CO_2 emitted as equipment leakage or vented emissions from equipment located on the surface between the flow meter used to measure injection quantity and the injection wellhead.

(6) Annual records of information used to calculate the CO_2 emitted as equipment leakage or vented emissions from equipment located on the surface between the production wellhead and the flow meter used to measure production quantity.

(7) Any other records as specified for retention in your EPA-approved MRV plan.

(b) You must complete your monitoring plans, as described in

§ 98.3(g)(5), by April 1 of the year you begin collecting data.

§ 98.448 Geologic sequestration monitoring, reporting, and verification (MRV) plan.

(a) *Contents of MRV plan.* You must develop and submit to the Administrator a proposed MRV plan for monitoring, reporting, and verification of geologic sequestration at your facility. Your proposed MRV plan must contain the following components:

(1) Delineation of the maximum monitoring area and the active monitoring areas. The first period for your active monitoring area will begin from the date determined in your MRV plan through the date at which the plan calls for the first expansion of the monitoring area. The length of each monitoring period can be any time interval chosen by you that is greater than 1 year.

(2) Identification of potential surface leakage pathways for CO_2 in the maximum monitoring area and the likelihood, magnitude, and timing, of surface leakage of CO_2 through these pathways.

(3) A strategy for detecting and quantifying any surface leakage of CO_2.

(4) A strategy for establishing the expected baselines for monitoring CO_2 surface leakage.

(5) A summary of the considerations you intend to use to calculate site-specific variables for the mass balance equation. This includes, but is not limited to, considerations for calculating equipment leakage and vented emissions between the injection flow meter and injection well and/or the production flow meter and production well, and considerations for calculating CO_2 in produced fluids.

(6) If a well is permitted under the Underground Injection Control program, for each injection well, report the well identification number used for the Underground Injection Control permit and the Underground Injection Control permit class. If the well is not yet permitted, and you have applied for an Underground Injection Control permit, report the well identification numbers in the permit application. If an offshore well is not subject to the Safe Drinking Water Act, for each injection well, report any well identification number and any identification number used for the legal instrument authorizing geologic sequestration. If you are submitting your Underground Injection Control permit application as part of your proposed MRV plan, you must notify EPA when the permit has been approved. If you are an offshore facility not subject to the Safe Drinking Water Act, and are submitting your application for the legal instrument authorizing geologic sequestration as part of your proposed MRV plan, you must notify EPA when the legal instrument authorizing geologic sequestration has been approved.

(7) Proposed date to begin collecting data for calculating total amount sequestered according to equation RR–11 or RR–12 of this subpart. This date must be after expected baselines as required by paragraph (a)(4) of this section are established and the leakage detection and quantification strategy as required by paragraph (a)(3) of this section is implemented in the initial AMA.

(b) *Timing.* You must submit a proposed MRV plan to EPA according to the following schedule:

(1) You must submit a proposed MRV plan to EPA by June 30, 2011 if you were issued a final Underground Injection Control permit authorizing the injection of CO_2 into the subsurface on or before December 31, 2010. You will be allowed to request one extension of up to an additional 180 days in which to submit your proposed MRV plan.

(2) You must submit a proposed MRV plan to EPA within 180 days of receiving a final Underground Injection Control permit authorizing the injection of CO_2 into the subsurface. If your facility is an offshore facility not subject to the Safe Drinking Water Act, you must submit a proposed MRV plan to EPA within 180 days of receiving authorization to begin geologic sequestration of CO_2. You will be allowed to request one extension of the submittal date of up to an additional 180 days.

(3) If you are injecting a CO_2 stream in subsurface geologic formations to enhance the recovery of oil or natural gas and you are not permitted as Class VI under the Underground Injection Control program, you may opt to submit an MRV plan at any time.

(4) If EPA determines that your proposed MRV plan is incomplete, you must submit an updated MRV plan within 45 days of EPA notification, unless otherwise specified by EPA.

(c) *Final MRV plan.* The Administrator will issue a final MRV plan within a reasonable period of time. The Administrator's final MRV plan is subject to the provisions of part 78 of this chapter. Once the MRV plan is final and no longer subject to administrative appeal under part 78 of this chapter, you must implement the plan starting on the day after the day on which the plan becomes final and is no longer subject to such appeal.

(d) *MRV plan revisions.* You must revise and submit the MRV plan within 180 days to the Administrator for approval if any of the following in paragraphs (d)(1) through (d)(4) of this section applies. You must include the reason(s) for the revisions in your submittal.

(1) A material change was made to monitoring and/or operational parameters that was not anticipated in the original MRV plan. Examples of material changes include but are not limited to: Large changes in the volume of CO_2 injected; the construction of new injection wells not identified in the MRV plan; failures of the monitoring system including monitoring system sensitivity, performance, location, or baseline; changes to surface land use that affects baseline or operational conditions; observed plume location that differs significantly from the predicted plume area used for developing the MRV plan; a change in the maximum monitoring area or active monitoring area; or a change in monitoring technology that would result in coverage or detection capability different from the MRV plan.

(2) A change in the permit class of your Underground Injection Control permit.

(3) If you are notified by EPA of substantive errors in your MRV plan or monitoring report.

(4) You choose to revise your MRV plan for any other reason in any reporting year.

(e) *Final MRV plan.* The requirements of paragraph (c) of this section apply to any submission of a revised MRV plan. You must continue reporting under your currently approved plan while awaiting approval of a revised MRV plan.

(f) *Format.* Each proposed MRV plan or revision and each annual report must be submitted electronically in a format specified by the Administrator.

(g) *Certificate of representation.* You must submit a certificate of representation according to the provisions in § 98.4 at least 60 days before submission of your MRV plan, your research and development exemption request, your MRV plan submission extension request, or your initial annual report under this part, whichever is earlier.

§ 98.449 Definitions.

Except as provided below, all terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

Active monitoring area is the area that will be monitored over a specific time interval from the first year of the period (n) to the last year in the period (t). The

boundary of the active monitoring area is established by superimposing two areas:

(1) The area projected to contain the free phase CO_2 plume at the end of year t, plus an all around buffer zone of one-half mile or greater if known leakage pathways extend laterally more than one-half mile.

(2) The area projected to contain the free phase CO_2 plume at the end of year t+5.

CO_2 received the CO_2 stream that you receive to be injected for the first time into a well on your facility that is covered by this subpart. CO_2 received includes, but is not limited to, a CO_2 stream from a production process unit inside your facility and a CO_2 stream that was injected into a well on another facility, removed from a discontinued enhanced oil or natural gas or other production well, and transferred to your facility.

Equipment leak means those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

Expected baseline is the anticipated value of a monitored parameter that is compared to the measured monitored parameter.

Maximum monitoring area means the area that must be monitored under this regulation and is defined as equal to or greater than the area expected to contain the free phase CO_2 plume until the CO_2 plume has stabilized plus an all-around buffer zone of at least one-half mile.

Research and development project means a project for the purpose of investigating practices, monitoring techniques, or injection verification, or engaging in other applied research, that will enable safe and effective long-term containment of a CO_2 stream in subsurface geologic formations, including research and short duration CO_2 injection tests conducted as a precursor to long-term storage.

Separator means a vessel in which streams of multiple phases are gravity separated into individual streams of single phase.

Surface leakage means the movement of the injected CO_2 stream from the injection zone to the surface, and into the atmosphere, indoor air, oceans, or surface water.

Underground Injection Control permit means a permit issued under the authority of Part C of the Safe Drinking Water Act at 42 U.S.C. 300h *et seq.*

Underground Injection Control program means the program responsible for regulating the construction, operation, permitting, and closure of injection wells that place fluids underground for storage or disposal for purposes of protecting underground sources of drinking water from endangerment pursuant to Part C of the Safe Drinking Water Act at 42 U.S.C. 300h *et seq.*

Vented emissions means intentional or designed releases of CH_4 or CO_2 containing natural gas or hydrocarbon gas (not including stationary combustion flue gas), including process designed flow to the atmosphere through seals or vent pipes, equipment blowdown for maintenance, and direct venting of gas used to power equipment (such as pneumatic devices).

■ 10. Part 98 is amended by adding subpart UU to read as follows:

Subpart UU—Injection of Carbon Dioxide

Sec.

98.470 Definition of the source category.
98.471 Reporting threshold.
98.472 GHGs to report.
98.473 Calculating CO_2 received.
98.474 Monitoring and QA/QC requirements.
98.475 Procedures for estimating missing data.
98.476 Data reporting requirements.
98.477 Records that must be retained.
98.478 Definitions.

Subpart UU—Injection of Carbon Dioxide

§ 98.470 Definition of the source category.

(a) The injection of carbon dioxide (CO_2) source category comprises any well or group of wells that inject a CO_2 stream into the subsurface.

(b) If you report under subpart RR of this part for a well or group of wells, you are not required to report under this subpart for that well or group of wells.

(c) A facility that is subject to this part only because it is subject to subpart UU of this part is not required to report emissions under subpart C of this part or any other subpart listed in § 98.2(a)(1) or (a)(2).

§ 98.471 Reporting threshold.

(a) You must report under this subpart if your facility injects any amount of CO_2 into the subsurface.

(b) For purposes of this subpart, any reference to CO_2 emissions in § 98.2(i) shall mean CO_2 received.

§ 98.472 GHGs to report.

You must report the mass of CO_2 received.

§ 98.473 Calculating CO_2 received.

(a) You must calculate and report the annual mass of CO_2 received by pipeline using the procedures in paragraphs (a)(1) or (a)(2) of this section and the procedures in paragraph (a)(3) of this section, if applicable.

(1) For a mass flow meter, you must calculate the total annual mass of CO_2 in a CO_2 stream received in metric tons by multiplying the mass flow by the CO_2 concentration in the flow, according to Equation UU–1 of this section. You must collect these data quarterly. Mass flow and concentration data measurements must be made in accordance with § 98.474.

$$CO_{2T,r} = \sum_{p=1}^{4} (Q_{r,p} - S_{r,p}) * C_{CO_{2,p,r}} \qquad \text{(Eq. UU-1)}$$

Where:

$CO_{2T,r}$ = Net annual mass of CO_2 received through flow meter r (metric tons).

$Q_{r,p}$ = Quarterly mass flow through a receiving flow meter r in quarter p (metric tons).

$S_{r,p}$ = Quarterly mass flow through a receiving flow meter r that is redelivered to another facility without being injected into your well in quarter p (metric tons).

$C_{CO2,p,r}$ = Quarterly CO_2 concentration measurement in flow for flow meter r in quarter p (wt. percent CO_2, expressed as a decimal fraction).

p = Quarter of the year.

r = Receiving flow meter.

(2) For a volumetric flow meter, you must calculate the total annual mass of CO_2 in a CO_2 stream received in metric tons by multiplying the volumetric flow at standard conditions by the CO_2 concentration in the flow and the density of CO_2 at standard conditions, according to Equation UU–2 of this section. You must collect these data quarterly. Volumetric flow and concentration data measurements must be made in accordance with § 98.474.

$$CO_{2T,r} = \sum_{p=1}^{4}(Q_{r,p} - S_{r,p}) * D * C_{CO_{2,p,r}} \quad \text{(Eq. UU-2)}$$

Where:

$CO_{2T,r}$ = Net annual mass of CO_2 received through flow meter r (metric tons).

$Q_{r,p}$ = Quarterly volumetric flow through a receiving flow meter r in quarter p at standard conditions (standard cubic meters).

$S_{r,p}$ = Quarterly volumetric flow through a receiving flow meter r that is redelivered to another facility without being injected into your well in quarter p (standard cubic meters).

D = Density of CO_2 at standard conditions (metric tons per standard cubic meter): 0.0018704.

$C_{CO2,p,r}$ = Quarterly CO_2 concentration measurement in flow for flow meter r in quarter p (vol. percent CO_2, expressed as a decimal fraction).

p = Quarter of the year.

r = Receiving flow meter.

(3) If you receive CO_2 through more than one flow meter, you must sum the mass of all CO_2 received in accordance with the procedure specified in Equation UU–3 of this section.

$$CO_2 = \sum_{r=1}^{R} CO_{2T,r} \quad \text{(Eq. UU-3)}$$

Where:

CO_2 = Total net annual mass of CO_2 received (metric tons).

$CO_{2T,r}$ = Net annual mass of CO_2 received (metric tons) as calculated in Equation UU–1 or UU–2 for flow meter r.

r = Receiving flow meter.

(b) You must calculate and report the annual mass of CO_2 received in containers using the procedures specified in either paragraph (b)(1) or (b)(2) of this section.

(1) If you are measuring the mass of contents in a container under the provisions of § 98.474(a)(2)(i), you must calculate the CO_2 received in containers using Equation UU–1 of this section.

Where:

$CO_{2T,r}$ = Annual mass of CO_2 received in containers r (metric tons).

$C_{CO2,p,r}$ = Quarterly CO_2 concentration measurement of contents in containers r in quarter p (wt. percent CO_2, expressed as a decimal fraction).

$Q_{r,p}$ = Quarterly mass of contents in containers r in quarter p (metric tons).

$S_{r,p}$ = Quarterly mass of contents in containers r that is redelivered to another facility without being injected into your well in quarter p (standard cubic meters).

p = Quarter of the year.

r = Containers.

(2) If you are measuring the volume of contents in a container under the provisions of § 98.474(a)(2)(ii), you must calculate the CO_2 received in containers using Equation UU–2 of this section.

Where:

$CO_{2T,r}$ = Annual mass of CO_2 received in containers r (metric tons).

$C_{CO2,p,r}$ = Quarterly CO_2 concentration measurement of contents in containers r in quarter p (vol. percent CO_2, expressed as a decimal fraction).

$S_{r,p}$ = Quarterly mass of contents in containers r that is redelivered to another facility without being injected into your well in quarter p (standard cubic meters).

$Q_{r,p}$ = Quarterly volume of contents in containers r in quarter p (standard cubic meters).

D = Density of the CO_2 received in containers at standard conditions (metric tons per standard cubic meter): 0.0018682.

p = Quarter of the year.

r = Containers.

§ 98.474 Monitoring and QA/QC requirements.

(a) *CO_2 received.*

(1) You must determine the quarterly flow rate of CO_2 received by pipeline by following the most appropriate of the following procedures:

(i) You may measure flow rate at the receiving custody transfer meter prior to any subsequent processing operations at the facility and collect the flow rate quarterly.

(ii) If you took ownership of the CO_2 in a commercial transaction, you may use the quarterly flow rate data from the sales contract if it is a one-time transaction or from invoices or manifests if it is an ongoing commercial transaction with discrete shipments.

(iii) If you inject CO_2 from a production process unit that is part of your facility, you may use the quarterly CO_2 flow rate that was measured at the equivalent of a custody transfer meter following procedures provided in subpart PP of this part. To be the equivalent of a custody transfer meter, a meter must measure the flow of CO_2 being transported to an injection well to the same degree of accuracy as a meter used for commercial transactions.

(2) You must determine the quarterly mass or volume of contents in all containers if you receive CO_2 in containers by the most appropriate of the following procedures:

(i) You may measure the mass of contents of containers summed quarterly using weigh bills, scales, or load cells.

(ii) You may determine the volume of the contents of containers summed quarterly.

(iii) If you took ownership of the CO_2 in a commercial transaction, you may use the quarterly mass or volume of contents from the sales contract if it is a one-time transaction or from invoices or manifests if it is an ongoing commercial transaction with discrete shipments.

(3) You must determine a quarterly concentration of the CO_2 received that is representative of all CO_2 received in that quarter by following the most appropriate of the following procedures:

(i) You may sample the CO_2 stream at least once per quarter at the point of receipt and measure its CO_2 concentration.

(ii) If you took ownership of the CO_2 in a commercial transaction for which the sales contract was contingent on CO_2 concentration, and if the supplier of the CO_2 sampled the CO_2 stream in a quarter and measured its concentration per the sales contract terms, you may use the CO_2 concentration data from the sales contract for that quarter.

(iii) If you inject CO_2 from a production process unit that is part of your facility, you may report the quarterly CO_2 concentration of the CO_2 stream supplied that was measured following procedures provided in subpart PP of this part as the quarterly CO_2 concentration of the CO_2 stream received.

(4) You must assume that the CO_2 you receive meets the definition of a CO_2 stream unless you can trace it through written records to a source other than a CO_2 stream.

(b) *Measurement devices.*

(1) All flow meters must be operated continuously except as necessary for maintenance and calibration.

(2) You must calibrate all flow meters used to measure quantities reported in § 98.476 according to the calibration and accuracy requirements in § 98.3(i).

(3) You must operate all measurement devices according to one of the following. You may use an appropriate standard method published by a consensus-based standards organization if such a method exists or an industry standard practice. Consensus-based standards organizations include, but are not limited to, the following: ASTM International, the American National Standards Institute (ANSI), the American Gas Association (AGA), the American Society of Mechanical Engineers (ASME), the American Petroleum Institute (API), and the North

American Energy Standards Board (NAESB).

(4) You must ensure that any flow meter calibrations performed are National Institute of Standards and Technology (NIST) traceable.

(c) *General.*

(1) If you measure the concentration of any CO_2 quantity for reporting, you must measure according to one of the following. You may use an appropriate standard method published by a consensus-based standards organization if such a method exists or an industry standard practice.

(2) You must convert all measured volumes of CO_2 to the following standard industry temperature and pressure conditions for use in Equations UU–2 of this subpart: standard cubic meters at a temperature of 60 degrees Fahrenheit and at an absolute pressure of 1 atmosphere.

(3) For 2011, you may follow the provisions of § 98.3(d)(1) through (2) for best available monitoring methods rather than follow the monitoring requirements of this section. For purposes of this subpart, any reference to the year 2010 in § 98.3(d)(1) through (2) shall mean 2011.

§ 98.475 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG quantities calculations is required.

(a) Whenever the monitoring procedures for all facilities that used flow meters covered under this subpart cannot be followed to measure flow, the following missing data procedures must be followed:

(1) Another calculation methodology listed in § 98.474(a)(1) must be used if possible.

(2) If another method listed in § 98.474(a)(1) cannot be used, a quarterly flow rate value that is missing must be estimated using a representative flow rate value from the nearest previous time period.

(b) Whenever the monitoring procedures of this subpart cannot be followed to measure quarterly quantity of CO_2 received in containers, the most appropriate of the following missing data procedures must be followed:

(1) Another calculation methodology listed in § 98.474(a)(2) must be used if possible.

(2) If another method listed in § 98.474(a)(2) cannot be used, a quarterly mass or volume that is missing must be estimated using a representative mass or volume from the nearest previous time period.

(c) Whenever the monitoring procedures cannot be followed to measure CO_2 concentration, the following missing data procedures must be followed:

(1) Another calculation methodology listed in § 98.474(a)(3) must be used if possible.

(2) If another method listed in § 98.474(a)(3) cannot be used, a quarterly concentration value that is missing must be estimated using a representative concentration value from the nearest previous time period.

§ 98.476 Data reporting requirements.

If you are subject to this part and report under this subpart, you are not required to report the information in § 98.3(c)(4) for this subpart. In addition to the information required by § 98.3(c)(1) through § 98.3(c)(3) and by § 98.3(c)(5) through § 98.3(c)(9), you must report the information listed in this section.

(a) If you receive CO_2 by pipeline, report the following for each receiving flow meter:

(1) The total net mass of CO_2 received (metric tons) annually.

(2) If a volumetric flow meter is used to receive CO_2:

(i) The volumetric flow through a receiving flow meter at standard conditions (in standard cubic meters) in each quarter.

(ii) The volumetric flow through a receiving flow meter that is redelivered to another facility without being injected into your well (in standard cubic meters) in each quarter.

(iii) The CO_2 concentration in the flow (volume percent CO_2 expressed as a decimal fraction) in each quarter.

(3) If a mass flow meter is used to receive CO_2:

(i) The mass flow through a receiving flow meter (in metric tons) in each quarter.

(ii) The mass flow through a receiving flow meter that is redelivered to another facility without being injected into your well (in metric tons) in each quarter.

(iii) The CO_2 concentration in the flow (weight percent CO_2 expressed as a decimal fraction) in each quarter.

(4) The standard or method used to calculate each value in paragraphs (a)(2) through (a)(3) of this section.

(5) The number of times in the reporting year for which substitute data procedures were used to calculate values reported in paragraphs (a)(2) through (a)(3) of this section.

(6) Whether the flow meter is mass or volumetric.

(b) If you receive CO_2 in containers, report:

(1) The mass (in metric tons) or volume at standard conditions (in standard cubic meters) of contents in containers in each quarter.

(2) The concentration of CO_2 of contents in containers (volume or weight percent CO_2 expressed as a decimal fraction) in each quarter.

(3) The mass (in metric tons) or volume (in standard cubic meters) of contents in containers that is redelivered to another facility without being injected into your well in each quarter.

(4) The net total mass of CO_2 received (in metric tons) annually.

(5) The standard or method used to calculate each value in paragraphs (b)(1) and (b)(2) of this section.

(6) The number of times in the reporting year for which substitute data procedures were used to calculate values reported in paragraphs (b)(1) and (b)(2) of this section.

(c) If you use more than one receiving flow meter, report the net total mass of CO_2 received (metric tons) through all flow meters annually.

(d) The source of the CO_2 received according to the following categories:

(1) CO_2 production wells.

(2) Electric generating unit.

(3) Ethanol plant.

(4) Pulp and paper mill.

(5) Natural gas processing.

(6) Gasification operations.

(7) Other anthropogenic source.

(8) Discontinued enhanced oil and gas recovery project.

(9) Unknown.

§ 98.477 Records that must be retained.

(a) You must follow the record retention requirements specified by § 98.3(g). In addition to the records required by § 98.3(g), you must retain quarterly records of CO_2 received, including mass flow rate or contents of containers (mass or volumetric) at standard conditions and operating conditions, operating temperature and pressure, and concentration of these streams. You must retain all required records for at least 3 years.

(b) You must complete your monitoring plans, as described in § 98.3(g)(5), by April 1 of the year you begin collecting data.

§ 98.478 Definitions.

Except as provided below, all terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

CO_2 received means the CO_2 stream that you receive to be injected for the first time into a well on your facility that is covered by this subpart. CO_2 received includes, but is not limited to, a CO_2 stream from a production process unit inside your facility and a CO_2 stream that was injected into a well on another facility, removed from a

discontinued enhanced oil or natural gas or other production well, and transferred to your facility.

[FR Doc. 2010–29934 Filed 11–30–10; 8:45 am]

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Federal Register

Wednesday,
December 1, 2010

Part VI

Federal Trade Commission

16 CFR Part 322

Mortgage Assistance Relief Services; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 322

RIN 3084–AB18

Mortgage Assistance Relief Services

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Final rule.

SUMMARY: Pursuant to the 2009 Omnibus Appropriations Act (Omnibus Appropriations Act), as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), the Commission issues a Final Rule and Statement of Basis and Purpose (SBP) concerning the practices of for-profit companies that, in exchange for a fee, offer to work on behalf of consumers to help them obtain modifications to the terms of mortgage loans or to avoid foreclosure on those loans. The Final Rule, among other things, would: prohibit providers of such mortgage assistance relief services from making false or misleading claims; mandate that providers disclose certain information about these services; bar the collection of advance fees for these services; prohibit anyone from providing substantial assistance or support to another they know or consciously avoid knowing is engaged in a violation of the Rule; and impose recordkeeping and compliance requirements.

DATES: This final rule is effective on December 29, 2010, except for § 322.5, which is effective on January 31, 2011.

ADDRESSES: Requests for copies of this Rule and this Statement of Basis and Purpose (SBP) should be sent to: Public Reference Branch, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Room 130, Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the Final Rule and SBP, are available at (*http://www.ftc.gov*).

FOR FURTHER INFORMATION CONTACT: Laura Sullivan or Evan Zullow, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3224.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

On March 11, 2009, President Obama signed the Omnibus Appropriations Act of 2009.[1] Section 626 of the Act directed the Commission to commence, within 90 days of enactment, a rulemaking proceeding with respect to mortgage loans.[2] Section 626 also directed the FTC to use notice and comment procedures under Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, to promulgate these rules.[3]

On May 22, 2009, President Obama signed the Credit CARD Act.[4] Section 511 of this statute clarified the Commission's rulemaking authority under the Omnibus Appropriations Act. First, Section 511 specified that the rulemaking "shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services."[5] The Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not specify any particular types of provisions that the Commission should include, or refrain from including, in a rule addressing loan modification and foreclosure rescue services, but rather directs the Commission to issue rules that "relate to" unfairness or deception.[6] Accordingly, the Commission interprets the Omnibus Appropriations Act to allow it to issue rules that prohibit or restrict conduct that may not be unfair or deceptive itself, but that are reasonably related to the goal of preventing unfairness or deception.[7]

Second, Section 511 of the Credit CARD Act clarified that the Commission's rulemaking authority was limited to entities that are subject to enforcement by the Commission under the FTC Act.[8] The rules the Commission promulgates to implement the Omnibus Appropriations Act, therefore, cannot cover the practices of banks, thrifts, Federal credit unions,[9] or certain nonprofits.[10]

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, also permits both the Commission and the states to enforce the rules the FTC issues.[11] The Commission can use its powers under the FTC Act to investigate and enforce the rules, and the FTC can seek civil penalties under the FTC Act against those who violate them. In addition, states can enforce the rules by bringing civil actions in Federal district court or another court of competent jurisdiction to obtain civil penalties and other relief. Before bringing such an action, however, states must give 60 days advance notice to the Commission or other "primary federal regulator" of the proposed defendant, and the regulator has the right to intervene in the action.

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act.[12] The Dodd-Frank Act made substantial changes in the federal regulatory framework for providers of financial services. Among the changes, the Dodd-Frank Act will transfer the Commission's rulemaking authority under the Omnibus Appropriations Act to a new Bureau of Consumer Financial Protection (BCFP)[13] on July 21, 2011, which is the "designated transfer date" that the Treasury Department has set.[14] In addition, on the designated transfer date, the FTC's authority to "prescribe rules" and "issue guidelines" under the Omnibus Appropriations Act will transfer to the BCFP.[15] Both the Commission and the BCFP, however, will have authority to bring law enforcement actions to enforce the rules promulgated under the Omnibus Appropriations Act, including the Final Rule in this Proceeding.

B. The Rulemaking and Public Comments Received

On June 1, 2009, the Commission published in the **Federal Register** an Advance Notice of Proposed

[1] Omnibus Appropriations Act, 2009, Public Law 111–8, 123 Stat. 524 (Omnibus Appropriations Act).

[2] *Id.* § 626(a).

[3] *Id.* Because Congress directed the Commission to use these APA rulemaking procedures, the FTC did not use the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a.

[4] Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111–24, 123 Stat. 1734 (Credit CARD Act).

[5] *Id.* § 511(a)(1)(B).

[6] *Id.*

[7] Unlike Section 18 of the FTC Act, 15 U.S.C. 57a, *see Katharine Gibbs Sch.* v. *FTC,* 612 F.2d 658 (2d Cir. 1979), the Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not require that the Commission identify with specificity in the rule the unfair or deceptive acts or practices that the prohibitions will prevent. Omnibus Appropriations Act § 626(a); Credit CARD Act § 511(a)(1)(B).

[8] Credit CARD Act § 511(a)(1)(C).

[9] 15 U.S.C. 45(a)(2).

[10] 15 U.S.C. 44. Bona fide nonprofit entities are exempt from the jurisdiction of the FTC Act. Sections 4 and 5 of the FTC Act confer on the Commission jurisdiction over persons, partnerships, or corporations organized to carry on business for their profit or that of their members. 15 U.S.C. 44, 45(a)(2). The FTC does, however, have jurisdiction over for-profit entities that provide mortgage-related services as a result of a contractual relationship with a nonprofit organization. *See Nat'l Fed'n of the Blind* v. *FTC,* 420 F.3d 331, 334–35 (4th Cir. 2005). In addition, the Commission has jurisdiction over sham non-profits that in fact operate as for-profit entities. *See infra* note 176.

[11] Omnibus Appropriations Act § 626(b); Credit CARD Act § 511(a)(1)(B).

[12] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010) (Dodd-Frank Act).

[13] *Id.* § 1061.

[14] Dep't of the Treasury, *Bureau of Consumer Financial Protection; Designated Transfer Date,* 75 FR 57252, 57253 (Sept. 20, 2010); *see also* Dodd-Frank Act § 1062.

[15] Dodd-Frank Act § 1061.

Rulemaking (ANPR) addressing the acts and practices of for-profit companies that offer to work on behalf of consumers to help them modify the terms of their loans or to avoid foreclosure. The ANPR described these services generically as "Mortgage Assistance Relief Services," or "MARS."[16] On March 9, 2010, the Commission published[17] a Notice of Proposed Rulemaking (NPRM) and proposed rule addressing Mortgage Assistance Relief Services (MARS).[18] Among other things, the proposed rule included provisions that would:

- Prohibit MARS providers from making false or misleading claims;
- Mandate that providers disclose certain information about their services;
- Bar the collection of advance fees for the provision of MARS, except in certain circumstances for attorneys who collect them in connection with preparing or filing documents in bankruptcy, court, or administrative proceedings;
- Prohibit anyone from providing substantial assistance or support to another they know or consciously avoid knowing is engaged in a violation of the rule; and
- Impose recordkeeping and compliance requirements.

In response to the NPRM, the Commission received 75 comments from stakeholders, including for-profit MARS providers, state law enforcers, consumer and community groups, state bars and bar associations, and financial service providers.[19] The largest number of comments—a total of 30—were submitted either by attorneys who provide MARS[20] or entities representing attorneys, including the American Bar Association and several state bar associations.[21] These comments focused on the scope of the proposed rule's exemption for attorneys, asserting that the Commission should expand the exemption. Other commenters, including some consumer groups and a coalition of state bank examiners, also advocated that the proposed exemption for attorneys be broadened, although to a lesser extent than the attorneys and their representatives advocated.[22] By contrast, comments from NAAG[23] and others[24] urged the Commission not to change the attorney exemption in the proposed rule.

Apart from comments that focused on the coverage of attorneys, most comments supported the proposed rule and its specific provisions. Most significantly, these comments generally supported an advance fee ban,[25] although a few non-attorney MARS providers opposed it.[26]

II. Mortgage Assistance Relief Services

A. The Mortgage Crisis and Assistance for Consumers

As discussed in the ANPR and NPRM, historically high levels of consumer debt, increased unemployment, and a stagnant housing market have contributed to high rates of mortgage loan delinquencies, which in many cases lead to foreclosures.[27] As a result, many consumers struggling to make their mortgage payments have been searching for ways to avoid default and foreclosure. There are a number of options that may be available to them, including: (1) Short sales or deeds-in-lieu of foreclosure transactions, in which the proceeds of a sale of the home or the receipt of the deed to the home, respectively, are treated by the mortgage lender as repayment of the outstanding mortgage balance; (2) forbearance or repayment plans that do not reduce the amount that consumers must pay but give them more time to bring their balance current; and (3) loan modifications that reduce consumers' indebtedness or the amount of their monthly payments. Because loan modifications allow consumers to stay in their homes and reduce their debt, this possible solution often has great appeal to them. The Commission's law enforcement experience suggests that loan modifications are the type of MARS most frequently marketed and sold.[28]

In response to the mortgage crisis, government and private sector programs have been initiated to assist distressed homeowners.[29] In March 2009, the Obama Administration launched the Making Home Affordable (MHA) program and the MHA's Home Affordable Modification Program (HAMP), through which the government provides mortgage owners and servicers with financial incentives to modify and refinance loans.[30] Under the program,

[16] *See Mortgage Assistance Relief Services,* 74 FR 26130 (June 1, 2009) *(MARS ANPR).* In response to the ANPR, the Commission received a total of 46 comments, which are *available at http://www.ftc.gov/os/comments/mars/index.shtm.* Notably, a wide spectrum of these commenters, including a consortium of over 40 state attorneys general, consumer and community organizations, and financial service providers, strongly urged the Commission to propose a rule prohibiting or restricting the collection of fees for mortgage relief services until the promised services have been completed. Additionally, a majority of the comments expressed concern regarding pervasive deception and abuse in the marketing of MARS, including misrepresentations regarding the services MARS providers will perform and regarding their affiliation with the government, nonprofits, lenders, or loan servicers.

This SBP cites to comments submitted in response to both the ANPR and the NPRM. To distinguish the comments submitted in response to the ANPR, the notation "(ANPR)" is included in any citations to them.

[17] *See* Press Release, FTC, *FTC Proposes Rule That Would Bar Mortgage Relief Companies From Charging Up-Front Fees* (Feb. 4, 2010), *available at http://www.ftc.gov/opa/2010/02/mars.shtm.*

[18] *See Mortgage Assistance Relief Services,* 75 FR 10707 (Mar. 9, 2010) (*MARS NPRM*).

[19] The comments submitted in response to the NPRM are available at *http://www.ftc.gov/os/comments/mars-nprm/index.shtm.* A list of those who submitted comments appears following Section V of this SBP.

[20] *See, e.g.,* Deal; Greenfield.

[21] *See, e.g.,* Am. Bar Ass'n (ABA); ME BA at 1–2; OR Bar at 1; WI Bar at 1; GA Bar at 1; FL Bar at 1.

[22] *See, e.g.,* NCLC at 10–13; CSBS at 4–5.

[23] *See* NAAG at 3–4.

[24] *See, e.g.,* CUUS at 8–9.

[25] *See, e.g.,* MN AG at 3; OH AG at 1; MBA at 2–3 (supporting "strict prohibition" of advance fees); NAAG at 2 ("The advance fee ban is the linchpin of effective deterrence of fraudulent practices by providers of mortgage relief services."); NCLC at 3 ("The single most important provision is section 322.5, which prohibits the collection of any fee before providing tangible results of real value to consumers."); AFSA at 5 ("Banning upfront fees is the best way for the FTC to ensure that MARS providers do really provide consumers with a beneficial service."); *see also* CSBS at 3; CUUS at 6; NYC DCA at 3.

[26] *See, e.g.,* Metropolis; RMI; Hirsch.

[27] *See, e.g., MARS NPRM,* 75 FR at 10708–09; MBA, *Delinquencies, Foreclosure Starts Increase in Latest MBA National Delinquency Survey* (May 19, 2010) ("The delinquency rate for mortgage loans on one-to-four-unit residential properties increased to a seasonally adjusted rate of 10.06 percent of all loans outstanding as of the end of the first quarter of 2010, an increase of 59 basis points from the fourth quarter of 2009, and up 94 basis points from one year ago."), *available at http://www.mbaa.org/NewsandMedia/PressCenter/72906.htm;* NCLC at 2; Press Release, Realtytrac, *Year-end Report Shows Record 2.8 Million U.S. Properties With Foreclosure Filings in 2009* (Jan. 14, 2010), *available at http://www.realtytrac.com/contentmanagement/pressrelease.aspx?itemid=8333;* Credit Suisse Fixed Income Research 2 (2008) (forecasting a total of 9 million foreclosures for the period 2009 through 2012), *available at http://www.chapa.org/pdf/ForeclosureUpdateCreditSuisse.pdf.*

[28] *See* List of MARS Law Enforcement Actions, following Section V of the SBP, for a list of cases that the FTC has prosecuted ("FTC Case List"). Unless otherwise specified, all citations to FTC actions in this SBP refer to the complaints in these lawsuits.

[29] *See, e.g.,* HOPE NOW, *About Us* ("HOPE NOW is an alliance between counselors, mortgage companies, investors, and other mortgage market participants. This alliance will maximize outreach efforts to homeowners in distress to help them stay in their homes and will create a unified, coordinated plan to reach and help as many homeowners as possible."), *available at http://www.hopenow.com/hopenow-aboutus.php.*

[30] For example, the program offers servicers that modify loans according to its guidelines an up-front fee of $1,000 for each modification, "pay for success" fees on still-performing loans of $1,000 per year, and one-time bonus incentive payments of $1,500 to lender/investors, and $500 to servicers, for a modification made while a borrower is still current on his or her mortgage payments. Dep't of the Treasury, *Making Home Affordable Summary of Guidelines* 2 (March 4, 2010), *available at*

Continued

lenders and servicers have approved roughly 500,000 permanent loan modifications.[31] The Treasury Department has also recently expanded the MHA program to assist more borrowers, for example, by introducing additional incentives for servicers to write down the outstanding principal balance for borrowers who are "under water," that is, who owe more on their mortgages than the value of their homes.[32]

On April 5, 2010, the Administration launched the Home Affordable Foreclosure Alternatives (HAFA) Program, which provides servicers with incentives to enter into short sales or deeds-in-lieu of foreclosure transactions with consumers who do not qualify for a loan modification under the MHA program.[33] In addition, state and local governments, nonprofit organizations, housing counselors, and private sector entities[34] have offered a variety of other programs and services to help homeowners in financial distress.[35]

Despite these public and private programs and services, consumers also continue to seek assistance from for-profit companies who act as intermediaries between consumers and their lenders or servicers in obtaining mortgage assistance relief services—including loan modifications. This may be happening for a number of reasons. First, MARS have been advertised and marketed widely in mass media and online, with the result that consumers may be more aware of the services offered by for-profit entities than they are of other available programs. Second, many consumers who are seeking loan modifications or other relief are not eligible for the MHA program or other government and private assistance programs. While the Treasury Department has estimated that the MHA program will help 3–4 million borrowers by February 2012,[36] industry reports estimate that roughly twice that number of mortgage loans currently are in delinquency or foreclosure.[37] Third, even among consumers who may be eligible to obtain a temporary loan modification under the MHA program, many do not qualify for a permanent loan modification.[38] Fourth, even if consumers are eligible for government programs or assistance directly from their servicers or lenders, many housing counselors and servicers have struggled to respond in a timely manner to the extraordinary number of consumers who are seeking loan modifications.[39] Finally, the Treasury Department also has observed that some servicers have not adequately met consumer demand for loan modifications under the HAMP program.[40]

Many consumers who have been unable to obtain mortgage assistance relief services through their own efforts have turned to for-profit MARS providers for help. Providers promoting their ability to negotiate with lenders and servicers to obtain loan modifications or some other type of mortgage relief have proliferated in the past few years.[41] Responding to consumer demand, many providers have promised to obtain loan modifications,[42] but others have begun

http://www.ustreas.gov/press/releases/reports/guidelines_summary.pdf.

[31] *See, e.g.,* Dep't of the Treasury, *Making Home Affordable Program: Servicer Performance Report Through September 2010* (Oct. 25, 2010), *available at http://www.financialstability.gov/docs/Sept%20MHA%20Public%202010.pdf.* Further, if trial modifications are added to permanent modifications, over 1.6 million modifications have been approved. *Id.,* Testimony of Herbert M. Allison, Dep't of the Treasury, "Foreclosure Prevention: Is the Home Affordable Modification Program Preserving Homeownership?," before the H. Comm. on Oversight and Gov't Reform, at 5 (Mar. 25, 2010), *available at http://oversight.house.gov/images/stories/Hearings/Committee_on_Oversight/2010/032510_HAMP/TESTIMONY-Allison.pdf.*

[32] *See* Press Release, Making Home Affordable ("MHA") *Housing Program Enhancements Offer Additional Options for Struggling Homeowners* (Mar. 26, 2010), *available at http://makinghomeaffordable.gov/pr_03262010.html.*

[33] *See* MHA, Home *Affordable Foreclosure Alternatives (HAFA) Program, available at http://makinghomeaffordable.gov/hafa.html.*

[34] Loan holders also have exhibited a growing willingness to modify loan terms for borrowers who do not qualify for loan modifications under government programs such as HAMP. These are known as "proprietary loan modifications." *See* Press Release, HOPE NOW, *HOPE NOW Reports More Than 476,000 Loan Modifications in the First Quarter of 2010* (May 10, 2010), *available at http://www.hopenow.com/press_release/files/1Q%20Data%20Release_05_10_10.pdf* (reporting that the industry completed 312,329 proprietary loan modifications in the first quarter of 2010).

[35] *See, e.g.,* Freddie Mac, *Foreclosure Prevention Workshops for Consumers, http://www.freddiemac.com/avoidforeclosure/workshops.html* (describing local credit counseling events by local governments and nonprofits); FTC, *Mortgage Payments Sending You Reeling? Here's What to Do* (2009), *available at http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.pdf* (describing various credit counseling alternatives).

[36] *See, e.g.,* Press Release, MHA, *Making Home Affordable Program on Pace to Offer Help to Millions of Homeowners* (Aug. 4, 2009) *available at http://www.makinghomeaffordable.gov/pr_08042009.html;* Dep't of the Treasury, *Making Home Affordable Program: Servicer Report Through June 2010* at 7 n.2 (June 2010) ("Selected Outreach Measures" table), *available at http://www.financialstability.gov/docs/June%20MHA%20Public%20Revised%20080610.pdf.*

[37] *See* Alan Zibel, *Foreclosures Down 2 Percent From Last Year,* Associated Press, May 13, 2010 (noting that as of March 2010, "[n]early 7.4 million borrowers, or 12 percent of all households with a mortgage, had missed at least one month of payments or were in foreclosure"), *available at http://abcnews.go.com/Business/wireStory?id=10632332; see also* Press Release, Mortgage Bankers Ass'n, *Delinquencies, Foreclosure Starts Fall in Latest MBA National Delinquency Survey* (Feb. 19, 2010) (noting that roughly 15% of mortgage loans were delinquent or in foreclosure and that "[t]he percentages of loans 90 days or more past due and loans in foreclosure set new record highs"), *available at http://www.mbaa.org/NewsandMedia/PressCenter/71891.htm;* Stephanie Armour, *Home Foreclosure Rates Posts First Annual Decline in Five Years,* USA Today (May 13, 2010) (noting that nearly one-fourth of borrowers owe more on their mortgages that the value of their homes).

[38] *See, e.g.,* Dep't of the Treasury: MHA Servicer Report June 2010 at 1; NCRC, *NCRC Home Affordable Modification Program Survey 2010,* at 2 (noting that, as of February 2010, only 12.5% of trial modifications had been converted into permanent modifications), *available at http://www.ncrc.org/images/stories/mediaCenter_reports/hamp_report_2010.pdf; Foreclosure Prevention: Is the Home Affordable Modification Program Preserving Homeownership: Hearing Before the H. Comm. on Oversight & Gov't Reform,* 111th Cong. (2010) (statement of Gene Dodaro, Acting Comptroller General, Government Accountability Office) (prepared statement at 7), *available at http://oversight.house.gov/images/stories/Hearings/Committee_on_Oversight/2010/032510_HAMP/TESTIMONY–Dodaro.pdf* (noting that 32% of trial modifications lasting three months or more had been approved for conversion into permanent modifications).

[39] *See, e.g.,* CRL at 3 (noting that MARS have flourished as "consumers' demand for relief outpaces the capacity of mortgage servicers and government programs alike"); *The Recently Announced Revisions to the Home Affordable Modification Program (HAMP): Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.,* 111th Cong. 131 (2010) (statement of Alan White, Assistant Professor, Valparaiso Univ.), *available at http://financialservices.house.gov/Media/file/hearings/111/Printed%20Hearings/111-122.pdf.* ("Modification requests are languishing for as long as a year, servicers repeatedly ask borrowers to resubmit documentation that has been lost or become outdated, and housing counselors and mediators are unable to get timely information and responses from servicers."); NCLC (ANPR) at 2 (noting that servicers have failed to meet borrower demand for loan modifications); NAAG (ANPR) at 7 (noting that borrowers have had difficulty reaching servicers and obtaining their assistance).

[40] *See, e.g., Holding Banks Accountable: Are Treasury and Banks Doing Enough to Help Families Save Their Homes?: Hearing Before the S. Subcomm. on Fin. Servs. & Gen. Gov't of the S. Comm. on Appropriations,* 111th Cong. (2010) (statement of Timothy Geithner, Sec'y, Dep't of the Treasury) ("[W]e do not believe that servicers are doing enough to help homeowners.")

[41] *See MARS ANPR,* 74 FR at 26134–35.

[42] *See, e.g., Safe Mortgage Licensing Act: HUD Responsibilities Under the Safe Act, Proposed Rule,* 74 FR 66548, 66554 (Dec. 15, 2009) ("HUD has seen a substantial increase in the number of third-party actors (*i.e.,* individuals other than lenders and loan servicers) offering their services as intermediaries putatively to work on behalf of borrowers to negotiate modifications of existing loan terms."); NAAG (ANPR) at 2 ("[T]he [loan modification] consulting business model is dominating the marketplace. Consultants are by far the most common source of consumer complaints received by our offices in the area of mortgage assistance services."); OH AG (ANPR) at 2 ("For those companies that actually do put some effort into helping the consumer, the most common business model is an offer to negotiate a loan modification or repayment plan with the consumer's servicer."); CRC (ANPR) at 1 ("In California, advertisements promising loan modification success are inescapable."); FinCEN, *Loan Modification and Foreclosure Rescue Scams—Evolving Trends and*

to market short sales and other forms of relief.[43] The Commission's law enforcement experience shows that MARS providers typically are small and relatively new businesses,[44] and thus it is difficult to estimate their numbers.[45] Based on the law enforcement actions brought by the FTC and the states, however, it appears that there are over 500 such providers in the United States.[46]

Typically, MARS providers charge consumers hundreds or thousands of dollars[47] in advance fees, *i.e.,* fees prior to providing their services. In its law enforcement actions, the FTC has observed that some providers collect their entire fee at the beginning of the transaction,[48] while others collect two to three large installment payments from consumers.[49] NAAG and other commenters also stated that many MARS providers have begun to offer their services piecemeal, collecting fees upon reaching various stages in the process, such as assembling the documentation required by the lender or servicer, mailing paperwork to the lender or servicer, and negotiating with a lender's loss mitigation department.[50]

As discussed in the ANPR and NPRM, MARS providers often claim to possess specialized knowledge of the mortgage lending industry,[51] sometimes touting their hiring of former mortgage brokers and real estate agents[52] to bolster their claims of purported expertise. In addition, some attorneys—including solo practitioners and small law firms that represent financially distressed individuals—increasingly have been offering MARS in connection with their legal practice.[53]

A number of non-attorney MARS providers are employing or affiliating with lawyers, with the providers representing that they are offering traditional legal services.[54] Although these providers often tout the expertise of these attorneys in negotiating with lenders and servicers, in many instances the attorneys do little or no *bona fide* legal work.[55] In some cases, MARS

Patterns in Bank Secrecy Act Reporting 10 (May 2010), *available at http://www.fincen.gov/news_room/rp/files/MLFLoanMODForeclosure.pdf* (FinCEN Report) ("Reports of foreclosure rescue scams increased substantially in the last eight months of calendar year 2009.").

[43] Although the dominant trend among MARS providers is to offer loan modifications, over the past few years some providers also have offered other purported types of loss mitigation and foreclosure avoidance. *See, e.g., FTC* v. *Foreclosure Solutions, LLC,* No. 1:08–cv–01075 (N.D. Ohio filed Apr. 28, 2008) (alleging that provider offered to stop foreclosure proceedings and secure workout plans with consumers' lenders or servicers); *FTC* v. *Mortgage Foreclosure Solutions, Inc.,* No. 8:08-cv-388–T–23EAJ (M.D. Fla. filed Feb. 26, 2008) (same). Providers may adjust their marketing to offer newly-minted forms of mortgage relief—for example, the possibility of entering a short sale under the HAFA program. *See, e.g., Illinois* v. *Home Foreclosure Solutions LLC,* No. 08CH43259 (Ill. Cir. Ct. Cook County 2008) (alleging MARS provider offered to assist consumers to enter short sales). Another new variation of MARS is charging an advance fee to purportedly "eliminate" mortgage debts by challenging the legality of the original mortgages. *See* FinCEN, *Foreclosure Rescue Fraud Report May 2010, supra* note 42 at 9. MARS providers also have offered "sale-leaseback" or "title reconveyance" transactions. In these transactions, MARS providers instruct consumers to transfer title to their homes to the providers and then the consumers rent the homes from them. The providers promise to reconvey title at some later date, yet often do not do so, thereby taking the equity in the homes. Sale-leaseback and title reconveyance transactions appear to have become less prevalent, in part because many consumers do not have sufficient equity in their homes to make this strategy profitable. *See, e.g.,* FinCEN, *Foreclosure Rescue Fraud Report* May 2010, *supra* note 42 at 4.

[44] *See* FTC Case List. Some of these small and relatively new businesses are law firms. For example, NCLC surveyed members of the National Association of Consumer Advocates (NACA) and the National Association of Consumer Bankruptcy Attorneys (NACBA); 298 attorneys responded that they provided some form of MARS. NCLC at 5; *see also* IRELA at 1 (stating that many of the 2,000 members of the Illinois Real Estate Lawyers Association are "engaged in the process of trying to assist their consumer clients in dealing with foreclosures, mortgage loan workouts, and related matters").

[45] *See, e.g.,* U.S. Gov't Accountability Office, GAO–10–787, *Federal Efforts to Combat Foreclosure Rescue Schemes are Under Way, but Improved Planning Elements Could Enhance Progress* 12–16 (July 2010) ("GAO Report") (noting that data on MARS providers is limited); NAAG (ANPR) at 3 ("It is difficult to gather exact empirical data on companies providing loan modification and foreclosure rescue services due to the predominance of Internet-based companies and their ephemeral nature."); OH AG (ANPR) at 2 ("There is little reliable data about the foreclosure rescue industry."); CRL at 3 ("With few barriers to entry and little to no oversight, scams are flourishing in the current environment.").

[46] *See* NAAG (ANPR) at 4 (noting that state attorneys general have investigated more than 450 MARS providers); FTC Case List, *supra* note 28; Press Release, FTC, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at http://www.ftc.gov/opa/2009/04/hud.shtm* (reporting that the Commission sent warning letters to 71 companies offering MARS).

[47] *See, e.g., infra* notes 48–49; GAO Report, *supra* note 45, at 7 (noting that MARS typically charge a fee of thousands of dollars); Dargon at 2 ("We charge $2,500 as a flat fee" in advance.); CRC (ANPR) at 2 ("The average fee that we are seeing borrowers charged is $3,000; we have seen fees as high as $9,500. In nearly every instance, these fees are charged up front, before any services have been rendered."); NCRC (ANPR) at 3 (noting that "[t]ypically, loan modification companies request a significant fee upfront" and that a study performed by NCRC "documented a median fee of $2,900," although "[f]ees ranged as high as $5,600"); NCLR (ANPR) at 1 (observing fees as high as $8,000); NCLC (ANPR) at 5–6 (estimating typical advance fees to be between $2,000 and $4,000).

[48] *See, e.g., supra* note 47; *FTC* v. *Infinity Group Servs.,* No. SACV09–00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009); *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09–cv–01167–FJM (D. Ariz. June 1, 2009); *FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

[49] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009); *FTC* v. *Washington Data Res., Inc.,* No. 8:09-cv-02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322, Mem. Supp. TRO at 5 (S.D. Fla. filed Nov. 24, 2009); *see also, e.g.,* Dargon at 2; Rogers at 13.

[50] *See, e.g.,* LFSV at 2 ("[W]e have seen MARS providers who are effectively evading the advance fee prohibition in California law by charging for their 'services' in 'phases.'"); NAAG at 3; LCCR at 5; *see also FTC* v. *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009).

[51] *See, e.g.,* NCLC (ANPR) at 3 ("Some modification firms claim superior expertise even though there are no recognized qualifications other than the training programs offered by HUD to certified agencies. Instead, some for-profit entities tout their experience as mortgage industry insiders."); NAAG (ANPR) at 4; *FTC* v. *Fed Housing Modification Dep't,* No. 09–CV–01759 (D.D.C. filed Sept. 15, 2009) (alleging defendants' Web sites state that many of their "skilled negotiators" have "worked for the lenders they are dealing with"); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Mem. Supp. TRO. at 4–5 (C.D. Cal. filed July 7, 2009) (alleging that defendants "boasted of twenty years' experience" and that they had "extensive experience in the industry"); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Mem. Supp. P.I. at 20 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendants' Web sites represented that they have "extensive loss mitigation experience" and that "they are led by a seasoned and proven team of professionals"); *see also FTC* v. *LucasLawCenter "Inc.",* No. 09–CV–770 (C.D. Cal filed July 7, 2009).

[52] *See, e.g.,* NCLC (ANPR) at 11 ("Mortgage brokers—often cited as one of the driving forces in the growth of bad subprime loans—are in demand to work for loan modification companies. One MARS advertised for consultants with mortgage and real estate experience to join its cadre of loan modification specialists."); GAO Report, *supra* note 45, at 10 ("Federal and state officials and representatives of nonprofit organizations told us that persons who have conducted foreclosure rescue schemes include former mortgage industry professionals who had been involved in the subprime market. * * *").

[53] *See generally* Greenfield; Deal; Giles. *See also* NCLC at 4.

[54] *See, e.g.,* NAAG at 3–4 ("We have noticed that national companies are recruiting for attorney "partners" or "local counsel" in all of the states they work in to evade states' mortgage rescue fraud statutes."); IL AG at 1; *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. Pls. Ex Parte App. at 3 (Aug. 3, 2009) (alleging that defendants engaged in "misrepresentations prohibited by the TRO, behind a new facade: the 'Walker Law Group,'" which was "nothing more than a sham legal operation designed to evade state law restrictions on the collection of up-front fees for loan modification and foreclosure relief"); *FTC* v. *LucasLawCenter "Inc.",* No. SACV–09–770 DOC (ANX) (C.D. Cal. filed July 7, 2009); *FTC* v. *Data Med. Capital Inc.,* No. SA–CV–99–1266 AHS (Eex) (C.D. Cal., contempt application filed May 27, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009); *FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); *see also Cincinnati Bar Assoc.* v. *Mullaney,* 119 Ohio St. 3d 412 (2008) (disciplining attorneys involved in mortgage assistance relief services).

[55] *See supra* note 54. The experiences detailed in one comment from an attorney illustrate the role

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providers also offer "forensic audits," during which attorneys purportedly conduct a legal analysis of mortgage loan documents to find law violations, thereby supposedly helping consumers acquire leverage over their lenders or servicers to obtain a better loan modification.[56] Providers offering forensic audits also assert that, because of their relationships with attorneys, state laws that prohibit non-attorneys from collecting advance fees for loan modification services do not apply to them.[57] For example, California law previously imposed a number of restrictions on "foreclosure consultants," but allowed "licensed attorneys * * * [to] charge advance fees under certain limited circumstances."[58] The State Bar of California subsequently observed that "foreclosure consultants may be attempting to avoid the statutory prohibition on collecting a fee before any services have been rendered by having a lawyer work with them in foreclosure consultations."[59] California has since passed a new law that removes this attorney exemption.[60]

B. Unfair or Deceptive Practices in the Marketing of MARS

The FTC, state attorneys general, and other law enforcement agencies, have extensive experience with MARS providers. In the past three years, the Commission has filed 32 law enforcement actions against providers of loan modification and foreclosure rescue services.[61] State attorneys general have investigated at least 450 MARS providers and sued hundreds of them for alleged state law violations.[62] Additionally, the Department of Justice and other agencies, working both individually and jointly, have pursued MARS providers for illegal conduct.[63] As discussed in more detail below, the evidence in the record, including extensive law enforcement experience, demonstrates that the unfair or deceptive practices of MARS providers are widespread and are causing substantial consumer harm.[64] Indeed, one recent survey of state and local consumer agencies found that the fastest growing category of consumer complaints concerned the failure of MARS providers to fulfill their promises to help save consumers' homes from foreclosure.[65]

MARS providers commonly initiate contact with prospective customers through Internet, radio, television, or direct mail advertising.[66] Although MARS providers did not submit information for the record relating to the extent and cost of their marketing efforts, they appear to use a variety of media to target large numbers of consumers who are struggling to pay their mortgages. For example, one MARS provider that was the subject of an FTC enforcement action spent $9 million in one year to broadcast deceptive advertisements nationwide on major television and cable networks, as well as on radio stations and the Internet.[67] Typical MARS advertisements instruct consumers to call a toll-free telephone number or to e-mail the provider. One provider's advertisements allegedly yielded 1,500 inbound calls per day.[68] Another such provider disseminating direct mail advertisements reported receiving approximately 500 inbound calls per day.[69]

Customary representations in the ads and ensuing telemarketing and email pitches claim that the MARS provider (1) will obtain for the consumer a substantial reduction in a mortgage loan's interest rate, principal amount, or monthly payments; (2) will achieve these results within a specific period of time;[70] (3) has special relationships

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that attorneys play or have been asked to play in connection with MARS:

I had numerous non-attorney modification companies ask me to serve as their lawyer and accept a flat fee on each file. I would get this money and do little or no work for it. In some cases I would take in the advance fee and then disburs[e] a share to the loan officer producing the deal and a share to the company actually doing the work. Or I would be collecting the advance fee and then holding all or part of it in my trust account until the modification was completed. I declined to get involved in such arrangements.

Deal at 6.

[56] *See, e.g.,* MN AG at 2 ("Recently, so-called forensic loan auditors have emerged as a new type of mortgage assistance relief 'service.'"); 1st ALC at 3 (MARS provider stating it engages in forensic audits); Dargon at 2 (same); *see also FTC* v. *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio Am. Compl. filed May 14, 2010) (alleging defendants purporting to offer forensic audits misrepresented that "between 80–90% of all loans [they] have audited have some form of rights violations"); *FTC* v. *Data Med. Capital Inc.,* No. SA–CV–99–1266 AHS (Eex), Mem. Supp. App. Contempt at 18 (C.D. Cal. filed May 27, 2009); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

Since publication of the NPRM, the Commission has released an alert to warn consumers about entities purporting to provide forensic audits. FTC, *Forensic Mortgage Loan Audit Scams: A New Twist on Foreclosure Rescue Fraud* (Mar. 2010), *available at http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt177.shtm; see also, e.g.,* Cal. Dep't of Real Estate, Consumer Alert 6 (Mar. 2009) (warning consumers of "forensic loan reviews"), *available at http://www.dre.ca.gov/pdf_docs/FraudWarningsCaDRE03_2009.pdf.*

[57] *See supra* notes 51–56; *see also* IL AG (ANPR) at 2 ("Attorneys are using the [state] exemption to market and sell the same mortgage consulting services provided by non-attorneys.").

[58] Press Release, Office of the Att'y Gen., Cal. Dep't of Justice, *Brown Alerts Homeowners that New Law Prohibits Up-front Fees for Foreclosure Relief Services* (Oct. 15, 2009), *available at http://ag.ca.gov/newsalerts/release.php?id=1821.*

[59] *See* State Bar of Cal., *Ethics Alert: Legal Services to Distressed Homeowners and Foreclosure Consultants on Loan Modifications* ("Cal. State Bar Ethics Alert") 2, Ethics Hotliner (Feb. 2, 2009), *available at http://www.calbar.ca.gov/calbar/pdfs/ethics/Ethics-Alert-Foreclosure.pdf ; see also Florida Bar, Ethics Alert: Providing Legal Services to Distressed Homeowners 1, available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/872C2A9D7B71F05785257569005795DE/$FILE/loanModification20092.pdf?OpenElement* ("The Florida Bar's Ethics Hotline recently has received numerous calls from lawyers who have been contacted by non-lawyers seeking to set up an arrangement in which the lawyers are involved in loan modifications, short sales, and other foreclosure-related rescue services on behalf of distressed homeowners. * * * The [Florida] Foreclosure Rescue Act * * * imposed restrictions on non-lawyer loan modifiers to protect distressed homeowners. The new statute appears to be the impetus for these inquiries.").

[60] Cal Civ. Code § 2944.7; *see also* Press Release, Office of the Att'y Gen.l, Cal. Dep't of Justice, *Brown Alerts Homeowners that New Law Prohibits Up-front Fees for Foreclosure Relief Services* (Oct. 15, 2009), *available at http://ag.ca.gov/newsalerts/release.php?id=1821.*

[61] *See* FTC Case List, *supra* note 28.

[62] NAAG (ANPR) at 4; IL AG (ANPR) at 1 (noting that Illinois has over 240 open investigations of MARS providers and filed 28 lawsuits against them); Press Release, FTC, *Federal and State Agencies Target Mortgage Relief Scams* (Nov. 24, 2009) (announcing 118 actions by 26 federal and state agencies), available at *http://www.ftc.gov/opa/2009/11/stolenhope.shtm;* Press Release, FTC, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009) (announcing operation involving 189 actions by 25 federal and state agencies), *available at http://www.ftc.gov/opa/2009/07/loanlies.shtm; Press Release, Financial Fraud Enforcement Task Force, Financial Fraud Enforcement Task Force Announces Results of Broadest Mortgage Fraud Sweep in History (June 17, 2010), available at http://www.stopfraud.gov/news/news-06172010–02.html.*

[63] *See infra* notes 92–96 and accompanying text.

[64] *See, e.g.,* LFSV at 1 ("During the recent mortgage crisis, we have been dealing with a flood of borrowers whose mortgages are distressed and who have been subject to abuses by companies and individuals promising assistance with obtaining modification of those loans.")

[65] *See* Consumer Fed'n of Am. *et al.,* 2009 Consumer Complaint Survey Report 3 (July 27, 2010), *available at http://www.consumerfed.org/elements/www.consumerfed.org/File/Consumer_Complaint_Survey_Report2009.pdf.*

[66] The FTC procured information from a media monitoring company on the occurrence of broadcast advertising for MARS. The company located 68 radio ads and 71 television and cable ads containing the terms "save your home," "mortgage modification," or "loan modification." These ads aired between the dates of September 1, 2008 and September 1, 2010. These ads were attributable to 139 different companies.

[67] *See FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx), Mem. Supp. Ex Parte TRO at 6–7 (C.D. Cal. filed Apr. 6, 2009).

[68] *Id.* at 6–8.

[69] *See FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV–09–800 DOC (ANX), Mem. Supp. TRO at 7 (C.D. Cal filed Jul. 13, 2009).

[70] *See, e.g., FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322, Mem. Supp. TRO at 4–5 (S.D. Fla. filed Nov. 24, 2009); *FTC* v. *1st Guar. Mortgage Corp.,* No. 09–DV–61846 (S.D. Fla. filed Nov. 17, 2009); *FTC* v. *Freedom Foreclosure Prevention*

with lenders and servicers;[71] and (4) is closely affiliated with the government,[72] nonprofit programs,[73] or the consumer's lender or servicer.[74] Providers also commonly represent that there is a high likelihood, and in some instances a "guarantee," of success.[75] Many MARS providers do not disclose to consumers in their promotions the cost of their services.[76] In some cases, MARS providers entice consumers to make substantial up-front payments with false claims that they will be able to obtain a refund if consumers do not receive an acceptable result.[77]

Based on the FTC's law enforcement experience, the public comments, and consumer complaints, it appears that the vast majority of consumers do not receive the results MARS providers promise.[78] After collecting their up-front fees, MARS providers often fail to make initial contact with the consumer's lender or servicer for months, if at all, or to have substantive discussions or negotiations with the lender or servicer.[79] In many cases, MARS providers fail to perform even the most basic promised services or achieve any beneficial results.

In some cases, providers also cause harm to consumers by instructing them to stop communicating with their lenders and servicers.[80] Consumers who

Specialists, LLC, No. 2:09–cv–01167–FJM (D. Ariz. filed June 1, 2009); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

[71] *See, e.g., FTC* v. *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009); *FTC* v. *1st Guar. Mortgage Corp.,* No. 09–DV–61846 (S.D. Fla filed Nov. 17, 2009); *FTC* v. *LucasLawCenter "Inc.,"* No. SACV–09–770 DOC (ANX) (C.D. Cal. filed July 7, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACVF09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009).

[72] *See, e.g., FTC* v. *Dominant Leads, LLC,* No. 1:10–cv–00997 (D.D.C. filed June 16, 2010) (alleging that defendants' Web sites featured official government seals and logos, and deceptively appeared to be affiliated with the government); *FTC* v. *Washington Data Res., Inc.,* No. 8:08–cv–02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009) (alleging that defendants falsely represented that they were affiliated with the United States government); *FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 15, 2009); *FTC* v. *Sean Cantkier,* No. 1:09–cv–00894 (D.D.C. filed July 10, 2009) (alleging defendants placed advertisements on Internet search engines that refer consumers to Web sites that deceptively appear to be affiliated with government loan modification programs); *FTC* v. *Thomas Ryan,* No. 1:09–00535 (HHK) (D.D.C. filed Mar. 25, 2009); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (charging defendant with misrepresenting that it is part of or affiliated with the federal government); *see also* LOLLAF at 2 ("Other clients have been deceived into believing the MARS provider will assist them because it claimed to be a 'non-profit,' used a government symbol or claimed to be affiliated with the HOPE hotline."); OH AG (ANPR) at 4 ("Our office has seen many companies that have names or advertisements that make it sound like they are government sponsored."); NCLC (ANPR) at 3 ("One website, USHUD.com, even claims to be 'America's Only Free Foreclosure Resource' even though HUD-certified agencies also offer free assistance regardless of income.").

[73] *See FTC* v. *New Hope Prop. LLC,* No. 1:90–cv–01203–JBS–JS (D.N.J. filed Mar. 17, 2009); FTC v. New Hope Modifications, LLC, No.1:09–cv–01204–JBS–JS (D.N.J. filed Mar. 17, 2009).

[74] *See, e.g., FTC* v. *Kirkland Young, LLC,* No. 09–23507 (S.D. Fla. filed Nov. 18, 2009) (alleging that defendants falsely represented an affiliation with borrowers' lenders); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV–09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging that defendants deceptively claimed affiliation with consumers' lenders); *see* also Am. Bankers Ass'n (ANPR) at 7 ("They often misuse the intellectual property of lenders and servicers by claiming in mailings, on Web sites, and in other communications that they either are affiliated with the lenders and servicers or have special relationships with them that do not exist. They use the names, trademarks and logos of these lenders and servicers in their advertising to deceive consumers into believing they can obtain modification relief for them that these consumers could not otherwise obtain for themselves at no cost."); Chase (ANPR) at 3 ("These MARS entities also may lead the borrower to believe that they are associated with the servicer or that they have special agreements with the servicer for processing loan modifications, when, in fact, they do not.").

[75] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging defendants falsely claimed success rate of 97 to 100%); *FTC* v. *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009) (alleging defendants falsely claimed a 90% success rate); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging "[d]efendants have told homeowners that their success rate is above ninety percent"); *FTC* v. *LucasLawCenter "Inc.,"* No. SACV–09–770 DOC (ANX) (C.D. Cal. filed July 7, 2009) (alleging "[d]efendants' representatives tell consumers that Defendants have a success rate in the ninetieth percentile with their lender"); *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09–cv–01167–FJM (D. Ariz. filed June 1, 2009) (alleging defendants claimed to have 97% success rate); *FTC* v. *Data Med. Capital Inc.,* No. SA–CV–99–1266 AHS (Eex), Mem. Supp. App. Contempt at 8 (C.D. Cal. filed May 27, 2009) (alleging defendants represented 100% success rate to consumers).

The Loan Modification Scam Prevention Network (LMSPN)—a coalition of Federal and state organizations led by the Lawyers' Committee for Civil Rights—has created a nationwide complaint reporting system for loan modification fraud. The Network, formed in February 2010, has received complaints through a variety of channels, including a form posted on its Web site, the Homeowners' Hope Hotline, and referrals from non-profit housing counselors. As of August 25, 2010, the LMSPN database contained a total of 6,473 complaints of loan modification fraud, dating as far back as April 8, 2008. FTC staff reviewed a random sample of 100 of these complaints and found that 63 reported that MARS providers had guaranteed consumers loan modifications. In projecting this finding to the entire LMSPN database, the FTC estimates that between 52% and 72% of the complaints report the same information.

[76] In a recent report summarizing the results of undercover calls made to MARS providers, the National Community Reinvestment Coalition (NCRC) found that in 54% of the calls the providers did not inform consumers about their fees. *See* NCRC, *Foreclosure Rescue Scams: A Nightmare Complicating the American Dream,* at 21 (Mar. 2010) ("NCRC Report"), *available at http://www.ncrc.org/images/stories/pdf/research/foreclosure%20rescue%20scams%20-%20%20nightmare%20complicating%20the%20american%20dream.pdf.*

[77] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendant falsely claimed to provide "100% money back guarantee"); *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009) (alleging that defendants falsely represented they will refund borrower fee if unsuccessful); *FTC* v. *Infinity Group Servs.,* No. SACV09–00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009); *FTC* v. *Loan Modification Shop, Inc.,* No. 3:09–cv–00798 (JAP), Mem. Supp. TRO at 1 (D.N.J. amended complaint filed Aug. 4, 2009) (alleging defendants represented that advance fees were fully refundable); *FTC* v. *Freedom Foreclosure Prevention Specialists,* LLC, No. 2:09–cv–01167–FJM (D. Ariz. June 1, 2009) (alleging defendants promised "100% money-back guarantee" but then failed to provide refunds); *see also* NAAG at 2 ("[MARS providers] generally ignore their own refund policies. In the vast majority of complaints received by our offices, consumers were unable to get refunds even though the consultants performed little or no work and had promised consumers money-back guarantees. In some cases, the companies had closed or changed locations by the time the consumers discovered there was a problem, thereby preventing the consumers from even requesting a refund."); *see also, e.g., FTC* v. *Home Assure, LLC,* No. 8:09–CV–00547–T–23T–Sm, Mot. S.J., App.1 at 6 (M.D. Fla. filed Jan. 25, 2010) (Expert Report of Dr. Kivetz survey reporting that 56% of consumers requested that defendant provide a refund; 65% of those who requested a refund did so because defendant failed to perform its services; but only 12% of consumers who requested refunds received them).

[78] *See, e.g., infra* Section III.E.2.a.; LOLLAF at 1 ("We have worked with many homeowners who have paid money to a Mortgage Assistant Relief Services (MARS) provider, only to discover that they received absolutely no service in exchange for the fee."); CMC (ANPR) at 1 ("CMC members and other mortgage servicers found that MARS providers consistently misrepresent their ability to obtain concessions from servicers * * *."); Chase (ANPR) at 3 ("They collect their fees up-front and promise the borrower they can get a loan modification or other foreclosure relief, when, in fact, this is only a determination that the servicer can make after reviewing the borrower's financial information and investor agreements.").

[79] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendant often failed to return borrowers' phone calls and failed to contact and negotiate with lenders); *FTC* v. *Apply2Save, Inc.,* No. 2:09–cv–00345–EJL–CWD (D. Idaho filed July 14, 2009) (complaint alleging that "[m]any consumers learned from their lenders that Defendants had not even contacted the lender or that Defendants had only minimal, non-substantive contact with the lender"); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging that "[d]efendants have misrepresented that negotiations were underway, although Defendants had not yet contacted the lender"); *FTC* v. *LucasLawCenter "Inc.",* No. SACV–09–770 DOC (ANX), Mem. Supp. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that consumers who contact their lenders "learn that [Defendant] never even contacted the lender, or merely verified the consumer's loan information"); *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09–cv–01167–FJM (D. Ariz. June 1, 2009) (alleging that defendants failed to act on homeowners' cases for more than four to six weeks without completing—or in some cases, even starting—negotiations and "failed to return consumers' repeated telephone calls, even when homeowners were on the brink of foreclosure").

[80] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov.

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sever contact with lenders and servicers unwittingly diminish their ability to learn that their MARS provider is doing little or nothing on their behalf. These consumers may never learn of concessions their lenders or servicers would be willing to make—or, worst of all, may never discover that foreclosure is imminent.[81] In some cases, MARS providers also advise consumers to discontinue making their mortgage payments even though doing so could result in the loss of their homes and damage to their credit ratings.[82]

The Commission's law enforcement experience,[83] state law enforcement,[84] the comments received,[85] and state bar actions[86] indicate that a growing number of attorneys themselves market and sell MARS. Many of them engage in unfair and deceptive acts and practices, such as making the specific claim that they offer legal services,[87] when in fact, no attorneys are employed by the company, or if they are, they do little or no legal work for customers.[88]

C. Continued Law Enforcement and Other Responses

The Commission has taken aggressive action to protect consumers from deceptive MARS providers. As noted above, the FTC has filed 32 lawsuits[89] in the last three years against MARS providers for engaging in deceptive practices in violation of the FTC Act and, in several instances, the Telemarketing Sales Rule (TSR).[90] In addition, the FTC has coordinated its efforts with state law enforcement and other federal agencies, including the Department of Justice (DOJ), the Department of Housing and Urban Development (HUD), the Treasury Department, and the Office of the Special Inspector General for the Troubled Asset Relief Program (SIG–TARP).[91] The Commission also is a member of the Financial Fraud

23, 2009); *FTC* v. *Kirkland Young,* LLC, No. 09–23507 (S.D. Fla filed Nov. 18, 2009); *FTC* v. *Washington Data Res., Inc.,* No. 8:09–cv–02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009); *see also* NCRC Report, *supra note* 76, at 4 (noting that, on 25% of its undercover calls, MARS providers instructed the caller to cease communicating with his or her lender).

[81] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that "[w]hen consumers speak with their lenders directly, they often discover that Defendants had not yet contacted the lender or only had left messages or had non-substantive contacts with the lender"); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. TRO at 18–19 (C.D. Cal. filed July 13, 2009) (detailing "devastating effects" of consumers learning too late of lack of effort by loan modification company); CRC (ANPR) at 7 ("People who do have a chance of keeping the home are being steered away from legitimate, free homeowner counseling services or are failing to take any action before it is too late because they have been assured everything is being taken care of for them already.").

[82] *See* NAAG at 4 ("We are aware of a number of rescue consultants who incorrectly claim that consumers' lenders will not work with them until they are behind on their mortgage payments. We are also aware of consultants who advise consumers not to make mortgage payments so that they will be able to afford mortgage loan modification fees."); CUNA at 2 (consumers "are often instructed to stop making mortgage payments"); NCLC at 7 (family told "to stop paying their mortgage payments and promised a loan modification with lower payments."); Rodriguez at 1 ("I have had clients face foreclosure because of these companies telling them to stop paying their mortgage and pay them!"); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal., Am. Compl. filed June 24, 2009) ("In numerous instances, Defendants have [allegedly] encouraged consumers to stop paying their mortgages, telling consumers that delinquency will demonstrate the consumer's hardship to the lender and make it easier to obtain a loan modification."); *FTC* v. *LucasLawCenter "Inc.",* No. SACV–09–770 DOC (ANX) (C.D. Cal. filed July 9, 2009) (alleging that "[i]n numerous instances, Defendants' representative encourages consumers to stop paying their mortgages, telling consumers that delinquency will demonstrate the consumers' hardship to the lender and make it easier to obtain a loan modification."); *FTC* v. *Foreclosure Solutions, LLC,* No. 1:08–cv–01075 (N.D. Ohio filed Apr. 28, 2008) ("Defendants [allegedly] instruct the consumer to open a savings account and deposit, every month until further notice from Defendants, the consumer's monthly mortgage payment plus an additional [25%]. Defendants claim this money will be used to negotiate with the lender to reinstate the loan."); *see also FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322 (S.D. Fla. filed Nov. 24, 2009); *FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 15, 2009); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC(ANx) (C.D. Cal. filed July 13, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MLGx) (C.D. Cal., Amd. Compl. filed Mar. 8, 2009); FTC v. *New Hope Property LLC,* No. 1:09–cv–01203–JBS–JS (D.N.J. filed Mar. 17, 2009); NCRC Report, *supra* note 76, at 24 ("[I]n over 50% of the tests service providers advised testers that they should not pay their mortgage."); NAAG (ANPR) at 10 ("In some cases, the mortgage consultants will actually counsel the consumer not to make a mortgage payment, which of course frees up funds for the consultants' fee.").

[83] *See infra* notes 89–90.

[84] *See, e.g., Florida* v. *Kirkland Young,* No. 09–90945 (Fla. Cir. Ct. Miami-Dade Cty., filed Dec. 17, 2009), *available at http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7YXQF7/$file/Complaint.121709.pdf.* Press Release, N.C. Dep't of Justice, *AG Cooper Targets California Schemes that Prey on NC Homeowners* (July 15, 2009), *available at http://www.ncdoj.com/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/AG-Cooper-targets-California-schemes-that-prey-on-.aspx;* Press Release, Colo. Att'y Gen. Office, *Attorney General Announces Actions Against Seven Loan-Modification Companies As Part of Multistate Sweep* (July 15, 2009), *available at http://www.coloradoattorneygeneral.gov/press/news/2009/07/15/attorney_general_announces_actions_against_seven_loan_modification_companies_p;* Press Release, Ill. Att'y Gen., *Illinois Attorney General Sues 14th Company for Mortgage Rescue Fraud* (Aug. 28, 2009), *available at http://www.illinoisattorneygeneral.gov/pressroom/2008_08/20080828.html.*

[85] *See, e.g.,* Deal at 5–6 ("Some non-attorney modification companies claimed to have attorneys on staff or available to review the work or to negotiate with lenders. A few lawyers 'rented' their names to non-attorney MARS providers while providing little service."); IL AG (ANPR) at 1 (noting that "33 percent of the [MARS] companies we have dealt with are owned by attorneys, while 38 percent have some link to the legal profession"); CRC (ANPR) at 2 ("An increasing number of attorneys are involving themselves in these unethical practices without providing any legal (or other) services. . . ."); MN AG (ANPR) at 5 ("This Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law."); NAAG (ANPR) at 4 ("Attorneys * * * have an increasing presence in this industry and have been found working in conjunction with or serving as referral sources for mortgage consultants.").

[86] *See, e.g., Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.,* 111th Cong. 58 (2009) (statement of Scott J. Drexel, Chief Trial Counsel, State Bar of California), *available at http://financialservices.house.gov/media/file/hearings/111/111-28.pdf* at 2, 4 (Drexel Testimony) (noting that attorney misconduct in connection with MARS "is a problem of extremely significant—if not crisis—proportions in California," and that the state bar has initiated over 175 associated investigations of attorneys); Polyana Da Costa, *Record Number of Complaints Target Florida Loan Modification Lawyers,* Law.com (Oct. 1, 2009) ("The [Florida] state attorney general has received a record 756 complaints through August of this year about loan modifications involving attorneys."), available at *http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202434223147.*

[87] *See, e.g., FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 16, 2009) (alleging that defendants falsely claim to have attorneys or forensic accountants on staff); *FTC* v. *Loan Modification Shop, Inc.,* No. 3:09–cv–00798 (JAP), Mem. Supp. TRO at 14 (D.N.J. filed Aug. 4, 2009) (alleging that defendants misrepresent "that it is an attorney-based company"); *see also FTC* v. *LucasLawCenter "Inc.",* No. SACV–09–770 DOC (ANX), Mem. Supp. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that "[d]espite promises to the contrary, consumers have no contact with the purported attorneys who are supposed to be negotiating with their lenders").

[88] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009); *FTC* v. *Washington Data Res., Inc.,* No. 8:09–cv–02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *see also FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Prelim. Rep. Temp. Receiver at 2–3 (C.D. Cal. filed July 7, 2009) (stating that defendants' "relationship with two different lawyers was nominal at best and served primarily as a cover to dignify the business and invoke the attorney exception to advance fee prohibitions").

[89] *See* FTC Case List, *supra* note 28.

[90] 16 CFR 310.1, *et seq.* (2003); *see, e.g., FTC* v. *Kirkland Young, LLC,* No. 09–23507 (S.D. Fla. filed Nov. 18, 2009); *FTC* v. *Washington Data Res., Inc.,* No. 8:09–cv–02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322 (S.D. Fla. filed Nov. 24, 2009); *FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 15, 2009); *FTC* v. *Hope Now Modifications, LLC,* No. 1:09–cv–01204–JBX–JS (D.N.J. filed Sept. 14, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009).

[91] See Press Release, FTC, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009), *available at http://www.ftc.gov/opa/2009/07/loanlies.shtm;* Press Release, FTC, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at http://www.ftc.gov/opa/2009/04/hud.shtm.*

Enforcement Task Force (FFETF), a coalition of federal and state law enforcement agencies that has worked to combat illegal activity by MARS providers.[92] In the past 15 months, the FTC has participated in three interagency nationwide sweeps: "Operation Stolen Dreams" (June 17, 2010), in which the Commission secured consent orders against 16 marketers of MARS;[93] "Operation Stolen Hope" (November 24, 2009), in which the Commission joined with 20 states collectively to file over one hundred lawsuits against MARS providers;[94] and "Operation Loan Lies" (July 15, 2009), in which the FTC coordinated with 25 federal and state agencies to bring 189 actions against MARS defendants.[95] Prior to these nationwide sweeps, the Commission, jointly with the DOJ, the Treasury Department, HUD, and the Illinois Attorney General, had announced several law enforcement actions targeting MARS.[96]

In addition to their coordination with the Commission, the states have continued to engage in their own aggressive law enforcement. Collectively, the states have investigated at least 450 MARS providers and sued hundreds of them for alleged state law violations.[97] Individual states also have continued to enact statutes and regulations to address practices related to MARS.[98]

In addition to federal and state law enforcement, on December 15, 2009, HUD published a proposed rule in the **Federal Register** that would require states to adopt uniform licensing requirements for MARS providers.[99] The proposed HUD Rule targets the practices of "loan originators," a term that encompasses third-party loan modification services.[100] Under the proposed HUD Rule, loan originators must undergo a background check, complete 20 hours of pre-licensing education, and pass a written test to obtain a license.[101] The proposed HUD Rule also requires the creation of a centralized database of loan originators licensed in each state, containing such information as their employment history, consumer complaints, and any enforcement and disciplinary actions brought against them. State regulators and the public will be able to access this database, thus allowing them to find and track mortgage loan originators throughout the country.[102] The goal of the proposed HUD Rule is to reduce the incidence of fraud by encouraging states to establish minimum licensing and registration standards, thereby making originators, including MARS providers, more accountable.[103]

III. Discussion of the Rule

As detailed in this SBP, the Final Rule prohibits and seeks to prevent unfair and deceptive acts and practices in connection with mortgage assistance relief services. It includes provisions that:

1. Define several key terms, including "mortgage assistance relief service" and "mortgage assistance relief service provider";
2. Prohibit providers from instructing consumers to cease communication with their lenders or servicers;
3. Bar providers from misrepresenting any material aspect of their services, including but not limited to several specific misrepresentations;
4. Mandate that providers disclose: (a) That they are for-profit businesses not affiliated with the consumers' lenders or the government, (b) that consumers' lenders or servicers may not agree to change their loans, (c) that consumers could lose their homes and damage their credit ratings if they stop making their mortgage payments (a disclosure triggered if providers instruct consumers to stop making payments), and (d) that consumers are not required to stay in the service or accept the results delivered, and the total cost of the service if they do accept the results.

[92] *See* Press Release, Financial Fraud Enforcement Task Force (FFETF), *President Obama Establishes Interagency Financial Fraud Enforcement Task Force* (Nov. 17, 2009), *available at http://www.stopfraud.gov/news/news-11172009-01.html.* The FFETF was established by President Obama in late 2009 and is chaired by the Attorney General. The Commission has played an active role on the Task Force through, among other things, its membership on the Task Force's Mortgage Fraud Working Group.

[93] *See* Press Release, FTC, *FTC Settlement Orders Ban More Than A Dozen Marketers from Selling Mortgage Relief Services; Repeat Offender Ordered to Pay $11.4 Million for Contempt* (June 17, 2010), *available at http://www.ftc.gov/opa/2010/06/loanmods.shtm.* This sweep was organized by the FFETF, and member agencies filed hundreds of civil and criminal mortgage fraud cases, including numerous cases against MARS providers.

[94] Press Release, FTC, *Federal and State Agencies Target Mortgage Relief Scams* (Nov. 24, 2009), *available at http://www.ftc.gov/opa/2009/11/stolenhope.shtm.*

[95] Press Release, FTC, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009), *available at http://www.ftc.gov/opa/2009/07/loanlies.shtm.*

[96] Press Release, FTC, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at http://www.ftc.gov/opa/2009/04/hud.shtm.* In connection with these joint efforts, the Commission also sent warning letters to 71 companies marketing potentially deceptive mortgage loan modification and foreclosure assistance programs on the Internet. *Id.*

Moreover, the Justice Department and other members of the FFETF have pursued many MARS providers for illegal conduct, including criminal activity. *See* Press Release, FFETF, *Financial Fraud Enforcement Task Force Announces Results of Broadest Mortgage Fraud Sweep in History* (June 17, 2010), *available at http://www.stopfraud.gov/news/news-06172010-02.html.*

[97] *See supra* note 62.

[98] At least 30 states and the District of Columbia have enacted such statutes or regulations. *See, e.g.,* Ariz. Rev. Stat. § 44–1378 (2010 Ariz. ALS 143); Cal. Civ. Code § 2944.7; *id.* § 2945, *et seq.;* Colo. Rev. Stat. § 6–1–1101, *et seq.;* 2009 Conn. Gen. Stat. § 36a–489; 6 Del. Code Ann. § 2400B, *et seq.;* D.C. Code § 42–2431, *et seq.;* Fla. Stat. § 501.1377; Haw. Rev. Stat. § 480E–1, *et seq.;* Idaho Code Ann. § 45–1601, *et seq.;* 765 Ill. Comp. Stat. Ann. 940/1, *et seq.;* 24 Ind. Admin. Code § 5.5–1–1, *et seq.;* Iowa Code § 741E.1, *et seq.;* Me. Rev. Stat. Ann. tit. 32, § 6171, *et seq.* & 6191, *et seq.;* Md. Code Ann., Real Property § 7–301, *et seq.;* 940 Mass. Code Regs. § 25.01, *et seq.;* Mich. Comp. Law § 445.1822, *et seq.;* Minn. Stat. § 325N.01, *et seq.;* Mo. Rev. Stat. § 407.935, *et seq.;* Neb. Rev. Stat. § 76–2701, *et seq.;* Nev. Rev. Stat. § 645F.300, *et seq.;* N.H. Rev. Stat. Ann. § 479–B:1, *et seq.;* 2010 N.M. ALS 58; N.Y. Real Prop. Law § 265–B; N.C. Gen. Stat. § 14–423, *et seq.;* 2008 Or. Laws Ch. 19; R.I. Gen. Laws § 5–79–1, *et seq.;* Tenn. Code Ann. § 47–18–5501, *et seq.;* Utah Admin. Code § 61.2; Va. Code Ann. § 59.1–200.1; Wash. Rev. Code § 19.134.010, *et seq.;* Wis. Stat. § 846.45.

These laws generally include a number of requirements and restrictions, including: (1) Banning covered entities from requiring or collecting advance fees before fully performing contracted or promised services to the consumer; (2) requiring written contracts containing certain provisions and disclosures; and (3) providing consumers with the right to cancel the contract in certain circumstances.

Where, as here, Congress has not foreclosed state regulation, a state statute is preempted only if it conflicts with a federal statute. *Ray* v. *Atl. Richfield Co.,* 435 U.S. 151, 158 (1978). State laws are preempted only to the extent there is a conflict—compliance with both federal and state regulations is impossible or the state law is an obstacle to effectuating the purposes and objectives of Congress. *Id.* Thus, state laws can impose additional requirements as long as they do not directly conflict with the Final Rule. *See, e.g., TSR Final Rule,* 75 FR at 48481.

[99] *See Safe Mortgage Licensing Act: HUD Responsibilities under the Safe Act; Proposed rule,* 74 FR 66548 (Dec. 15, 2009) (proposed HUD Rule). Pursuant to the Dodd-Frank Act, responsibility for HUD's proposed rule will transfer to the BCFP as of the transfer date selected by the Treasury Department. Dodd-Frank Act § 1061; which has been designated as July 21, 2011. *BCFP; Designated Transfer Date,* 75 FR 57252.

[100] 74 FR at 66554.

[101] 74 FR at 66552.

[102] 74 FR at 66548–49.

[103] 74 FR at 66548. The proposed rule also would authorize HUD to examine loan originators' records, conduct enforcement proceedings, and collect civil penalties for violations of HUD and state licensing requirements. *See* 74 FR at 66550, 66555.

A coalition of state bank regulators argued in its comment that the FTC's proposed rule would provide important additional protections not included in the HUD proposal. *See* CSBS at 1 ("SAFE Act-compliant state licensing laws are primarily focused toward the origination of new mortgage loans and may not directly address the particular dangers associated with mortgage assistance relief services. The proposed FTC rule will establish a floor to protect consumers from abusive MARS practices nationwide. By banning up-front fees, implementing disclosure requirements, prohibiting certain misrepresentations, and instituting various record-keeping requirements for MARS providers, the FTC's proposal, if adopted, will go a long way in rooting out fraudulent practices among these individuals wherever they operate.").

5. Prohibit the collection of fees until providers have: (a) Secured a written and executed agreement between the consumer and the lender or servicer and, (b) before that agreement has been executed, (i) disclosed that the consumer can accept or reject the lender's or servicer's offer for mortgage relief and (ii) provided a separate written notice from the consumer's lender or servicer summarizing the material differences between the consumer's current mortgage loan and the relief offered;

6. Enjoin persons from providing substantial assistance or support to another whom they know or consciously avoid knowing is engaged in a violation of the Rule;

7. Require that providers maintain records and monitor Rule compliance; and

8. Exempt attorneys providing MARS as part of the practice of law from most provisions of the Rule if they: (a) Are licensed in the state where the consumer or the dwelling is located, and (b) comply with relevant state licensing and bar requirements. Such attorneys are exempt from the Rule's advance fee ban if they set aside MARS fees in a client trust account and withdraw funds only as the fees are earned.

A. Section 322.1: Scope

Section 322.1 states that the Final Rule implements the mandate of the Omnibus Appropriations Act, as clarified by the Credit CARD Act. These statutes state that the Commission "shall initiate a rulemaking proceeding," and that "[s]uch rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services." [104] As noted earlier, this language authorizes rules that not only prohibit or restrict practices that are themselves unfair or deceptive, but also rules that prohibit or restrict other practices if such rules are reasonably related to the goal of preventing unfairness or deception.[105] As discussed above, the Commission's rulemaking authority is limited by the Credit CARD Act to persons over whom the FTC has jurisdiction under the FTC Act.

B. Section 322.2: Definitions

1. Section 322.2(i): Mortgage Assistance Relief Service

As discussed above, the Rule is intended to regulate for-profit providers of mortgage assistance relief services. Section 322.2(i) of the Rule adopts, without substantive modification, the proposed rule's definition of "mortgage assistance relief service" (MARS) as including "any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer" in negotiating a modification of a dwelling loan that reduces the amount of interest, principal balance, monthly payments, or fees; stopping, preventing, or postponing a foreclosure or repossession; or obtaining one of several other types of relief to avoid delinquency or foreclosure. Sections 322.2(i)(3)–(6) define these additional types of relief to include obtaining: (1) A forbearance or repayment plan; (2) an extension of time to cure default, reinstate a loan, or redeem a property; [106] (3) a waiver of an acceleration clause or balloon payment; and (4) a short sale, deed-in-lieu of foreclosure, or any other disposition of the property except a sale to a third-party that is not the loan holder.[107] The Rule covers instances in which a third party itself works with lenders or servicers to obtain mortgage relief as well as instances in which a third party markets services to aid consumers who themselves work with lenders or servicers to obtain relief.[108] Accordingly, § 322.2(i) is intended to apply to every service MARS providers offer,[109] expressly or by implication, for the purpose of obtaining loan concessions, avoiding foreclosure, or saving their homes.[110]

Mortgage assistance relief services under the Rule are limited to services

[104] *See* Omnibus Appropriations Act § 626(a); Credit CARD Act § 511.

[105] In articulating the scope of its rulemaking authority to remedy unfair and deceptive acts and practices under the FTC Act, the Commission has explained:

In exercising this remedial authority, the Commission has not been limited to proscribing only the precise practices found to exist, but rather has been free to close all roads to the prohibited goal. * * * The Commission's discretion to formulate an appropriate means of preventing the unfair or deceptive acts or practices found to exist also takes into account the nature of rulemaking, which involves predictions based upon pure legislative judgment and judgmental or predictive determinations such as those involved in fashioning remedies. In making such determinations, the Commission is entitled to rely on its judgment, based on experience as to the appropriate remedy to impose in the rule.

FTC, *Funeral Industry Practices; Final Trade Regulation Rule,* 47 FR 42269, 42272 (Sept. 24, 1982) (citing, *inter alia, FTC* v. *Ruberoid,* 343 U.S. 470, 473 (1952)) (internal citations and quotations omitted); *see also Am. Fin. Servs Ass'n* v. *FTC.,* 767 F.2d 957, 988 (DC Cir. 1985) (noting that the Commission "has wide latitude for judgment" in crafting rules to curb unfair or deceptive practices).

The Commission exercises similar discretion in crafting orders to resolve law violations. *See FTC* v. *Nat'l Lead Co.,* 352 U.S. 419, 428 (1957) ("[T]he Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist."); *Ruberoid,* 343 U.S. at 473 ("If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."); *Jacob Seigel Co.* v. *FTC,* 327 U.S. 608, 611–12 (1946) ("The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce.").

[106] In many states, mortgagors have the right to "redeem," *i.e.,* regain possession of, a property for a period of time following foreclosure. *See, e.g.,* RealtyTrac, *Foreclosure Laws and Procedures By State* (chart showing that, depending on the state and the borrower's circumstances, redemption periods can last anywhere from 10 days to over one year), *available at http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp.*

[107] Several commenters supported the adoption of this definition. *See, e.g.,* NCLC at 3 ("[T]he broad definition of MARS and MARS provider are also important aspects of the rule that will help ensure its effectiveness. By including all possible forms of mortgage relief assistance, including those represented by implication to assist or attempt to assist consumers, the FTC has reduced the possibility of scammers evading the rule with tricks or loopholes."); CUUS at 2 ("[T]he definition of 'mortgage assistance relief services' in [the proposed rule] is sufficiently broad to include the types of companies offering the services which are the subject of abuses."); CSBS at 2 ("The state regulators believe that the proposed definition of 'mortgage assistance relief service' is generally adequate in covering the scope of the NPR[M].").

[108] The Rule, however, is not intended to cover those who provide general financial advice to consumers—such as accountants or financial planners—that consumers could potentially use to avoid foreclosure or obtain loan modifications from their lenders or servicers. Nevertheless, if an entity that provides financial advice or that reviews consumers' mortgage loan paperwork (*e.g.,* performs a "forensic audit"), *see infra* note 110, promotes its services in such a manner that consumers take away the express or implied claim that the entity's service will result in a loan modification or other mortgage relief, the entity is a "mortgage assistance relief service provider" under the Final Rule. In that instance, if consumers do not obtain the represented result, the entity will have made a misrepresentation in violation of Section 322.3(b) of the Final Rule. *See infra* § III.3.a. The Commission emphasizes that fine-print or pro forma disclaimers generally are not sufficient to qualify performance or success claims. *See, e.g.,* Deception Policy Statement, *infra* note 200, at 180; *infra* note 220.

[109] *See, e.g.,* MN AG at 2 ("Any rule adopted by the Commission should clearly regulate all forms of mortgage assistance relief servicers.").

[110] This provision encompasses "forensic audits" and other services in which the provider purports to review, and identify potential errors in, loan documents or documents sent by a consumer's lender or servicer in order to avert foreclosure or obtain concessions from the lender or servicer. *See supra* note 56; *MARS NPRM,* 75 FR at 10720 n.160. For example, if, for these purposes, a provider offers to examine and find mistakes in foreclosure documents which the lender or servicer signed by automatic means (sometimes referred to as "robo-signing") without checking them for accuracy, this service would fall within § 322.2(i) of the Final Rule.

that are offered to consumers [111] who are obligated under loans secured by a "dwelling" or residence. A "dwelling" is defined in Section 322.2(e) of the Rule to be a residential structure containing four or fewer units, regardless of whether it is attached to real property. The term dwelling includes "an individual condominium unit, cooperative unit, mobile home, manufactured home, or trailer." [112] In response to comments on the NPRM, the Rule adds the term "manufactured home" to the definition of "dwelling" to ensure that the Rule's protections extend to consumers whose homes are constructed at a site (*e.g.,* factory floor) other than the final location of the structure.[113] Finally, the definition of "dwelling" applies only to residences that are "primarily for personal, family, or household purposes." [114] The definition of "dwelling" includes second homes and rental properties of consumers, because the Commission's law enforcement experience indicates that consumers who own such properties may seek help to avoid foreclosure on these properties.[115] However, "dwelling" does not cover MARS offered in connection with commercial properties.[116]

a. Sale-Leaseback and Title Reconveyance Transactions

In the NPRM, the Commission advised that the proposed definition of MARS would cover offers of sale-leaseback and title reconveyance transactions,[117] but only if they were marketed "to save the consumer's home from foreclosure or repossession." [118] The Commission specifically solicited comment on this aspect of the proposed rule, including whether and how a final rule should address these transactions.[119]

In response to the FTC's request for comments, state law enforcers and consumer groups endorsed the proposed rule's coverage of sale-leaseback or title reconveyance transactions when they are marketed as ways to avoid foreclosure.[120] These organizations asserted that this limited coverage is sufficient in light of existing state laws governing how such sales must be structured.[121] One group of state regulators, however, advocated that the Commission address the underlying sale-leaseback transaction in a subsequent rulemaking if addressing it now would delay the issuance of the Final Rule.[122]

Many states have enacted laws that comprehensively regulate sale-leaseback and title reconveyance transactions, imposing, for example, specific valuation requirements on the property transfers and obligations to determine that the consumer can reasonably afford to repurchase the property.[123] On the other hand, the record shows that sale-leaseback and title reconveyance transactions have been commonly touted as a means to avert foreclosure and its consequences.[124] Although the Final Rule does not regulate the terms of sale-leaseback and title reconveyance transactions, if such transactions are represented, expressly or impliedly, as a way for a consumer to avoid foreclosure, they present the same risks to consumers as other forms of MARS.[125] The FTC thus has determined that the Final Rule will cover offers of sale-

[111] "Consumer" is broadly defined to include "any natural person who is obligated under any loan secured by a dwelling." Section 322.2(d). For the purposes of clarity, the Final Rule's definition of "consumer" replaces "owes on" in the proposed definition with "is obligated under." The Commission intends to cover consumers at every stage of the process and does not limit the Rule's protections to those who are in default or foreclosure. *See* NAAG at 3 ("We support broad application of the rule to cover all homeowners, regardless of whether they are in foreclosure or have defaulted on their loans."). Covering consumers who are not in default or foreclosure is necessary because many of them seek assistance from MARS providers before they are actually delinquent on their loans. *See* CMC (ANPR) at 8 ("Many of the abuses that servicers have encountered have occurred before the consumer has received a notice of default. MARS providers sometimes solicit customers who are not in default but who live in areas with high numbers of distressed borrowers. Any rule should apply to MARS providers at any stage of the process."); NCLC (ANPR) at 4 ("Many homeowners have sought help from MARS [providers] before entering default, though sometimes the MARS then encourages a default. * * * The mortgage servicing industry and others have urged homeowners to seek help before they go into default."); NCRC (ANPR) at 2 (noting that there are "[c]ompanies claiming to offer assistance with loan modifications, to consumers who may or may not be in default"); NAAG (ANPR) at 11 ("The [state] requirement that consumers be in default before statutory protections begin made sense when mortgage consultants solicited business based on foreclosure filings, as those consumers would necessarily be in default. Mortgage consultants are now able to mine public information to target consumers who are not yet in default. Consultants may rely on an Internet presence to draw in consumers who may also not be in default. As consumers have grown more concerned about the state of the economy, these solicitations are proving increasingly attractive. Based on these reasons, a rule should provide as much coverage for consumers as possible.").

[112] Section 322.2(e). The definition for "dwelling" is similar to the definition of that term in Regulation Z, 12 CFR. 226, which implements the Truth in Lending Act, 15 U.S.C. 1601 *et seq.;* 12 CFR 226.2(a)(19).

[113] Some commenters recommended including manufactured homes, a term defined by the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. 5402(6), to refer to non-site built homes. *See, e.g.,* NCLC at 3 (the term "mobile home" often refers to a home built prior to 1974, while the term "manufactured home" means a post-1974 home that complies with HUD standards); *see also* OPLC at 2; NCLC at 4.

[114] This language is derived from Regulation Z. *See* 12 CFR 226.2(a)(12) (definition of "consumer credit").

[115] There have been cases in which consumers were at risk of foreclosure on non-primary residences. One comment observed that those at risk of losing a property to foreclosure include senior citizens who live in nursing homes or assisted living facilities and military service members who rent their homes while deployed. NCLC at 4 (supporting covering services purported to assist consumers save second homes or rental properties from foreclosure).

[116] The Final Rule also contains a definition of "dwelling loan," unmodified from the proposal, as "any loan secured by a dwelling, and any associated deed of trust or mortgage." Section 322.2(f).

[117] As noted in § II, in a sale-leaseback or title reconveyance transaction, the MARS provider typically instructs the consumer to transfer title to his or her home to the provider and then to rent the home from the provider. The provider then promises to reconvey title to the home at some later date. In some cases, the provider also may charge upfront fees in connection with the transaction. *See supra* note 43.

[118] *MARS NPRM,* 75 FR at 10728.

[119] *Id.*

[120] See NAAG at 5 ("We believe that the proposed rule will not interfere with state laws, but instead will complement existing state laws that address sale-leaseback transactions"); CSBS at 2 ("[S]tate regulators believe that it is important for the FTC to address abuses with respect to sale-leaseback transactions."); NCLC at 16 ("We support the FTC's plan to regulate only the marketing of these scams while leaving further regulation to the states.").

[121] *Supra* note 120.

[122] CSBS at 2 ("The state regulators believe that it is important for the FTC to address abuses with respect to sale-leaseback transactions. However, given the current prevalence of loan modification scams, regulations addressing those practices must receive priority. If the development of sale-leaseback regulations will delay the promulgation of final regulations to address loan modification scams, we believe that the sale-lease back regulations should be addressed in a separate effort.").

[123] *See supra* note 98. For example, some laws mandate that before executing a title transfer, the foreclosure rescue operator must verify that the consumer can reasonably afford to repurchase the home. *See, e.g.,* Minn. Stat. § 325N.17(a)(1). In addition, the foreclosure rescue operator may be required to obtain written consent from the homeowner, conduct a face-to-face closing, abide by federal and state laws governing sales of residential properties, allow consumers a period of time to cancel the transaction before title conveyance can be recorded, and either return title to the consumer or provide compensation that represents the property's fair market value. *See, e.g., id.* § 325N.17(a)(2)–(4), (b).

[124] *See supra* note 43; *see also, e.g.,* CJI, Att. 1, 2 (private plaintiffs in Maryland challenging foreclosure rescue and equity stripping scam); NAAG (ANPR) at 5–6; CJI, Att. 1 at 2; NCLC at 16 ("Sale-leaseback and other title-transfer transactions can be the most harmful of foreclosure rescue scams because they not only deprive a homeowner of scarce money but outright steal the homeowner's deed.").

[125] Other transactions proposed to consumers similarly would be covered by the Rule if marketed as a means to stop or avoid foreclosure. *See, e.g.,.* NV DML at 2–3 (describing two transactions being marketed to some consumers as a means to secure concessions on their mortgage loans). The definition of MARS encompasses any service that purports to help consumers stop, prevent, or postpone any foreclosure sale, or otherwise save the property, regardless of the form that relief may take. Section 322(i)(2).

leaseback and title reconveyance transactions marketed as a way to save a consumer's home from foreclosure or repossession.[126]

b. Mortgage Refinancing Services

The proposed rule covered mortgage brokers who offer loan origination or refinancing services, but only if those services are represented, expressly or impliedly, to help consumers avoid delinquency or foreclosure. The Final Rule is unchanged on this point. Thus, the Final Rule does not cover mortgage brokers who offer services that are advertised or marketed for other purposes. To obtain a new loan or refinance an existing loan, consumers can work either with the lender directly or with a mortgage broker. [127]

As discussed in the NPRM, in some cases consumers at risk of foreclosure could benefit from assistance in refinancing; thus, the Commission does not wish the Rule to reduce the availability of legitimate services of this kind.[128] At the same time, the Commission is concerned that services purported to help consumers avoid foreclosure through refinancing could be marketed unfairly or deceptively. Indeed, with the deterioration of the housing market, many mortgage brokers have focused on marketing and providing MARS to consumers,[129] and the record shows that some former brokers who now provide MARS have engaged in the same types of unfair and deceptive practices as other MARS providers.[130]

In the NPRM, the Commission specifically requested comment on how the Rule should treat mortgage brokers who offer refinancing services. A number of commenters, noting the incidence of unfair and deceptive practices by mortgage brokers selling MARS,[131] recommended that the Final Rule cover mortgage brokers.[132] In addition, one comment from a consumer group argued that the Rule should expressly cover refinancing as a form of MARS.[133] A consortium of state bank regulating agencies, on the other hand, recommended that the Rule exclude mortgage brokers entirely or, at a minimum, exclude their loan origination activities.[134]

The Commission concludes that mortgage brokers generally are not covered by the Rule. However, if a mortgage broker offers loan refinancing or originations as a means for consumers to save their homes from foreclosure—that is, the broker is providing MARS—then the Rule covers this conduct. Thus, the Final Rule protects consumers from unfair and deceptive practices by mortgage brokers operating as MARS providers without unduly restricting legitimate mortgage brokerage activities.

c. Mortgage Assistance Relief "Product"

One commenter recommended that the Commission add the word "product" to the proposed definition "mortgage assistance relief service." The commenter recommended this addition to ensure that providers cannot evade the Rule by claiming to sell a product (*e.g.,* software, books, CDs, or other tangible materials to help consumers avoid foreclosure) rather than a service.[135] Another comment from a group of state bank regulators disagreed, stating, without elaboration, that the regulators saw no reason to include the word "product" in the definition of MARS.[136]

The Commission declines to include products in the definition of MARS in the Final Rule. The record demonstrates that providers of services to help consumers modify their mortgages and avoid foreclosure often engage in unfair and deceptive practices; in contrast, neither the Commission's law enforcement experience nor the rulemaking record show that those who sell products for mortgage assistance relief are engaged in the same types of conduct. The Commission will continue to monitor to ensure that MARS providers do not gravitate to the sale of products to evade the Rule.[137] Should MARS providers selling products engage in unfair or deceptive practices, the Commission has the authority to take law enforcement action under Section 5 of the FTC Act. Moreover, should unfair or deceptive practices in the sale of mortgage assistance relief products become widespread, the Commission may consider amending the Rule to include such practices.[138]

2. Section 322.2(a): "Clear and Prominent"

The proposed rule required that mandated disclosures be made "clearly and prominently," specifying how this requirement applied in different mediums. The two commenters that addressed how disclosures must be made supported the proposed criteria for making clear and prominent

[126] As a general matter, the Final Rule is not intended to apply to the marketing of services to assist consumers in selling their properties to third parties. The Final Rule, however, does specifically cover the marketing of services involving the sale of properties to third parties if those services are designed or intended to assist consumers in averting foreclosure, *e.g.,* through a short sale or deed-in-lieu of foreclosure. One commenter urged the Commission to exempt licensed real estate professionals from the Final Rule. NAR at 1–2. The commenter argued the Rule would restrict real estate agents in helping consumers with the process of selling their homes through short sales. *Id.* The Commission concludes that an exemption for real estate agents is not necessary. Real estate agents customarily assist consumers in selling or buying homes and perform functions such as listing homes for sale, showing homes, and finding desirable homes for consumers. The Commission is aware that real estate agents may perform these functions when properties are bought or sold through a short sale transaction, but does not consider these services to be MARS.

[127] Mortgage brokers can offer a wide choice of loan products from different lenders, without consumers having to deal with each lender separately. Thus, mortgage brokers commonly act as intermediaries between consumers and lenders in bona fide loan origination or refinancing transactions. Mortgage brokers typically are paid by the lender, or in some cases by the borrower, from the closing costs of the loan transaction. *See, e.g.,* Nat'l Ass'n of Mortg. Brokers FAQs, *available at http://www.namb.org/namb/FAQs1.asp?SnID=498395277; see also* NAAG at 12 (noting that brokers "are traditionally paid * * * at the closing of a consumer's loan, after all services have been provided"); NCLC (ANPR) at 29 ("[B]rokers * * * are normally paid only when a sale or mortgage transaction is completed.").

[128] *MARS NPRM,* 75 FR at 10713.

[129] One commenter provided examples of advertisements showing MARS providers aggressively recruiting mortgage brokers to sell MARS. *See* NCLC (ANPR) at 10.

[130] *See, e.g. supra* note 52; Peter S. Goodman, *Subprime Brokers Back as Dubious Loan Fixers,* N.Y. Times, July 19, 2009, at A1 (accounting of how many mortgage brokers in southern California began selling MARS when loan origination work evaporated).

[131] *See* NYC DCA at 8; NAAG (ANPR) at 11–12.

[132] CSBS at 2 ("The proposed FTC rules should apply to mortgage brokers to the extent that mortgage brokers engage in non-loan origination MARS activities, *e.g.* negotiating loan modifications, short sales, etc."); NYC DCA at 8 ("Mortgage brokers offering for-profit mortgage assistance services are likely to be engaged in the same problematic practices as other MARS providers and must be subject to the rule."); LLAF at 2. Comments to the ANPR made similar arguments. *See, e.g.,* NAAG (ANPR) at 11–12 ("We have already seen complaints in which mortgage brokers charge consumers for mortgage consulting services and then failed to provide services or provided fewer services than originally promised. The trend of mortgage brokers providing services is likely to continue, especially if the market for mortgage loan origination remains soft."); NCLC (ANPR) at 13–14.

[133] *See* CUUS at 2–3 (recommending that Rule specify that "a refinance of the existing mortgage" is an example of an included service).

[134] *See* CSBS at 2 ("The proposed FTC rules do not need to address loan origination activities, even if the loan is being originated to avoid foreclosure.").

[135] *See* CUUS at 2 (adding the word "product" to the definition of MARS "would prevent MARS providers from claiming they are not covered by the rule because they offer a product, not a service.").

[136] *See* CSBS at 2 ("The state regulators do not believe that there is any reason to broaden the definition of MARS to include the word 'product' as inquired by the Commission.").

[137] Providers should be aware that merely including a product, such as a book, in conjunction with the sale of services will not remove the transaction from coverage by the Rule.

[138] As discussed above, *see supra* note 15, the Commission's authority to amend the MARS Rule will transfer to the BCFP on July 21, 2011.

disclosures.[139] No commenters opposed these requirements. The Final Rule substantially adopts the proposed rule's definition of "clear and prominent" with only the few changes discussed below. The Rule sets forth general requirements to ensure that required disclosures in commercial communications [140] are sufficiently clear and prominent for consumers to notice and comprehend them.[141] In all cases, the syntax and wording of disclosures must be easy for consumers to understand and must not be accompanied by statements that contradict or obscure their meaning.[142] The disclosures must be made in each language that is "substantially used" in the advertising.[143] In addition, as described below, the Rule includes clarity and prominence requirements specific to the particular media in which disclosures appear. The extensive record of unfairness and deception in the MARS industry makes it appropriate for the Commission to articulate with specificity how MARS providers must make required disclosures to prevent consumer harm.

a. Written Disclosures

The proposed rule set forth various requirements for disclosures that must appear in consumer communications disseminated in print or written form, including on a computer screen. The proposed rule provided that such disclosures:

shall be in a font easily read by a reasonable consumer, of a color or shade that readily contrasts with the background of the commercial communication, in the same language as each that is substantially used in the commercial communication, parallel to the base of the commercial communication, and, except as otherwise provided in this rule, each letter of the disclosure shall be, at a minimum, the larger of 12-point type or one-half the size of the largest letter or numeral used in the name of the advertised website or telephone number to which consumers are referred to receive information relating to any mortgage assistance relief service.

Section 322.2(a)(1) of the Final Rule largely retains these requirements but modifies them slightly to improve the clarity and effectiveness of the disclosures and to conform the relevant provisions of the Final Rule to the Free Credit Report Rule the Commission recently issued.[144] The Final Rule therefore now specifies that a written disclosure must be easily readable; in a high degree of contrast from the immediate background on which it appears;[145] distinct from other text, such as inside a border; and in a distinct type style, such as bold.[146] Unchanged, however, are the requirements that the disclosure must be communicated in the same languages that are substantially used in the commercial communication;[147] and appear parallel to the base of the communication[148] and that, unless otherwise specified, each letter of the disclosure text shall be, at a minimum, the larger of 12-point type or one-half the size of the largest character used in the name of the advertised website or telephone number to which consumers are referred for information on any MARS.[149]

b. Audio Disclosures

Section 322.2(a)(2) addresses the use of disclosures in audio communications such as broadcast radio or streaming radio. The proposed rule required these disclosures to be "delivered in a slow and deliberate manner and in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them." As with the requirements for written disclosures, the Commission has decided to modify these requirements slightly to improve the clarity of the

[139] *See* CSBS at 2 (endorsing requirements as "generally well-rounded and adequate"); NCLC at 16 ("The Commission has done an admirable job writing disclosure rules that will reduce the ability of MARS providers to obscure or overshadow mandatory disclosure statements.").

[140] As defined in the Final Rule, "commercial communication" is intended to include any written or oral statement, illustration, or other depiction used to induce the purchase of a service, plan, or program. *See* § 322.2(c) (adopting the proposed definition without substantive modification). As detailed in Section III.D. of this SBP, the Final Rule also adds to the proposed provision two subprovisions defining "general commercial communication" and "consumer-specific commercial communication." *See* §§ 322.2(c)(1) & 322.2(c)(2). Section 322.2(c)(1) defines a "general commercial communication" to be "a commercial communication that occurs prior to the consumer agreeing to permit the provider to seek offers of mortgage assistance relief on behalf of the consumer, or otherwise agreeing to use the mortgage assistance relief service, and that is not directed at a specific consumer." Section 322.2(c)(2) defines a "consumer-specific commercial communication" as "a commercial communication that occurs prior to the consumer agreeing to permit the provider to seek offers of mortgage assistance relief on behalf of the consumer, or otherwise agreeing to use the mortgage assistance relief service, and that is directed at a specific consumer." These definitions were added to clarify the disclosure requirements in § 322.4 of the Final Rule.

[141] Where possible, in formulating the requirements of the Rule, the Commission has drawn from comparable FTC rules requiring clear and prominent disclosures. *See* Free Annual File Disclosures, 16 CFR 610.4 (2010) (*Free Credit Report Rule*); Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.6 (2007) (*Franchise Rule*); Disclosure Requirements and Prohibitions Concerning Business Opportunities, 16 CFR 437.1 (*Business Opportunity Rule*); Regulations Under Section 4 of the Fair Packaging and Labeling Act, 16 CFR 500.4 (*Fair Packaging and Labeling Act Regulations*); Trade Regulation Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 CFR 308.2 (*900 Number Rule*); Rule Concerning Cooling-Off Period for Sales Made at Home or at Certain Other Locations, 16 CFR 429.1 (*Door-to-Door Sales Rule*). The disclosure requirements also are consistent with those in many FTC orders. *See, e.g.,* Sears Holding Mgmt. Co., Docket No. C–4264, File No. 082–3099 (FTC Sept. 9, 2009), *available at http://www.ftc.gov/os/caselist/0823099/090604searsdo.pdf.*

[142] *See Free Credit Report Rule,* 16 CFR 610.4(3)(vi) (prohibiting any representation that contradicts, is inconsistent with, or undermines the required disclosures, and any techniques that significantly detract from the message communicated by the disclosures); *900 Number Rule,* 16 CFR 308.3(a)(5); *Franchise Rule,* 16 CFR 436.9(a); *Business Opportunity Rule,* 16 CFR 437.1(a)(21).

[143] *See Free Credit Report Rule,* 16 CFR 610.4(3)(ii) (same language as that principally used in the advertisement); *see also* NYC DCA at 7–8 ("The FTC should require MARS providers to offer all mandated disclosures * * * in the languages used in their advertising."); LFSV at 2 ("The FTC should require that companies that negotiate a contract primarily in a language other than English provide a contract in the language in which the contract was primarily negotiated.").

[144] *See Free Credit Report Rule,* 16 CFR 610.4 (2010). The Commission did not promulgate the Free Credit Report Rule until after it issued the *MARS NPRM.* In that proceeding, unlike this one, the Commission received numerous comments on how the rule should address the prominence of the required disclosures, including formatting and placement. *Free Annual File Disclosures; Final Rule* 75 FR 9733 (2010). Several commenters, for example, offered suggestions on how to make visual disclosures prominent, including placing them within a border in a box, and in a contrasting color. *Id.* at 9734.

[145] *Free Credit Report Rule,*16 CFR 610.4(a)(3)(iii); *see also, In re Tender Corp.,* Docket No. C–4261 (FTC July 17, 2009), *available at http://www.ftc.gov/os/caselist/0823188/090717tenderdo.pdf* (stating that disclosures must appear "in print that contrasts with the background against which it appears"); *In re Budget Rent-A-Car-System, Inc.,* Docket No. C–4212 (FTC Jan. 4, 2008), available at *http://www.ftc.gov/os/caselist/0623042/080104do.pdf* (same); *see also* FTC, *Dot Com Disclosures: Information about Online Advertising* 12 (2000), *available at http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf (Dot Com Disclosures)* ("A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable. Information in a color that blends in with the background of the advertisement is likely to be missed.").

[146] Sections 322.4(a) and (b) of the Rule set forth additional requirements for the heading that must precede written disclosures. This heading must be in bold face font that is at least two-point type larger than the font size of the text of the required disclosures.

[147] *See also, e.g., Free Credit Report Rule,* 16 CFR 610.4(a)(3)(ii); *900 Number Rule,* 16 CFR 308.3(a)(1). If the advertisement has substantial material in more than one language, the MARS Rule requires that the disclosure be delivered in each such language. Section 322.2(a)(1).

[148] *See, e.g., Swisher Int'l, Inc.,* Docket No. C–3964 (FTC Aug. 25, 2000), *available at http://www.ftc.gov/os/2000/08/swisherdo.htm* (requiring warnings for cigars to appear "parallel * * * to the base of the * * * advertisement"); Fair Packaging and Labeling Act Regulations, 16 CFR 500.4(b) (requiring that identification for packaged goods appear "in lines generally parallel to the base on which the packaging or commodity rests as it is designed to be displayed").

[149] *See Free Credit Report Rule,* 16 CFR 610.4(b)(3); *see also 900 Number Rule,* 16 CFR 308.

requirements for audio disclosures and to be consistent with the Free Credit Report Rule.[150] Thus, the Final Rule requires MARS providers to deliver the required disclosures "in a slow and deliberate manner and in a reasonably understandable volume and pitch."[151]

c. Video Disclosures

Section 322.2(a)(3) of the Final Rule adopts the proposed rule's video disclosure requirements without modification. Video communications include those that appear on television or are streamed over the Internet. As a threshold matter, these disclosures must be delivered in accordance with the requirements for written and audio disclosures in §§ 322.2(a)(1) and (2). In addition, the disclosures must be made simultaneously in both audio and video,[152] the latter of which must be displayed for at least the duration of the audio disclosure and comprise at least four percent of the vertical picture height of the screen.[153]

d. Interactive Media

Section 322.2(a)(4) of the Final Rule addresses how disclosures must be made in interactive media formats, such as software, the Internet, or mobile media. As in proposed § 322.2(a)(4), the disclosures must conform with the requirements for written, audio, and video disclosures set forth in other parts of the "clear and prominent" definition. In addition, the disclosures must be provided in a way that the consumer cannot avoid the information, *i.e.*, it must be visible without the need to scroll down a Web page. The Final Rule makes two minor modifications to the proposed rule. First, it modifies the requirement that the disclosure be made on a separate landing page from the page on which the consumer takes any action to incur a financial obligation. The disclosure instead must be made on or immediately prior to the page on which the consumer takes any action to incur a financial obligation.[154] Second, the Final Rule mandates that the disclosure appear in text at least the same size as the largest character of the advertisement, replacing the proposed rule's requirement that it be twice the size of any hyperlink to the company's website or display of the URL. Both of these modifications are intended to ensure that consumers see mandated disclosures before they decide whether to purchase a mortgage assistance relief service.[155]

e. Program-Length Media

Section 322.2(a)(6) of the Final Rule, which adopts the proposed rule without modification, requires that disclosures in program-length television, radio, and Internet-based advertisements for MARS be presented at the beginning, near the middle, and at the end of the advertisement.[156] Requiring that disclosures be delivered at different stages of the broadcast makes it more likely that consumers who join the broadcast in progress will receive them.

3. Section 322.2(j): "Mortgage Assistance Relief Service Provider"

a. Exemption for Loan Holders and Servicers

Under § 322.2(j) of the Final Rule, "any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service" is a "mortgage assistance relief service provider,"[157] and thus subject to the Rule. The proposed rule generally exempted from its provisions loan holders and servicers, and agents of such entities unless the agents "claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent's benefit."[158]

In the NPRM, the Commission specifically sought comment on the proposed exemption for loan holders and servicers.[159] Lenders and servicers (who actually have the authority to change loan terms) may offer MARS that the Rule would cover in the absence of an exemption.[160] For example, a lender or servicer may notify a consumer of her eligibility for a loan modification under the MHA program and assist her in submitting the necessary paperwork.[161] In addition, lenders and servicers may outsource these functions to other parties who operate on their behalf. Such outsourcing is a common method of providing these services given the large number of consumers currently requesting assistance.[162]

Several comments from the financial services industry and consumer groups expressly supported the proposed exemption for lenders and servicers,[163]

[150] *See supra* notes 141–49.

[151] *See Free Credit Report Rule,* 16 CFR 610.4(a)(1)(3)(iv); *see also In re Sears Holding,* Docket No. C–4264 (stating that audio disclosures must be made "in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them"); *In re Darden Rests., Inc.,* Docket No. C–4189 (FTC May 11, 2009), *available at http://www.ftc.gov/os/caselist/0623112/070510do0623112c4189.pdf* (same); *In re Kmart Corp.,* Docket No. C–4197 (FTC Aug. 15, 2007), *available at http://www.ftc.gov/os/caselist/0623088/0623088do.pdf* (same); *In re Palm, Inc.,* Docket No. C–4044 (FTC Apr. 19, 2002), *available at http://www.ftc.gov/os/caselist/0023332/index.shtm* (same); *Dot Com Disclosures, supra* note 145, at 14 (same).

[152] Disclosures generally are more effective if they are made in both the visual and audio part of a consumer communication. *See generally* Maria Grubbs Hoy & J. Craig Andrews, *Adherence of Prime-Time Televised Advertising Disclosures to the "Clear and Conspicuous" Standard: 1990 Versus 2002,* 23 J. Mktg. Pub. Pol. 170 (2004) (stating that "dual modality" disclosures—oral and visual together—are more effective at communicating information to consumers); *see also In re Kraft, Inc.,* 114 F.T.C. 40 (1991) (finding that a visual disclosure alone was unlikely to be effective as a corrective measure in light of "the distracting visual and audio elements and the brief appearance of a complex superscript in the middle of the commercial"), *aff'd,* 970 F.2d 311 (7th Cir. 1992).

[153] *See Federal Election Commission Rules: Contributions and Expenditure Limitations and Prohibitions,* 11 CFR 110.11(c)(3)(iii)(B)–(C) (statement concerning funding source for political ads "must appear in letters equal to or greater than four (4) percent of the vertical picture height" and "be visible for a period of at least (4) four seconds").

[154] The Commission declines to require in the Final Rule that information be disclosed on a separate landing page, because this requirement may not be feasible or effective in some contexts, *cf. Free Credit Report Rule; Final Rule,* 75 FR 9726, 9737 (Mar. 6, 2010), and there is no evidence in the record addressing its effectiveness in this context.

[155] *See Dot Com Disclosures, supra* note 145, at 11 (explaining that disclosures are more likely to be effective if they are provided when the consumer is considering the purchase).

[156] *See Free Credit Report Rule,* 16 CFR 610.4(a)(3)(v). Section 308.3(a)(6) of the 900 Rule also imposes a nearly-identical requirement. 16 CFR 308.3(a)(6).

[157] Section 322.2(j).

[158] *See* § 322.2(i) (proposed rule). This limiting language was intended to ensure that MARS providers could not evade the Rule by styling themselves as "agents" of the lender or servicer.

[159] *See MARS NPRM,* 75 FR at 10728.

[160] *See, e.g.,* CMC (ANPR) at 5 ("Servicers are increasingly turning to third-party service-providers to assist them in processing loan modifications and in other loss-mitigation activities."); Am. Bankers Ass'n (ANPR) at 4–6; AFSA (ANPR) at 3, 5; MBA (ANPR) at 4.

[161] *See, e.g.,* AFSA at 3 (stating that mortgage servicers engage in the same forms of communication that would be covered under the Rule "to make the consumer aware of the availability of possible loss mitigation options and to encourage the consumer to contact the mortgage servicer directly, which is a critical component of any loss mitigation policy by a mortgage servicer to assist consumers"); MBA (ANPR) at 4 (stating that mortgage servicers collect payments, conduct borrower contact and outreach, and execute loan modification or other loss mitigation agreements).

[162] *See, e.g.,* David Lawder, *Few US Mortgage Modifications Made Permanent,* Reuters Dec. 10, 2009, *available at http://www.reuters.com/article/idUSN1021463420091210* (referring to a company that "has been hired by some of the largest U.S. banks to assist in modification efforts").

[163] *See* AFSA at 2–3 (The Rule is "not intended to regulate mortgage holders and servicers, but to stop for-profit MARS providers from harming consumers. The FTC is currently drafting proposed rules for mortgage acts and practices. That rule, rather than this MARS rule, is the appropriate place to consider additional regulations for mortgage holders and servicers."); CUUS at 3 ("Consumers Union agrees that lenders and servicers should be exempted from the definition of 'mortgage assistance relief services.'" Consumers Union is not aware of any lenders or servicers actively marketing MARS services for a fee to their customers."); CUNA at 2 ("We strongly urge the FTC to retain this exemption in the Final Rule. Credit unions have not been the source of any problems for home loan

but some recommended modifications to its scope.[164] Three commenters said that the Rule should cover lenders and servicers.[165]

The Commission has determined that the record supports an exemption for lenders and servicers. These lenders and servicers might provide useful MARS to consumers, and nothing in the record shows that such entities have engaged in the core conduct addressed by the Final Rule, i.e., deceiving consumers into paying large advance fees for services and not delivering promised results.[166]

Thus, the Commission adopts the exemption in the proposed rule for lenders and servicers, but with three modifications.[167] First, the Commission has modified the definitions of "servicer" and "dwelling loan holder" in §§ 322.2(l) and 322.2(g), respectively, to limit the exemption to loan holders and servicers of loans "that [are] the subject of the offer to provide mortgage assistance relief services."[168] This modification clarifies that there is no blanket exemption for lenders and servicers based solely on their status,[169] but rather that the Final Rule exempts such entities only if they offer MARS in connection with loans they actually hold or service.

The second change to the exemption clarifies that it encompasses both agents and contractors of lenders and servicers. Specifically, §§ 322.2(j)(1) and (2) have been changed to include not only loan holders and servicers as well as their agents, but also "contractor[s] of such individual[s] or entit[ies]."[170] Adding the term "contractor" makes clear that the exemption would apply to third parties with whom lenders and servicers technically do not have an agency relationship as a matter of law, but who nevertheless perform MARS on their behalf.[171]

Third, the Commission has determined to remove the language in the proposed rule that would exclude from the exemption third parties who "claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent's benefit." Such language would have resulted in the Rule covering agents and contractors that lenders and servicers may pay on a contingency or commission basis.[172] The Rule is not intended to restrict how lenders and servicers choose to compensate third parties that perform MARS functions on their behalf. Further, the Commission concludes that such a restriction on the exemption is not necessary to prevent third parties from improperly claiming an exemption in order to collect advance fees for MARS from consumers. The exemption applies only to those activities conducted within the scope of their agency or contractor relationship with exempted lenders and servicers. Thus, if they collect fees for MARS not performed on behalf of the lender or servicer, they would be subject to the Rule's requirements.

b. Treatment of Nonprofit Providers of Mortgage Relief Services

Section 322.2(k) of the Final Rule retains without substantive modification the exemption for nonprofit entities that was included in the proposed rule.[173] Nonprofits are excluded from the FTC's jurisdiction under the FTC Act and, therefore, they are exempt from rules issued pursuant to the Omnibus Appropriations Act.[174] This exemption includes bona fide nonprofit organizations with housing counselors offering MARS and nonprofit legal organizations representing financially stressed consumers.[175] The FTC, however, does have jurisdiction over purported nonprofits that in fact operate for the profit of their members,[176] and § 322.2(k) does not exempt these entities.[177]

borrowers and do not need additional rules to ensure they act in their members' best interests."); CSBS at 2–3 ("We support the Commission's inclination to generally exempt loan holders and servicers, as well as their agents, and nonprofit entities excluded from the FTC's jurisdiction from the definition of mortgage assistance relief service provider."); MBA at 3–4 ("We are pleased that the proposed rule specifically excludes mortgage servicers.").

[164] CUUS at 3 ("The Rule should specify that the only lender or servicer qualifying for this exemption is the one currently holding the mortgage loan of the homeowner retaining the services of a MARS entity."). *But see* MBA at 4 (the rule should exempt contractors of lenders and servicers); AFSA at 3–4 (servicers' agents and contractors that request or collect fees for their own benefit should not be excluded from the exemption). One commenter also requested that the Rule specify that "certain up-front fees are permissible by a licensed mortgage company, servicer or depository institution when necessary to execute a refinance, modification, or other loss mitigation agreement." MBA at 4. As discussed, the rule does not apply to loan holders or servicers, and thus does not govern these activities.

[165] One of the three commenters argued that lenders and servicers do not properly inform consumers of their foreclosure risks, lose paperwork associated with loan modification requests, fail to process these requests correctly, and mislead consumers about their eligibility for permanent loan modifications. *See* OPLC at 2. Another said it was aware of servicers who instructed homeowners to stop making payments and, in some cases, required homeowners to pay a fee to be considered for a loan modification. LOLLAF at 2–3. In opposing the exemption, a third commenter, a MARS provider, claimed that some lenders are "staffing up to create their own MARS entities" but did not elaborate further. *See* 1st ALC, Att. at 7. However, these practices fall outside of the scope of this rulemaking, which is focused on the conduct of intermediaries who consumers retain to work with their lenders.

[166] CUUS at 3 ("Consumers Union is not aware of any lenders or servicers actively marketing MARS services for a fee to their customers."); NAAG (ANPR) at 13 ("We are unaware of any banks, thrifts or federal credit unions engaged in for-profit loan modification or foreclosure rescue services, aside from negotiating loan modifications for consumers whose loans they are servicing."); Am. Bankers Ass'n (ABA) (ANPR) at 6; AFSA (ANPR) at 3; HPC (ANPR) at 2; OH AG (ANPR) at 5.

[167] Section 322.2(j)(1)–(2).

[168] "Dwelling loan holder" is defined in § 322.2(g) as "any individual or entity who holds the dwelling loan that is the subject of the offer to provide mortgage assistance relief services." Section 322.2(l) defines "servicer" as "the individual or entity responsible for (1) receiving any scheduled periodic payments from a consumer pursuant to the terms of the dwelling loan that is the subject of the offer to provide mortgage assistance relief services, including amounts for escrow accounts under section 10 of the Real Estate Settlement Procedures Act (12 U.S.C. 2609), and (2) making the payments of principal and interest and such other payments with respect to the amounts received from the consumer as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract." This definition draws upon the definition of servicer in the Real Estate Settlement Procedures Act. *See* 12 U.S.C. 2605(i). As noted above, the Final Rule adds the phrase "that is the subject of an offer to provide mortgage assistance relief services" to the proposed definitions of "dwelling loan holder" and "servicer."

[169] *See* CUUS at 3 ("[C]onsumers Union is concerned that the lender or servicer exemptions may be used by MARS entities who otherwise provide or service loans and are technically lenders or servicers, but are not the lenders or servicers for the mortgage loan that is the subject of MARS services.")

[170] Section 322.2(j).

[171] *See* MBA at 4 (contractors under the supervision and control of the servicer do not "pose the risk of a foreclosure scam or phantom help").

[172] *See* AFSA at 3–4 (describing use of employee incentive programs and attorneys who work on a contingency).

[173] To improve the organization and clarity of the Rule text, however, the Commission has deleted proposed § 322.2(j)(3), and altered the definition of "person" in § 322.2(k) of the Final Rule—the foundational term of "mortgage assistance relief service provider"— to exclude "any person [that] is specifically excluded from the Federal Trade Commission's jurisdiction pursuant to 15 U.S.C. 44 and 45(a)(2)."

[174] Section 5(a)(2) of the FTC Act states: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4 of the Act defines "corporation" to include: "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, *which is organized to carry on business for its own profit or that of its members*." 15 U.S.C. 44 (emphasis added).

[175] These nonprofit services are described in more detail in Section II.C. of the ANPR. MARS ANPR, 74 FR at 26135.

[176] *See, e.g., AMA* v. *FTC,* 638 F.2d 443 (2d Cir. 1980); *FTC* v. *Ameridebt, Inc.,* 343 F. Supp. 2d 451 (D. Md. 2004).

[177] An entity that is registered as a tax exempt nonprofit under the Internal Revenue Code is not necessarily considered a nonprofit for the purposes of the exemption in the FTC Act. *See, e.g., FTC* v.

Continued

C. Section 322.3: Prohibited Representations

Section 322.3 of the Final Rule prohibits MARS providers from making certain representations or misrepresentations in connection with mortgage assistance relief services.

1. Section 322.3(a): Prohibited Statement

Section 322.3(a) of the Final Rule bans MARS providers from instructing consumers not to communicate with their lender or servicer. The Commission has concluded that giving such instruction is an unfair practice. In addition, the Commission has concluded that barring such instruction is reasonably related to the prevention of deception. The provision in the Final Rule is slightly modified from the proposed rule, as detailed below.

a. Public Comments on the Proposed Provision

Several commenters supported the ban on instructing consumers not to speak with their lender or servicer, including two consumer groups, a consortium of state banking regulators, and two trade groups for the financial services industry.[178] The comments generally warned that financially-distressed consumers who receive this advice from purported MARS experts and follow it are prevented from receiving valuable information from their lender or servicer. More specifically, consumers who cease such communications prior to purchasing MARS do not learn about workout or modification offers available from their lender or servicer,[179] as well as other information that may be material in evaluating the veracity of the claims made by the MARS provider about its services.[180] Consumers who stop communicating with their lenders or servicers after purchasing MARS may not learn that the MARS provider is not taking the actions necessary to deliver the results it promised.[181] Finally, in some cases, both before and after purchasing MARS, consumers who do not communicate with their lenders or servicers may not know that foreclosure and loss of their home is imminent.[182]

A few commenters objected to this prohibition as it applied to attorneys, voicing concern that it would prevent attorneys from properly advising their clients as to their mortgages.[183] As described in § III.G. of this SBP, the Final Rule exempts from § 322.3(a) attorneys who provide MARS when they meet certain conditions.

b. Final Section 322.3(a)

Section 322.3(a) of the Final Rule adopts the proposed rule's prohibition on the instruction,[184] with one clarification. The proposed rule prohibited MARS providers from giving consumers such instruction "in connection with the advertising, marketing, promotion, offering for sale, or sale" of mortgage assistance relief services. The Final Rule clarifies that MARS providers also are prohibited from giving consumers such instruction in connection with performing services under their contracts. This change is consistent with the discussion of the scope of the prohibition in the NPRM,[185] and with the comments indicating that consumers who follow this instruction are likely to be harmed even after purchasing MARS.

c. Legal Basis

(1) Unfairness

The Commission concludes that it is an unfair practice for MARS providers to instruct consumers not to communicate with their lenders or servicers, because that instruction:

(1) Causes or is likely to cause substantial injury to consumers,[186] (2) that is not outweighed by countervailing benefits to consumers or competition, and (3) is not reasonably avoidable by consumers.[187]

First, consumers who follow this instruction suffer or are likely to suffer substantial injury. As the commenters noted, consumers who stop communicating with their lender or servicer are deprived of critical information about (1) possible work-out options, (2) the veracity of the provider's claims, (3) whether the provider is actually performing, and (4) in some cases, that foreclosure and the loss of their homes is imminent. Consumers who lack this information may end up paying hundreds or thousands of dollars for MARS services that do not provide the promised relief, and may even lose their homes.[188]

Ameridebt, Inc., 343 F. Supp. 2d 451, 460–61 (D. Md. 2004).

[178] *See, e.g.,* CUUS at 3 ("strongly support[ ] the Rule's prohibition on any representation that would encourage consumers not to speak with their servicer or lender"); LOLLAF at 3 ("endorse[ ] the proposed rule's ban on MARS providers advising consumers not to contact their mortgage lenders and servicers"); CSBS at 3 (supports prohibiting MARS providers from instructing consumers not to contact their lenders or servicers but agrees with limited exemption for attorneys); AFSA at 4 ("strongly support[ ] proposed § 322.3(a). MARS providers should be banned from advising consumers not to contact or communicate with their lenders or servicers * * * [T]elling a borrower not to contact a lender or servicer is the worst advice someone can give a borrower at risk or in default.").

[179] AFSA at 4 ("If lenders and servicers are unable to contact borrowers, they are unable to offer workouts or loan modifications."); LOLLAF at 3 ("[O]ngoing communication with mortgage servicers is key to any homeowner negotiating a workout to save their home from foreclosure.").

[180] CUUS at 3 ("[T]he foreclosure clock continues to run, and rather than seeking help from a legitimate non-profit housing counseling agency, the homeowner is diverted away from legitimate sources of help by the MARS provider's assurances that they will deliver results."); *see also* CRC (ANPR) at 7 ("People who do not have a chance of keeping the home are being steered away from legitimate, free homeowner counseling services or are failing to take any action before it is too late because they have been assured everything is being taken care of for them already. All too often, it is not.").

[181] LOLLAF at 3 ("[C]ommunication with a servicer may allow a homeowner to determine whether or not the MARS provider is providing any service on his or her behalf, as that provider promised."); CUUS at 3 ("Consumers report often being instructed by MARS providers to cease all communication with their lenders and/or loan servicers, even though the provider subsequently does nothing of value on the homeowner's behalf.").

[182] AFSA at 4 ("[L]enders and servicers would be unable to warn a borrower of a potential foreclosure."); LOLLAF at 3 ("[U]rging a homeowner not to communicate with his/her servicers only increases the likelihood that a homeowner will end up in foreclosure, as well as burdened with additional late charges and other fees.").

[183] *See, e.g.,* ABA at 5; Bronson at 5.

[184] The Final Rule does not prohibit MARS providers from discussing with consumers the advantages and disadvantages of communicating with their lenders and servicers, so long as providers do not make any deceptive claims in doing so. Rather, the Final Rule bars MARS providers from instructing consumers not to engage in these communications.

[185] *MARS NPRM,* 75 FR at 10715–16.

[186] To establish that an act or practice is unfair, the Commission must demonstrate actual or likely consumer injury. 15 U.S.C. 45(n).

[187] 15 U.S.C. 45(n) (codifying the Commission's unfairness analysis); *see also In re Int'l Harvester Co.,* 104 F.T.C. 949, 1079, 1074 n.3 (1984), *reprinting* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Comm. on Commerce, Sci. and Transp., United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980) ("Unfairness Policy Statement").

[188] The FTC has observed these losses repeatedly in its law enforcement work. *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. Ex Parte TRO at 18–19 (C.D. Cal. filed July 13, 2009) ("In numerous instances, Defendants have warned consumers that any contact with their lenders will hinder Defendants' modification negotiations, and have threatened to drop consumers and deny them refunds if they independently talk to their lenders. Relying on this advice, many consumers avoid their lenders during critical periods, including after receiving notices of default or foreclosure, or other important communications. * * * At that point the cumulative effects of Defendant's misrepresentations are devastating * * * [including that] many consumers have lost their homes.") (citations omitted); *FTC* v. *Kirkland Young, LLC,* No. 09–23507, Mem. Supp. P.I. at 19 (S.D. Fla. filed Nov. 24, 2009) ("[By] attempting to sever communications between consumers and their lenders, Defendants harm consumers. * * * The cost to consumers is both in time and money, which are obviously important to consumers who are behind on their mortgages and facing the threat of foreclosure on their family's home."); *FTC* v. *US*

Second, the injury is not outweighed by any countervailing benefits to consumers or competition. There is nothing in the record suggesting that there are any circumstances in which a non-attorney MARS provider's instruction not to communicate with a consumer's lender or servicer would benefit the consumer.[189] Similarly, nothing in the record, including the comments of MARS providers, identifies any benefits to competition from such an instruction. A "benefit" this practice might bring is to increase MARS providers' revenues by increasing the number of consumers who decide to contract with them. Such "benefits" are not cognizable in an unfairness analysis.[190] Consequently, the Commission concludes that there are no benefits to consumers or competition from this act or practice, and, even if there were, they clearly are outweighed by the substantial injury to consumers discussed above.

Finally, consumers cannot reasonably avoid the injury this act or practice causes. Many consumers are unaware of the negative consequences of failing to communicate with their lender or servicer. Moreover, the claims many MARS providers make that they have specialized expertise[191] make it less likely that consumers will disregard or discount their advice. As a result, consumers cannot reasonably avoid the harm from such instructions.

The Commission therefore concludes that MARS providers instructing consumers not to communicate with their lenders or servicers is an unfair act or practice. The Final Rule's prohibition on this instruction is intended to preserve and foster consumer access to information from lenders and servicers that may shed light on issues critical to consumers' decision making and their well-being.

(2) Prevention of Deception

The Final Rule's prohibition on instructing consumers not to communicate with their lenders and servicers will remove a barrier to consumers obtaining information that will enable them to evaluate the truth and accuracy of the provider's claims and to gauge the provider's performance against those claims. This provision thus will help consumers avoid being deceived. Accordingly, the Commission has concluded that this prohibition is reasonably related to the goal of preventing deception.[192]

d. Recommendations by Commenters Not Adopted

Several commenters, including a consortium of state attorneys general and a consumer group, recommended that the Commission adopt an additional prohibition, not included in proposed § 322.3(a), that would ban providers from instructing consumers to stop making their mortgage payments.[193] The commenters asserted that MARS providers commonly mislead consumers concerning the consequences of not paying on their mortgages, for example, by telling them that lenders will not work with them unless they stop paying.[194]

The Commission declines to adopt this prohibition. The benefits and costs to consumers of failing to pay their mortgage depend on their individual circumstances. In most instances, it is not in the best interest of a consumer to stop paying,[195] yet there are some, albeit limited, circumstances in which it might be beneficial for some consumers to do so.[196] The Commission declines to

Foreclosure Relief Corp., No. SACV09–768 JVS (MGX), Mem. Supp. TRO at 12 (C.D. Cal. filed July 7, 2009) ("At the company's behest, consumers also stopped answering inquiries from their lenders, and therefore did not realize that their modifications were not in process and that their homes might be at risk. * * * Defendants' inaction caused some lenders to begin foreclosure proceedings against consumers. Other consumers lost their homes."); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Mem. Supp. P.I. at 20 (S.D. Fla. filed Nov. 23, 2009) ("When consumers speak with their lenders directly, they often discover that Defendants had not yet contacted the lender or only had left messages or had non-substantive contacts with the lender.").

[189] *Cf* Section III.G.3. (discussing the possible benefits to consumers when attorneys who represent them in legal matters give an instruction to stop communicating with adverse parties such as their lenders or servicers).

[190] Increased revenues or profits to a seller engaged in an act or practice are not necessarily a benefit to competition for purposes of unfairness analysis because "[t]he benefit [from the conduct] must be to * * * competition—not simply to the actor." J. Howard Beales, III, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection,* 2003 WL 21501809, at *14 n.51 (2003); *see In re Orkin Exterminating Co.,* 108 F.T.C. 263, 364–65 (1986) (discussing benefits to process of competition), aff'd 849 F.2d 1354 (11th Cir. 1988); *FTC* v. *J.K. Publications, Inc.,* 99 F.Supp.2d 1176 (C.D. Cal. 2000); *FTC* v. *Windward Mktg,* No. 1:96–CV–615–FMH, 1997 U.S. Dist. LEXIS 17114, *29–30 (N.D. Ga. Sept. 30, 1997).

[191] *See supra* notes 51–53.

[192] The Commission concludes that prohibiting MARS providers from instructing consumers to stop communicating with their lender or servicer does not violate the First Amendment. The Rule restricts speech that is "commercial" in nature because it arises in the context of a commercial transaction and is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n,* 447 U.S. 557, 561 (1980). The intermediate scrutiny standard applies to restrictions on nonmisleading commercial speech. *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 130 S. Ct 1324, 1339 (2010), slip op. at 19; Conn. State Bar Ass'n v. United States, 620 F.3d 81, 95 (2d Cir. 2010).

To pass constitutional muster, commercial speech restrictions subject to intermediate scrutiny must satisfy the test the Court set forth in *Central Hudson. Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 566. The Final Rule's prohibition on instructing consumers not to communicate with their lenders and servicers satisfies this test. First, the prohibition serves a substantial governmental interest in ensuring that financially distressed consumers who face foreclosure have access to information that may prevent injury and may be critical to their ability to make decisions free of deception and confusion. *See, e.g., Friedman* v. *Rogers,* 440 U.S. 1, 16 (1979) (upholding ban on use of trade names by optometrists because "[r]ather than stifling commercial speech, [the ban] ensures that information regarding optometrical services will be communicated more fully and accurately to consumers"). Second, prohibiting the instruction directly advances this goal by removing impediments to the availability of this information to consumers. Third, there is a reasonable fit between the problem—MARS providers impeding consumers' access to critical information—and the solution, which would remove the impediment. Moreover, alternatives that are less restrictive of speech, such as a disclosure remedy, would not be effective means of achieving the goal. *See, e.g., Pearson* v. *Shalala,* 164 F.3d 650, 659 (DC Cir. 1999) (noting that the banning of a claim may be permissible where a disclosure would not eliminate the harm the claim causes). For example, if MARS providers were permitted to instruct consumers not to communicate with their lender or servicer, but were required to disclose that these entities may have information that would be valuable to consumers, the inconsistent and contradictory nature of these statements would not prevent deception and would, at best, confuse consumers. *See, e.g.,* Deception Policy Statement, *infra* note 200, at 180; *Thompson Med. Co.,* 104 F.T.C. at 842–43; *In re Figgie Int'l, Inc.,* 107 F.T.C. 313, 401 (1986), *aff'd sub nom, Figgie Int'l Inc.* v. *FTC,* 817 F.2d 102 (4th Cir. 1987) (unpublished table decision).

[193] CUUS at 3 ("MARS providers should be prohibited from advising current or prospective clients who are not yet in default to stop making payments on their mortgage loans."); NAAG at 4 ("[W]e would suggest making clear that consultants may not advise consumers not to pay their mortgages.").

[194] *See, e.g.,* NAAG at 4 ("We are aware of a number of rescue consultants who incorrectly claim that consumers' lenders will not work with them until they are behind on their mortgage payments. We also are aware of consultants who advise consumers not to make mortgage payments so that they will be able to afford mortgage loan modification fees."); CUUS at 3 ("Consumers often report being instructed by for-profit MARS entities to stop making mortgage payments in order to qualify for loan modification services or other forms of foreclosure relief.").

[195] CUUS at 3 (Consumers are "often unaware that [following MARS providers' advice to stop paying their mortgage] may ruin their credit scores and lead to fewer options to avoid foreclosure."); CUNA at 2 (following this instruction "only serves to increase the overall mortgage debt in addition to the fees and other penalties that result when payments to the servicer or lender are not made in a timely manner").

[196] For example, the record suggests that some lenders, in the current financial crisis, may be more responsive to borrowers who are delinquent, especially if the borrower would not qualify for a loan modification under various government programs. *See, e.g.,* Suzanne Capner, *Lenders Await Call Back After Mobile Giveaway,* Fin. Times, Jun. 28, 2010 (some lenders are sending mobile phones programmed to call their loss mitigation departments to delinquent borrowers and offering them lower monthly payments when borrowers

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adopt the recommended prohibition because it could prevent MARS providers from disseminating truthful, non-misleading information that could be useful to some consumers.

Nevertheless, the Commission recognizes that most consumers would be harmed if they complied with a MARS provider's instruction to stop paying on their mortgages. Therefore, as discussed more fully in § III.D. of this SBP, the Final Rule requires that if providers instruct consumers not to pay on their mortgages, they must disclose clearly and prominently that not paying may cause consumers to lose their home and damage their credit rating.[197]

2. Section 322.3(b): Prohibited Misrepresentations

a. Proposed Provision

Section 322.3(b) of the proposed rule prohibited express or implied misrepresentations of any material aspect of any mortgage assistance relief service. To provide clarity and guidance to the industry, proposed §§ 322.3(b)(1)–(7) set forth a non-exhaustive list of specific misrepresentations that would violate the Rule, including misrepresentations about the following:

(1) The likelihood of negotiating, obtaining, or arranging a specific form of mortgage relief;

(2) The amount of time needed to obtain the promised mortgage relief;

(3) The affiliation of the provider with the government, public programs, or consumers' lenders or servicers;

(4) Consumers' payment obligations under their mortgage loans;

(5) The terms or conditions of consumers' mortgage loans;

(6) The provider's refund and cancellation policies; and

(7) That the provider has performed the promised services or has the right to demand payment.

The Commission received only a few comments specifically addressing this proposed provision. The comments were generally supportive and did not recommended substantive modification to the proposed exemplar misrepresentations [198]—although some commenters recommended adding additional examples, as detailed below.

b. Final Section 322.3(b)

Section 322.3(b) of the Final Rule, like the proposed rule, prohibits misrepresenting any material aspect of any MARS, to prevent deception. The Final Rule also adopts proposed §§ 322.3(b)(1)–(7) without substantive modification, but adds five examples of prohibited misrepresentations: (a) Misrepresentations about whether consumers will receive legal services; (b) misrepresentations of the benefits and costs of using alternatives to for-profit MARS to obtain relief, such as working with the consumer's lender or servicer directly or consulting with a nonprofit housing counselor; (c) misrepresentations regarding the amount or percentage of debts that consumers may save by purchasing MARS; (d) misrepresentations regarding the total costs consumers must pay to purchase MARS; and (e) misrepresentations regarding the terms, conditions, or limitations of any offer of MARS the provider obtains from the consumer's lender or servicer, including the amount of time the consumer has to accept or reject the offer.[199]

A claim is "deceptive" under Section 5 of the FTC Act if there is "a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material." [200] A representation is material if it is likely to influence consumers' decisions or conduct.[201] The types of misrepresentations specified in §§ 322.3(b)(1)–(12) of the Final Rule are presumed to be material to consumers because they pertain to the cost, central characteristics, efficacy, or other important attributes of MARS.[202]

The exemplar misrepresentations specified in the Final Rule track the types of false or misleading claims that the Commission and the states have challenged in law enforcement actions against MARS providers, as described in § II.C. of this SBP, and also address additional deceptive practices identified in the comments.

Sections 322.3(b)(1) and (2) prohibit MARS providers from misrepresenting "[t]he likelihood of negotiating, obtaining, or arranging any represented service or result" and "the amount of time it will take" to do so. As discussed in § II of this SBP, MARS providers commonly persuade consumers to purchase their services with false or misleading promises that they can achieve specific successful results in a short time frame.[203] This type of information is central to consumers' decisions to purchase MARS.

Section 322.3(b)(3) prohibits misrepresentations that any MARS is "affiliated with, endorsed or approved by, or otherwise associated with" the government, nonprofit housing programs, or consumers' lenders or servicers. To confer greater legitimacy on their services, MARS providers frequently falsely claim that their services are associated with such trusted third-party entities or programs.[204] When these claims are made expressly, as they frequently are, they are presumed to be material to consumers' purchasing decisions.[205] Even when affiliation, endorsement, or approval are implied, such claims are clearly material because some consumers are more likely to purchase MARS they believe are endorsed or approved by the government, non-profit programs, or their lender or servicer.

Sections 322.3(b)(4) and (5) bar misrepresentations concerning consumers' payment and other obligations under their mortgage loans and the amount owed on them. MARS providers, for example, often falsely state or imply that once consumers retain a MARS provider, their obligations to pay their mortgages are suspended and their lenders will not foreclose.[206] In fact, consumers who stop making payments may incur additional fees and charges and lose their homes, regardless of whether they have retained a MARS provider. The purported benefit of immunity from foreclosure is material to consumers' decisions to purchase MARS and whether to continue making payments on their mortgages. Section 322.3(b)(4)

call), *available at http://www.ft.com/cms/s/0/d6df8bec-82fe-11df-8b15-00144feabdc0.html;* David Streitfeld & Louise Story, Bank of America to Reduce Mortgage Balances, N.Y. Times, Mar. 24, 2010, *available at http://www.nytimes.com/2010/03/25/business/25housing.html* (Bank of America offers mortgage balance reductions up to 30% to borrowers at least 60 days delinquent on their loans). How effective a consumer may be in leveraging delinquency is highly dependent on the particular lender, the type of loan, and the consumer's financial situation.

[197] *See* § 322.4(c).

[198] CUUS at 4 ("Consumers Union supports the non-exclusive enumeration of other misrepresentations that give rise to a violation under the proposed rule."); CSBS at 3 ("We endorse the Commission's effort to prohibit misrepresentations of any material aspect of any MARS."); LOLLAF at 3 ("The prohibited misrepresentations enumerated in the proposed rule accurately target the deceptive conduct that it is intended to prevent and may help dispel the misconceptions that consumers hold regarding MARS providers."); MBA at 2.

[199] Sections 322.3(b)(8)–(12).

[200] Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174–83 (1984) ("Deception Policy Statement").

[201] *Id.* at 182–83.

[202] *Id.* at 182–83.

[203] *See supra* notes 70 & 75.

[204] *See supra* notes 72–74.

[205] *See* Deception Policy Statement, *supra* note 200, at 182.

[206] *See, e.g., FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx), Mem. Supp. TRO at 15 (C.D. Cal., Amd. Compl. filed June 24, 2009) (defendant allegedly instructing consumers to stop making mortgage payments because such payments were unnecessary or would adversely affect consumer's ability to obtain a loan modification).

will prohibit any such misrepresentations regarding the obligation of consumers to make payments on their current mortgages and the consequences of failing to pay. Additionally, § 322.3(b)(5) prohibits providers from misrepresenting the terms or conditions of consumers' current loans—for example, by falsely representing that the terms are unfavorable in some regard in order to persuade consumers to purchase MARS that purportedly will result in consumers obtaining more favorable terms. Information regarding the terms and conditions of consumers' loans is material to them because it is likely to influence their decision whether to purchase MARS.

Section 322.3(b)(6) prohibits misrepresentations of MARS providers' refund, exchange, or cancellation policies, including the "likelihood of obtaining a full or partial refund." MARS providers commonly tout their liberal refund and cancellation policies, often to give consumers a sense of security that the upfront fee they are asked to pay will be refunded if the provider is unsuccessful. In fact, many providers do not provide refunds or have restrictive cancellation policies.[207] Refund and cancellation policies are important considerations for consumers in deciding whether to purchase MARS.[208] As detailed in § III.E. of this SBP, the Final Rule effectively allows consumers to withdraw from MARS at any time, and prohibits MARS providers from collecting advance fees. Section 322.3(b)(6) will help ensure that MARS providers do not misrepresent to consumers that they are, in fact, obligated to continue to use the provider's services. This provision will also help ensure that providers do not misrepresent whether they will refund fees they collect—in compliance with § 322.5 of the Final Rule—after the consumer has accepted the mortgage relief delivered.[209]

Section 322.3(b)(7) prohibits misrepresentations that a MARS provider has achieved a represented result or has a right to claim, charge, or demand money from the consumer. This provision will protect consumers from MARS providers who make false claims as to whether they are entitled to receive fees. As detailed in § III.E. of this SBP, the Final Rule prohibits providers from collecting any fees until the consumer has accepted the results delivered by the provider. Section 322.3(b)(7) will help to prevent MARS providers from circumventing the advance fee ban in the Final Rule by misrepresenting that consumers owe fees before they have accepted the results delivered by the provider. Additionally, the claim as to results obtained is material to consumers' decisions whether or not to pay the providers.[210]

Section 322.3(b)(8) prohibits providers from misrepresenting that consumers will "receive legal representation." The record demonstrates that MARS providers commonly mislead consumers into believing that they offer legal services and that they employ attorneys who will represent consumers in legal proceedings.[211] Further, MARS providers often falsely claim to be law firms or affiliated with attorneys.[212] Whether licensed legal professionals will be working on consumers' behalf is material because some consumers may believe that attorneys are adept at negotiating with lenders or services and, thus, that having their assistance will increase the likelihood of obtaining mortgage relief.

Section 322.3(b)(9) prohibits misrepresentations concerning "[t]he availability, performance, cost, or characteristics of any alternative to for-profit mortgage assistance relief services through which the consumer can obtain mortgage assistance relief, including negotiating directly with the dwelling loan holder or servicer, or using any nonprofit housing counselor agency or program." As discussed in § II.A. of this SBP, consumers sometimes can obtain mortgage relief at no cost from nonprofit housing counselor programs or by working directly with their lenders or servicers. For-profit MARS providers, therefore, have an incentive to make false or misleading claims about the effectiveness and value of these forms of competing assistance. The FTC has charged in its law enforcement actions that some MARS providers, in fact, make such claims.[213] Information about potential alternatives to for-profit MARS is likely to influence consumers' decisions regarding whether to purchase MARS from a for-profit provider, and if so, at what price.[214]

Section 322.3(b)(10) prohibits MARS providers from misrepresenting the "amount of money or the percentage of the debt amount that a consumer may save by using the mortgage assistance relief service." Commonly MARS providers have claimed that they can obtain specific interest rate reductions and other concessions from lenders, when, in reality, the results are true only for few, if any, consumers.[215] This provision will prohibit providers from promising more savings than they can

[207] *See supra* note 77.

[208] The TSR Rule similarly prohibits misrepresentations about telemarketers' refund and cancellation policies. *See* 6 CFR 310.3(a)(2)(iv). In numerous individual cases, the Commission has challenged as deceptive misrepresentations concerning the refund and cancellation polices of MARS providers. *See* FTC Case List, *supra* note 28.

[209] Thus, for example, if a MARS provider represents that the fee it collects once the consumer has accepted the result the provider has delivered may later be refundable under certain conditions (*e.g.*, the consumer decides his or her monthly payments are unaffordable), then any failure by the provider to observe this policy would constitute a violation of § 322.3(b)(6).

[210] Section 322.3(b)(7) of the Final Rule makes one non-substantive modification to the proposed provision. Proposed § 322.3(b)(7) prohibited misrepresenting "[t]hat the mortgage assistance relief service provider has completed the represented services, as specified in § 322.5, or otherwise has a right to claim, demand, charge, collect or receive payment or other consideration." For clarity, the Final Rule removes the phrase, "as specified in § 322.5," and the word "otherwise."

[211] *See supra* notes 85–86; OPLC at 2–3 ("Often mortgage assistance relief services (MARS) providers will imply that they will represent the homeowners in legal proceedings, or otherwise suggest or state that they have attorneys on staff that will resolve the homeowners' legal proceedings. The list of prohibited representations should include a prohibition on such implications or statements. * * *"); Francis at 1 (noting concern that some MARS providers use an attorney's name in their marketing and mislead consumers "as to whether or not an attorney-client relationship will exist"). One comment recommended that the Rule require MARS providers who advertise legal services to disclose whether an attorney will represent consumers in foreclosure proceedings and to provide the name of such attorney, and require that any MARS provider that uses the name of a law firm or attorney disclose whether it employs attorneys licensed to practice law in the consumer's state and whether they would represent the consumer in foreclosure proceedings. Francis at 1. The Commission believes that requiring these disclosures is unnecessary in light of the prohibition on express or implied misrepresentations that a consumer will receive legal representation. The Commission believes that a general statement that a MARS provider offers legal services, in the absence of a qualifying disclosure, is likely to convey an implied claim that the attorney is properly licensed and will represent consumers in a foreclosure action.

[212] *See supra* notes 84–88 and accompanying text.

[213] *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging that defendants represented on their Web site that "Representing Yourself Can Be Hazardous!" and that "you will be offered less of a modification or short sale than you could really get"); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Mem. Supp. P.I. at 20 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendants' Web sites stated "Don't go through this alone. You need professional help at a time like this.").

[214] It is a deceptive practice for advertisers to make false or misleading comparisons between their product and that of competing products. *See, e.g., Novartis Corp.* v. *FTC,* 223 F.3d 783 (DC Cir. 2000) (advertising by drug company was deceptive because it falsely claimed that its pain pills were superior to other analgesics for treating back pain); *Kraft, Inc.* v. *FTC,* 970 F.2d 311, 322 (7th Cir. 1992) (advertising was deceptive because it falsely implied Kraft's cheese slices had more calcium than imitation cheese slices).

[215] *See, e.g., FTC* v. *Data Med. Capital, Inc.,* No. SA–CV–99–1266 AHS (Eex), Mem. Supp. Contempt at 12 (C.D. Cal. filed May 27, 2009) (alleging that defendant claimed it could reduce consumers' interest rates to 2 to 5 percent).

deliver, including any promised reduction in the interest rate on a mortgage loan—a consideration of central importance to consumers.

Section 322.3(b)(11) prohibits MARS providers from misrepresenting the "total cost to purchase the mortgage assistance relief service." This provision is designed to prevent providers from making deceptive claims about the amount of their fees—a pivotal fact for consumers considering whether to purchase MARS.

Finally, § 322.3(b)(12) prohibits MARS providers from misrepresenting "[t]he terms, conditions, or limitations of any offer of mortgage assistance relief the provider obtains from the consumer's dwelling loan holder or servicer, including the time period in which the consumer must decide to accept the offer." As discussed in § III.E. of this SBP, the Final Rule allows consumers to reject the results obtained by MARS providers, in which case they do not have to pay the provider's fee. When a MARS provider obtains an offer for a loan modification or other mortgage relief and presents it to the consumer, the terms, conditions, and limitations of the offer are material to the consumer's decision whether to accept it and pay the provider's fee. Additionally, it is material for consumers to know how much time they have to accept or reject the offer for mortgage relief, so that they make a timely decision. This provision will ensure that providers do not deceive consumers regarding the results they have obtained and do not make misrepresentations that pressure them into accepting unfavorable terms.[216] It is thus reasonably related to preventing providers from undermining the ability of consumers to accept or reject the offer.

c. Section 322.3(c): Substantiation

Commission law enforcement actions reveal that MARS providers often make representations about the benefits, performance, or efficacy of their services.[217] MARS providers must have substantiation for such claims at the time they are made. The Final Rule therefore specifies that it is a violation of the Rule to:

Mak[e] a representation, expressly or by implication, about the benefits, performance, or efficacy of any mortgage assistance relief service unless, at the time such representation is made, the provider possesses and relies upon competent and reliable evidence that substantiates that the representation is true. For the purposes of this paragraph, "competent and reliable evidence" means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by individuals qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

Section 322.3(c) also clarifies the types of evidence that MARS providers must possess and rely upon to comply with § 322.3(c) when representing the "benefits, performance, or efficacy" of any MARS. This provision encompasses a wide variety of claims, including but not limited to: the provider's ability to save consumers a specific amount of money (*e.g.*, a reduction in interest rate or monthly payments), the likelihood that the provider will secure a loan modification or other results for consumers, and the amount of time it will take for the provider to secure a loan modification or other result.

Advertisers and marketers that make objective claims about their products must have a "reasonable basis" to substantiate them.[218] In the particular context of MARS, when making claims regarding the performance, benefits, or efficacy of these services, providers must possess a reasonable basis in the form of "competent and reliable evidence" to support the claim.[219] Thus, when a MARS provider represents that it will save consumers money or reduce their debt amount or interest rate, this claim must be supported by competent and reliable, methodologically sound evidence showing that consumers who purchase the service generally will obtain the advertised results, i.e., that the typical consumer who purchases MARS from that provider will achieve that result.[220]

Providers cannot circumvent the substantiation requirements by making general, non-specific claims. Thus, for example, if a MARS provider makes only a general savings claim (e.g., "we will help you reduce your mortgage payments"), without specifying a percentage or amount of savings, these claims are likely to convey that consumers can expect to achieve a result that will be beneficial to them and that the benefits will be substantial.[221]

[216] Additionally, to the extent that providers obtain trial loan modifications for consumers, § 322.3(b)(12) prohibits providers from misrepresenting that these loan modifications are permanent.

[217] *See* FTC Case List, *supra* note 28.

[218] It is an unfair and deceptive practice, in violation of Section 5 of the FTC Act, to make an express or implied objective claim without a reasonable basis supporting it. *See, e.g., FTC* v. *Pantron I Corp.,* 33 F.2d 1088, 1096 (9th Cir. 1994); *Removatron Int'l Corp.,* 111 F.T.C. 206, 296–99 (1988), *aff'd,* 884 F.2d 1489 (1st Cir. 1989); *In re Thompson Med. Co.,* 104 F.T.C. 648, 813 (1984), *aff'd,* 791 F.2d 189 (DC Cir. 1986); *see also generally* 1984 Policy Statement Regarding Advertising Substantiation, *appended to Thompson Med. Co.,* 104 F.T.C. at 813 (Advertising Substantiation Policy Statement); Amended Franchise Rule, 16 CFR 436.5(s), 436.9(c); *Amended Franchise Rule Statement of Basis and Purpose,* 72 FR 15444, 15449 (Mar. 30, 2007).

[219] As discussed in the SBP addressing amendments to the TSR regarding debt relief services, claims concerning the benefits, performance, or efficacy of debt relief services must be supported by competent and reliable evidence. *See TSR; Final Rule,* 75 FR 48458, 48500 n.574 and accompanying text (Aug. 10, 2010).

In addition, in order to comply with § 322.3(b), the prohibition against misrepresentations, a provider must not make false or misleading statements regarding the level of support it has for a claim.

[220] It is deceptive to make unqualified performance claims that are only true for some consumers, because reasonable consumers are likely to interpret such claims to apply to the typical consumer. *See FTC* v. *Five-Star Auto Club, Inc.,* 97 F. Supp. 2d 502, 528–29 (S.D.N.Y. 2000) (holding that in the face of express earnings claims for multi-level marketing scheme, it was reasonable for consumers to have assumed the promised rewards were achieved by the typical participant); *Chrysler Corp.* v. *FTC,* 561 F.2d 357, 363 (DC Cir. 1977); *In re Ford Motor Co.,* 87 F.T.C. 756, 778, *aff'd in part and remanded in part,* 87 F.T.C. 792 (1976); *In re J. B. Williams Co.,* 68 F.T.C. 481, 539 (1965), *aff'd as modified,* 381 F.2d 884 (6th Cir. 1967); *FTC* v. *Feil,* 285 F.2d 879, 885–87 & n.19 (9th Cir. 1960); *cf.* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR 255.2 ("An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service. * * *"); *In re Cliffdale Assocs.,* 103 F.T.C. 110, 171–73 (1984); *Porter & Dietsch, Inc.* v. *FTC,* 605 F.2d 294, 302–03 (7th Cir. 1979).

Although providers may use samples of their historical data to substantiate savings claims, these samples must be representative of the entire relevant population of past customers. Providers using samples must, among other things, employ appropriate sampling techniques, proper statistical analysis, and safeguards for reducing bias and random error. Providers may not cherry-pick specific categories of consumers or exclude others in order to inflate the savings. *See, e.g., In re Kroger Co.,* 98 F.T.C. 639, 741–46 (1979) (initial decision), *aff'd,* 98 F.T.C. at 721 (1981) (claims based on sampling were deceptive because certain categories were systematically excluded and because the advertiser failed to ensure that individuals who selected the sample were unbiased); *FTC* v. *Litton Indus., Inc.,* 97 F.T.C. 1, 70–72 (1981) (claims touting superiority of microwave oven were deceptive because the advertiser based them on a biased survey of "Litton-authorized" service agencies), *enforced as modified,* 676 F.2d 364 (9th Cir. 1982); *Bristol Myers* v. *FTC,* 185 F.2d 58 (1950) (holding advertisements to be deceptive where they claimed that dentists used one brand of toothpaste "2 to 1 over any other [brand]" when, in fact, the vast majority of dentists surveyed offered no response). Additionally, the relationship between past experience and anticipated future results must be an "apples-to-apples" comparison. If there have been material changes to the MARS that could affect the applicability of historical experience to future results, any claims made must account for the likely effect of those changes. *See* Amended Franchise Rule, 16 CFR 437.5(s)(3)(ii).

[221] An unqualified efficacy claim conveys to consumers that the result or benefit will be

Under the Final Rule, the provider must have competent and reliable evidence showing that consumers obtain such results.

D. Section 322.4: Disclosures Required in Commercial Communications

Proposed § 322.4 would require that MARS providers disclose certain material information to prevent deception and thereby assist consumers in making informed decisions about purchasing MARS.[222] The Final Rule adopts all of these proposed disclosures. In addition, it requires one new disclosure: To inform consumers of the potential adverse consequences of not making mortgage payments. Further, the Final Rule expands the proposed disclosure regarding the total cost of the service to include: (1) Consumers' rights to withdraw from the service and to accept or reject any offer of mortgage relief the provider obtains from the lender or servicer; (2) the fact that consumers do not have to pay the provider if they reject the offer; and (3) the cost of the services if they accept the offer. The Final Rule also modifies the structure of the proposal to clarify that the disclosures in this provision almost all fall into three main categories: (1) Disclosures that providers must make in all "general commercial communications" (a term now defined in § 322.2(c)(1)), such as television or radio advertisements; (2) disclosures that providers must make in all "consumer-specific commercial communications" (a term now defined in § 322.2(c)(2)), such as telemarketing calls; and (3) disclosures that the provider must make in all communications.[223] The Final Rule broadens the conditions under which the disclosures must be provided, such that all required disclosures (except for one) must be provided in all general commercial communications and in all consumer-specific commercial communications. The disclosures regarding total cost and the consumer's right to withdraw from the service and reject mortgage relief offers need only be made in consumer-specific commercial communications.

1. Proposed Disclosures

The proposed rule[224] required MARS providers to disclose, in every commercial communication and every communication directed at a specific consumer prior to the consumer entering an agreement to purchase MARS, that the provider "is a for-profit business not associated with the government. This offer has not been approved by the government or your lender."[225] The proposed rule also included two disclosures that were required only in communications directed at a specific consumer prior to the consumer entering into an agreement to purchase MARS: (1) The full amount the consumer must pay for the service; and (2) that "[e]ven if you buy our service, your lender may not agree to change your loan."[226] Commenters who addressed these disclosures generally supported them, but some urged that all of the disclosures be required in every communication or advocated for requiring additional disclosures.[227]

2. Disclosures Required by the Final Rule

The Commission has determined to adopt the proposed rule with four basic changes. First, the Final Rule adds headings to § 322.4(a)–(c), which clarify that the disclosures fall into three categories: "Disclosures in All General Commercial Communications"; "Disclosures in All Consumer-Specific Commercial Communications"; and "Disclosures in All General Commercial Communications, Consumer-Specific Commercial Communications, and Other Communications." Second, the Final Rule has added a new triggered disclosure in § 322.4(c): "If you stop paying your mortgage, you could lose your home and damage your credit rating." MARS providers must make this disclosure if they advise consumers, expressly or by implication, to discontinue making their mortgage payments. Third, § 322.4(b)(1) of the Final Rule expands the proposed total cost disclosure to include the following information:

"You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (insert amount or method for calculating the amount) for our services." For the purposes of this paragraph, the amount "you will have to pay" shall consist of the total amount the consumer must pay to purchase, receive, and use all of the mortgage assistance relief services that are the subject of the sales offer, including, but not limited to, all fees and charges.

Fourth, as suggested by the comments, the Final Rule provides that, with one exception—the disclosure of total cost and the right to cancel the service at any time—all of the required disclosures must be made in every communication with consumers prior to the consumers entering into an agreement to purchase MARS.[228] As

meaningful and not *de minimis. See P. Lorillard Co.* v. *FTC,* 186 F.2d 52, 57 (4th Cir. 1950) (challenging advertising that claimed that a brand of cigarettes was lowest in nicotine, tar, and resins in part because the difference from other brands was insignificant); *In re Sun Co.,* 115 F.T.C. 560 (1992) (consent order) (alleging that advertising for high octane gasoline represented that it would provide superior power "that would be significant to consumers"); Guides for the Use of Environmental Marketing Claims, 16 CFR 260.6(c) (1998) ("Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible."); FTC Enforcement Policy Statement on Food Advertising, 59 FR 28388, 28395 & n.96 (June 1, 1994), *available at http://www.ftc.gov/bcp/policystmt/ad-food.shtm* ("The Commission shares FDA's view that health claims should not be asserted for foods that do not significantly contribute to the claimed benefit. A claim about the benefit of a product carries with it the implication that the benefit is significant.").

[222] The Commission concludes that the disclosures adopted in the Final Rule are consistent with the First Amendment. It is well established that the government may "require that a commercial message appear in such a form, or to include such additional information, warnings, and disclaimers, as are necessary to prevent deception." *Va. Bd of Pharmacy* v. *Va. Citizens Consumer Council,* 425 U.S. 748, 771–72 n.24 (1976); *see also Milavetz* v. *United States,* 130 S. Ct. 1324, 1340–41 (2010) (upholding the constitutionality of a Bankruptcy Code provision that required debt relief agencies to make certain disclosures in their advertisement); *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 651 (1985) ("[W]arning[s] or disclaimer[s] might be appropriately required * * * in order to dissipate the possibility of consumer confusion or deception.").

[223] *See supra* note 140.

[224] In the NPRM, the Commission sought comment and empirical data bearing on the costs and benefits of the disclosure requirements set forth in the proposed rule. No comments provided such data.

[225] Proposed §§ 322.4(a), 322.3(b)(2).

[226] The latter disclosure would not be required when a MARS provider offers only to stop, prevent, or postpone a foreclosure sale or repossession, as described in § 322.2(i)(1).

[227] *See* CUUS at 4 (stating that "Consumers Union supports the Rule's disclosure requirements listed in Sec. 322.4," but proposing expanded distribution and additional disclosures); CSBS at 3 (stating that "state regulators believe that the disclosures required under § 322.4 are generally appropriate," but proposing expanded distribution and additional disclosures); MA AG at 3 (stating that "I support the types of disclosures required in the proposed rule," but proposing expanded distribution); LOLLAF at 3 (stating that "[t]he required disclosures enumerated in the proposal will assist consumers who consider using a MARS provider," but proposing additional disclosures); NAAG at 4 (stating that "we do generally support enhanced disclosure requirements," but proposing additional disclosures); NYC DCA at 5–8 (suggesting expanded distribution and additional disclosures); *see also* NCLC at 3; OPLC at 3. One commenter suggested that MARS providers be required to provide consumer disclosures in the form of an FTC-drafted "bill of rights," which would include information on consumers' legal rights, the risks associated with purchasing MARS, and information on free services. NYC DCA at 7. The Commission recognizes the value of consumer education about MARS but declines to adopt this recommendation. The Final Rule requires disclosure of the key information in a manner that the Commission believes will assist consumers in avoiding deception and will help ensure that consumers will notice and comprehend it.

[228] As discussed in Section II.B, MARS providers often disseminate advertisements that instruct

Continued

explained below, the Commission believes the disclosures in the Final Rule are appropriate, because each of them either is necessary to prevent deception or is reasonably related to preventing deception.[229]

a. Disclosures Required Both in General Commercial Communications and Consumer-Specific Commercial Communications

Sections 322.4(a)(1) and 322.4(b)(2) of the Final Rule adopt, without substantive modification, the approach in the proposed rule and require MARS providers to disclose clearly and prominently, in each general commercial communication and consumer-specific commercial communication, that the MARS provider "is not associated with the government, and * * * [the] service is not approved by the government or your lender." As described above, there are many government, nonprofit, lender and servicer programs providing a wide array of services that MARS providers have mimicked. The Commission and state law enforcement officials have brought numerous law enforcement actions against for-profit MARS providers who have misrepresented their affiliation with a government agency, lender, or servicer.[230] These providers have used a variety of misleading techniques, including adopting trade names, URLs, or symbols that resemble those associated with government programs.[231] Given that the government, for-profit entities, and nonprofit entities assist financially distressed consumers with their mortgages and in light of the frequency of deceptive affiliation claims, the Commission concludes that requiring MARS providers to disclose their nonaffiliation with government or other programs is reasonably related to the goal of preventing deception.[232]

Sections 322.4(a)(2) and 322.4(b)(3) of the Final Rule, which adopt the proposal without substantive modification,[233] require MARS providers to disclose clearly and prominently in all their general and consumer-specific commercial communications that "[e]ven if you accept this offer and use our service, your lender may not agree to change your loan."[234] In light of the widespread deceptive success and "guarantee" claims in this industry,[235] this disclosure will ensure that consumers do not use MARS under the misimpression that they will, or are very likely to, receive a successful result. Thus, requiring such a disclosure is reasonably related to the goal of preventing deception.[236]

Section 322.4(c) of the Final Rule, which was not included in the proposed rule, also requires that if MARS providers advise consumers, expressly or by implication, to stop making mortgage payments, they must warn consumers: "If you stop paying your mortgage, you could lose your home and damage your credit rating."[237] This disclosure must be provided clearly and prominently in all communications in which the triggering statement is made. Moreover, unlike the other disclosures in § 322.4, this disclosure is not limited to commercial communications occurring prior to the consumer agreeing to enroll in the service. Thus, even if the consumer has already agreed to use MARS, the provider must make this disclosure if, and when, it advises consumers to stop making timely payments. Additionally, this disclosure must also be made in close proximity to the specific triggering claim, to ensure that the net impression consumers take away reflects both the information in the triggering claim and the information in the triggered disclosure. The record demonstrates that MARS providers frequently encourage consumers, often through deception, to stop paying their mortgages and instead pay providers.[238] Consumers who rely on these deceptive statements frequently suffer grave financial harm.[239] The Commission determines, therefore, that requiring MARS providers who encourage consumers not to pay their mortgages to disclose the risks of following this advice is necessary to prevent deception.[240]

b. Disclosure Required Only in Consumer-Specific Commercial Communications

Section 322.4(b)(1) retains, but also expands, the requirement in the proposed rule that MARS providers disclose, clearly and prominently, in all communications directed at specific consumers, the total amount the consumer will have to pay to purchase, receive, and use the service. Specifically, in addition to this cost information, the Final Rule requires that providers inform consumers that they (a) may withdraw from the service at any time, and (b) have the right to reject any offer of mortgage relief that the provider obtains from the servicer or lender and, (c) if they do so, they owe nothing to the provider. As detailed in § III.E. of this SBP, the Final Rule

consumers to call a telephone number or contact an email address, and once consumers do so, the providers begin to interact with them on an individual level. During these individual interactions, MARS providers commonly contradict or obfuscate disclaimers made in general advertising. *See, e.g., FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (alleging that false success rate claims and other deceptive claims often were made during telemarketing calls with consumers); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (same). As discussed below, the Commission therefore concludes that it is not sufficient to make the disclosures only in general advertisements.

[229] The Final Rule also includes a small number of minor, non-substantive modifications to ensure that these requirements are clear and easy to understand.

[230] *See supra* notes 72–74.

[231] *See, e.g., FTC* v. *Fed. Housing Modification Dep't, Inc.,* No. 09–CV–01753 (D.D.C. filed Sept. 16, 2009) (alleging use of direct mail material with seal depicting U.S. Capitol with words "NATIONS HOUSING MODIFICATION CENTER" superimposed); FTC v. Ryan, No. 1:09–00535 (HHK) (D.D.C., Amend. Compl. filed Mar. 25, 2009) (alleging use of government-like seal that read "United States—Department of Housing" on defendant's Web sites with URLs "*http://bailout.hud-gov.us*" and "*http://bailout.dohgov.us*" and that featured prominent button linking to official U.S. government Web site).

[232] *Supra* note 105.

[233] In order to clarify the application of this provision, however, the Final Rule includes two non-substantive modifications. First, the Final Rule clarifies that this disclosure applies to any MARS provider who represents, "expressly or by implication, that consumers will receive" MARS. This replaces the language of the proposed rule that stated that this disclosure applied to any MARS provider that "advertises any represented [mortgage relief]." Second, the Final Rule replaces the word "buy" in the proposal with the phrase "accept this offer and use."

[234] This disclosure is required in all cases except when the only MARS offered is the service or result described in § 322.2(i)(1)—*i.e.,* to stop, prevent or postpone any mortgage or deed of trust foreclosure sale, any repossession of the consumer's property, or otherwise save the consumer's dwelling from foreclosure or repossession.

[235] *Supra* note 75.

[236] *Supra* note 105. In the absence of a qualification, an efficacy claim may convey a greater likelihood of success than often is the case.

[237] Commenters supported this requirement. *See* NAAG at 4 (Rule should prohibit MARS providers "from representing that a consumer 'should stop making mortgage payments'."); CUUS at 5 ("[I]t would also be beneficial for MARS providers to disclose to consumers the consequences of not paying their mortgages (such as loss of their home and damage to their credit rating)."); CSBS at 3 ("[D]isclosures should include the fact that consumers are not exempt from making their home payments simply because they have decided to pursue MARS.").

[238] *See supra* note 82; CUNA at 2 (Consumers "are often instructed to stop making mortgage payments.").

[239] *Id.*

[240] It can be an unfair or deceptive practice to advise consumers to take a certain action without disclosing the attendant material adverse risks or consequences. *See, e.g., In re North Am. Philips Corp.,* 111 F.T.C. 139, 175–84 (1988); *In re Int'l Harvester Co.,* 104 F.T.C. 949, 1066–67 (unfair practice to conceal "fuel-geysering" hazard when using tractors). In Int'l Harvester, the Commission noted that it "frequently has decided that the omission of product safety information is an unfair and deceptive practice." *Id.* at 1045 (quoting *Firestone Tire & Rubber Co.,* 81 F.T.C. 398, 456 (1972)).

prohibits providers from collecting fees until the consumer has accepted the result obtained by the provider. The Commission determines that, to effectuate the advance fee ban, it also is necessary for the provider to inform consumers that they may withdraw from the service, and may accept or reject the result delivered by the provider. Thus, this disclosure is reasonably related to preventing unfair and deceptive acts and practices by MARS providers.

As in the proposed rule, § 322.4(b)(1) of the Final Rule also requires providers to disclose the total cost of their services.[241] To the extent that a provider bases its fee on a fixed percentage of the amount of money the consumer saves as a result of the service (instead of charging a flat fee), it must disclose this percentage.[242] This disclosure is limited to communications directed at a specific consumer because MARS providers often charge consumers different amounts based on their individual circumstances. In such cases, it would be very difficult or impossible to provide accurate information about total cost in commercial communications directed at general audiences. Nevertheless, the record shows that many MARS providers do not inform individual consumers about their fees prior to the time of contracting.[243] The total cost of a MARS is perhaps the most material information for consumers in making decisions whether to enter into a transaction with the provider. Requiring this disclosure will help protect consumers from being misled by providers who give incomplete, inaccurate, or confusing cost information. This disclosure, therefore, is reasonably related to the prevention of deception.

3. Disclosures Not Adopted

The Commission declines to adopt some modifications to the disclosure requirements that some commenters suggested. The reasons are set forth below. As a general matter, the disclosures required in the Final Rule are focused on responding to the core unfair and deceptive acts and practices that the Commission has identified through its law enforcement actions and through public comments. Adding more disclosure requirements, even to the extent they might provide some help to some consumers, risks overshadowing more important information or overloading consumers with too much information.[244]

Two commenters suggested that requiring MARS providers to disclose their historical performance could help consumers understand the risks in purchasing MARS from them.[245] Performance data, if it could be calculated in a useful, non-misleading way, likely would be valuable information to consumers in deciding whether to purchase MARS. The Commission has concluded, however, that requiring MARS providers to disclose their performance data is impracticable. Given the broad variety of results MARS providers might be able to obtain, they would have to incorporate many potential variables to calculate success rates for consumers. For example, one consumer may consider a short sale a success, while another may consider only a loan modification to be a success. It is, therefore, impracticable to develop accurate and comparable performance data that providers could disclose to consumers. Moreover, requiring disclosure of historical performance data would not be feasible for the large number of MARS providers who are new market entrants, because they lack past data on which to base a valid historical performance claim. Further, shifting market conditions and changes in government and other assistance programs could have substantial effects on the reliability of historical performance data as a predictor of future success.[246] The Commission concludes that, to prevent providers from deceiving consumers regarding their performance, it is enough that: (1) § 322.3(b)(1) of the Final Rule prohibits MARS providers from misrepresenting the likelihood that purchasing MARS will result in a successful outcome, and (2) §§ 322.4(a)(2) and 322.4(b)(3) require providers to disclose that lenders may not agree to modify loans even if consumers purchase MARS.[247]

Four commenters suggested that MARS providers be required to disclose that MARS are available for free or at lower cost from nonprofit housing counseling agencies, such as those certified by HUD, and disclose the contact information for these agencies.[248] Although some consumers would benefit from this information, it is already available from other sources, including the agencies themselves. In addition, the Commission is mindful of the need to limit the number of disclosures to maximize their effectiveness. As noted above, the greater the number of disclosures, the higher the risk of overloading consumers such that they do not read or comprehend any of the information. For these reasons, the Commission determines that the Final Rule's prohibition on misrepresenting the availability, performance, cost, or characteristics of any alternative means for consumers to obtain MARS, which includes misrepresentations regarding any nonprofit housing counseling agency or program, is sufficient.[249]

Finally, one commenter suggested that MARS providers be required to provide their physical address and landline telephone number.[250] Many MARS providers, like other businesses, routinely make contact information available to prospective customers and do not need to be compelled to do so. In addition, after the consumer agrees to use a provider's services, the prohibition on advance fees in the Final Rule means that the provider will have to communicate with the consumer to proffer the results and obtain payment. There is no information in the record to support the conclusion that MARS providers generally are not already making their contact information available, or that they generally would not make such information available to get paid. In the absence of information

[241] Providers may not evade this disclosure requirement, in whole or in part, by labeling their fees or charges as "penalties" or other terms. This provision requires that providers disclose all of the costs the consumer will have to pay the provider in connection with the mortgage assistance relief service.

[242] Further, regardless of whether the provider discloses its fee as a flat amount or percentage of savings, it may not later charge the consumer a larger amount or percentage than initially disclosed. Doing so would clearly violate § 322.3(b)(11) of the Final Rule.

[243] *See* NCRC Report, *supra* note 76, at 21.

[244] Consumer research shows that the ability of consumers to process information and make rational choices may be impaired if the quantity of the information they receive is too great. *See generally,* Yu-Chen Chen *et al., The Effects of Information Overload on Consumers' Subjective State Towards Buying Decision in the Internet Shopping Environment,* 8(1) Electronic Comm. Res. & Applications 48 (2009); Byung-Kwan Lee & Wei-Na Lee, *The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment,* 21(3) Psychol. & Marketing 159, 177 (2004).

[245] LOLLAF at 4; CUUS at 5–6 (adding that historical performance data would only be meaningful if a MARS provider had been in business long enough to have amassed a sufficient record). In contrast, a consortium of state regulators urged the Commission to prohibit MARS providers from disclosing such information because performance figures can be easily manipulated and could mislead consumers. CSBS at 3.

[246] For similar reasons, the Commission declined to require providers to disclose their drop out rates in amending the TSR to address debt relief services. *See TSR; Final Rule,* 75 FR 48458, 48497 & nn. 531–32 (Aug. 10, 2010).

[247] *See supra* §§ III.C.2.b. and III.D.2.

[248] LOLLAF at 3–4 (require disclosure that MARS services are available for free from HUD-certified counseling agencies); CSBS at 3 (require disclosure that MARS services can be obtained from non-profit and government organizations for little or no cost); LFSV at 3; NAAG at 4–5.

[249] *See* § 322.3(b)(9).

[250] NYC DCA at 6.

in the record SE showing that contact information is or will be lacking, the Commission declines to include in the Final Rule a requirement that MARS providers must disclose this information.

E. Section 322.5: Prohibition on Collection of Advance Fees and Related Disclosures

The proposed rule banned MARS providers from requiring that consumers pay in advance for their services, *i.e.,* prior to providers delivering the promised results. The Commission has determined to adopt an advance fee ban in the Final Rule, but with two significant revisions to the ban in the proposed rule. First, the Final Rule prohibits a provider of any mortgage assistance relief service—including loan modifications or other forms of MARS—from collecting any fees until the provider negotiates, and the consumer executes, a written agreement for mortgage relief with the lender or servicer. Second, to effectuate this provision, the Final Rule also requires MARS providers, at the time of forwarding the offer of mortgage relief, to disclose that consumers have the right to accept or reject the offer, and to provide consumers with a notice from their lender or servicer disclosing the material differences between the terms, conditions, and limitations of consumers' current loans and those associated with the offer for mortgage relief. These provisions supplant the proposed rule's allowance of fees once (1) the provider delivers an offer from the servicer or lender for a mortgage loan modification meeting certain minimum requirements; or (2) in the case of providers offering MARS other than loan modifications, the provider delivers the result that it represented it would deliver. The reasons for these alterations to the proposed rule are discussed below.

1. *Proposed Rule and Public Comments Received*

The advance fee ban in the proposed rule included two separate provisions, one addressing the marketing of MARS generally and the other addressing the marketing of MARS specifically to obtain loan modifications. The first provision in the proposed rule, § 322.5(a), prohibited MARS providers from requesting or receiving payment until they achieved all of the results that: (1) The provider had represented that the service would achieve; and (2) would be consistent with consumers' reasonable expectations about the service. The second provision, proposed § 322.5(b), prohibited MARS providers that represented that they would obtain a loan modification from requesting or receiving payment until they had achieved a modification meeting certain specifications, namely: The contractual change to one or more terms of an existing dwelling loan between the consumer and the owner of such debt that substantially reduces the consumer's scheduled periodic payments, where the change is (1) Permanent for a period of five years or more; or (2) Will become permanent for a period of five years or more once the consumer successfully completes a trial period of three months or less.

The proposed rule also required MARS providers, prior to collecting payment, to furnish to consumers documentation showing that they have secured an offer of mortgage relief from the consumer's lender or servicer.

a. Comments Supporting the Advance Fee Ban

A large number of commenters supported the proposed advance fee ban.[251] NAAG's comment, representing 40 attorneys general, urged the Commission to adopt proposed § 322.5, arguing that it was "critical" and "the linchpin of effective deterrence of fraudulent practices" by MARS providers.[252] According to NAAG, "[t]he collection of advance fees virtually ensures that consumers will have no recourse when consultants fail to perform services, as is generally the case."[253] Three state attorneys general who joined the NAAG comment also submitted individual comments offering similar reasons for supporting the proposed advance fee ban.[254] In addition, a coalition of state regulators of financial institutions supported the proposed ban, arguing that it would curb abuses in the MARS industry.[255] NAAG, individual state attorneys general, and the financial institution regulators specifically recommended that a final rule eliminate the possibility of MARS providers evading the ban by charging fees on a piecemeal basis before they have delivered all of the results they represented.[256] NAAG and the individual state attorneys general noted that many MARS providers split their service into discrete steps and then demand most of their fees after completing relatively insignificant initial steps, such as answering a phone call or sending the consumer preliminary forms.[257]

A wide array of consumer advocates, community organizations, and legal service providers also submitted comments generally supporting the proposed advance fee ban.[258] These comments argued that a ban is necessary to ensure that providers deliver the results they promise and to curb deception and abuse.[259] Like those of the state law enforcement agencies and financial regulators, some of these comments also urged the Commission to

[251] As detailed in the NPRM, many of these commenters recommended at the ANPR stage that the Commission include an advance fee ban. *See MARS NPRM,* 74 FR at 10808 & nn.19–21. In addition, some commenters who did not comment on the NPRM had advocated an advance fee ban at the ANPR stage. *See* CRC (ANPR) at 4 ("Banning advance fees is a crucial component to any effort to reduce * * * unfair and deceptive practices in the loan modification industry and will likely push many scam artists out of our communities. The FTC should ban the collection of advance fees outright * * *."); Shriver at 2 (recommending prohibition on up-front fees); NCLR at 1 (recommending that up-front fees be banned); CMC at 8 ("The CMC would support a ban or limitation on the collection of advance fees by MARS providers."); Chase at 3 ("[T]he payment of advance fees should be banned because there is no guarantee the MARS provider will be successful * * *."); HPC at 2 (arguing that consumers should not be required to pay up-front fees).

[252] NAAG at 2–3; *see also* NAAG (ANPR) at 9 ("A ban on advance fees * * * is necessary for any meaningful mortgage consultant regulation * * *. A key provision of any rule regulating mortgage consultants is that no fee may be charged or collected until after the mortgage consultant has fully performed each and every service the mortgage consultant contracted to perform or represented that he or she would perform.").

[253] NAAG at 2.

[254] *See, e.g.,* MN AG at 2–3; MA AG at 1; OH AG at 1; *see also, e.g.,* NYC DCA at 3–5 (New York City Department of Consumer Affairs stating support for advance fee ban).

[255] *See* CSBS at 3.

[256] *See* NAAG at 3; MN AG at 3; CSBS at 4; MA AG at 2. Some commenters also noted that they have observed MARS providers that charge fees piecemeal in order to circumvent state statutory advance fee bans. *See* NAAG at 3; MN AG at 3; MA AG at 2.

[257] NAAG at 3; MN AG at 3; MA AG at 2 ("[U]nder an exemption for piecemeal fees, providers would continue the widespread current practice of front loading piecemeal fees, so that the provider quickly obtains a substantial payment that is disproportionate to the amount of services provided.").

[258] *See* CRL; LFSV at 2–3; LCCR at 4; WMC at 1; NCLC at 3; LOLLAF at 4; CUUS at 6–8.

[259] *See, e.g.,* CUUS at 7 ("The prohibitions on advance fee payments is the most effective tool in this proposed rule to drive bad actors from the marketplace, making room for the legitimate companies to fill in the void and provide quality, honest services and products to consumers."); NCLC at 3 ("The single most important provision is section 322.5 * * *. Wrongdoers are attracted to mortgage assistance relief services by the potential for extracting large payments from homeowners without performing any work or providing anything of value. Requiring mortgage assistance relief services (MARS) providers to earn their fee before being paid will rid the market of those who specialize in nothing more than 'take the money and run.'"); LCCR at 4 ("The ban will also protect struggling homeowners by incentivizing MARS providers to represent their capabilities in a way that reflects services they can realistically provide in a timely manner.").

prohibit MARS providers from collecting fees piecemeal.[260]

Comments from the financial services industry, including a trade association representing mortgage brokers and another representing financial institutions, also supported the advance fee ban.[261] In addition, several California attorneys who provide MARS supported an advance fee ban for non-attorney MARS providers, asserting that it would curb their abuses.[262]

In the NPRM, the Commission requested comment on possible alternatives to the proposed advance fee ban, *e.g.,* permitting a limited advance fee or allowing providers to require consumers to set fees aside in a dedicated account.[263] In response to this request, state attorneys general and regulators argued that the alternatives on which the Commission requested comment would be inadequate to prevent deception and unfairness.[264] Several consumer group comments similarly recommended that the Commission not adopt either of these alternatives. For example, three commenters specifically opposed allowing providers to collect a fixed, limited advance fee;[265] two of the three argued that providers would collect any upfront fee amount permitted and never provide any benefits to consumers.[266] Other commenters urged the Commission not to permit providers to force consumers to set aside fees in dedicated accounts.[267] Among other reasons, these commenters asserted that allowing MARS providers to require such accounts would place the onus on consumers to recover the deposited funds if providers failed to perform.[268]

b. Comments Opposing the Proposed Advance Fee Ban

A number of MARS providers, many of them attorneys,[269] submitted comments opposing the proposed advance fee ban.[270] These commenters offered several reasons for their opposition. First, MARS providers argued that their services frequently confer substantial benefits on consumers, including collecting, reviewing, and explaining to consumers the paperwork sent by lenders and servicers;[271] making repeated phone calls on behalf of consumers to lenders and servicers to ensure that they have received necessary information and documents;[272] advising consumers on whether they would be eligible for a loan modification or other alternative;[273] recommending that consumers consider bankruptcy;[274] and offering emotional support.[275] At least two MARS providers submitted comments claiming that they have secured loan modifications for a large number of their customers,[276] although they offered no data or other substantiation for these claims.

Second, MARS providers asserted that, without the ability to collect fees in advance, legitimate MARS providers would be unable to stay in business and would stop providing services, leaving consumers either without assistance or vulnerable to illegitimate providers.[277] These commenters argued that MARS providers need advance fees to cover their ongoing operating costs—*e.g.,* for payroll, office space, and equipment—as well as the direct costs of seeking modifications, all of which they incur prior to obtaining the modifications.[278] The commenters claimed that, as a result of delays and other problems lenders and servicers cause, it can take from several months to a year to obtain a modification, a long time to go without being paid.[279] The commenters also argued that they need consumers' payments upfront because most consumers who purchase MARS are in financial distress and may be unwilling or unable to pay the amount owed to the provider even when the provider has completely fulfilled its promises.[280]

2. Legal Basis

a. Unfairness

Based on the record in this proceeding, the Commission concludes that it is an unfair act or practice for MARS providers to charge advance fees, because: (1) It causes or is likely to

[260] *See* LFSV at 2; LCCR at 8; LOLLAF at 5 ("Allowing any fees to be collected prior to providing a permanent loan modification presents MARS providers with a back door opportunity to extract significant sums of money without any benefit provided to the consumer.").

[261] *See, e.g.,* MBA at 2–3; AFSA at 5. AFSA argued that banning advance fees is the best way to ensure that providers deliver a beneficial service to consumers.

[262] *See* Greenfield at 2 ("We applaud the basic restrictions that are proposed on the ability of MARS providers * * * to request and accept advance fees. These restrictions are warranted because there is ample evidence from the state Attorneys General and other sources in California and nationwide that persons who are looking to take advantage of distressed consumers are gravitating toward this relatively new field.").

[263] 75 FR at 10730–31. For purposes of discussion in this Section of the SBP, the Commission uses the phrase "dedicated account" to include any account into which a MARS provider might request or require consumers to set aside fees to ensure that the provider can later collect them. The term encompasses an "escrow account," a phrase frequently used in the real estate context to describe an account controlled by a third-party administrator into which a consumer places a deposit for the purchase of a home. It also encompasses a "trust account," a phrase most commonly used to describe funds paid by clients to attorneys, which attorneys set aside and from which they later collect or withdraw their fees. The public comments and other materials in the record sometimes use these phrases interchangeably, and the Commission intends for "dedicated accounts" to include all of these mechanisms, and any other variations, for setting aside consumer funds.

[264] *See* NAAG at 2–3; MA AG at 2; CSBS at 4; *see also* NYC DCA at 5. Specifically, NAAG raised concerns that the use of dedicated accounts would not protect consumers because (as demonstrated in one law enforcement action described in its comment) providers might inappropriately access the funds set aside or refuse to return those funds to consumers. NAAG at 2–3. In response to similar concerns about permitting dedicated accounts in the provision of debt relief services, for purposes of its recent amendments to the TSR, the Commission imposed several conditions for using such accounts to ensure that providers do not improperly obtain or control the funds. *See TSR; Final Rule,* 75 FR at 49490–91.

[265] CUUS at 6; LCCR at 4; LOLLAF at 5.

[266] LOLLAF at 5; CUUS at 6.

[267] LFSV at 3; CUUS at 7; WMC at 2; LOLLAF at 5.

[268] LFSV at 3; LOLLAF at 5.

[269] *See, e.g.,* Mobley; Deal; Rogers; Dargon; Holler; Giles; 1st ALC. Many of the objections that MARS providers who are attorneys raised to the proposed advance fee ban applied equally to non-attorney MARS providers. Other objections were attorney-specific.

[270] *See, e.g.,* MFP (non-attorney provider); Metropolis (same); Rate Modifications (same); Fortress (same).

[271] *See, e.g.,* Giles at 3–4; Dargon at 2.

[272] *See, e.g.,* Dargon at 2; Goldberg at 2; Greenfield at 4.

[273] *See, e.g.,* 1st ALC at 8.

[274] *See, e.g.,* Giles at 3.

[275] *See, e.g.,* Giles at 3 ("I do the 'hand holding' throughout the process and I am the one that assures them they are not going to lose their homes."). One commenter also noted that, even when unsuccessful at obtaining a loan modification, he often can force a delay in his customers' foreclosure proceedings so that they can remain in their homes for an additional period of time. *See* Carr at 3.

[276] *See* Rogers at 2 (stating that his firm has obtained trial modifications for over 90% of its customers and has never failed to convert a trial modification into a permanent modification); Hawthorne at 1 ("I have over 600 success stories, and i [sic] get 80 loan modifications in a month for our clients.").

[277] *See, e.g.,* Sygit at 1; Rate Modifications at 1; Rogers at 9–10; Wallace at 1; Holler at 1; Giles at 3; Dargon at 1, 3; Carr at 5; Goldberg at 1–2; Deal at 4. One comment submitted by a group of attorneys who provide MARS suggested that many attorneys in California have already stopped offering these services to consumers as a result of that state's advance fee ban, which recently became applicable to attorneys. *See* Greenfield at 4.

[278] *See, e.g.,* Rogers at 9; Dix at 1; GLS at 1; Hunter at 1 ("How are the lights, phones, computers, marketing, and payroll to be met if we only receive compensation down the road?").

[279] *See, e.g.,* Rogers at 9; Peters at 1; GLS at 1; Dargon at 3; Giles at 3 (noting that "a successful loan modification takes a year, and is never accomplished in less than six (6) months"); Greenfield at 4 ("Mortgage loan modifications often take from six months to a year to reach a resolution.").

[280] USHS at 1; Rogers at 9; ARS/Peters at 1; GLS at 1; ARS/Peters at 1 (stating that, under California law barring upfront fees, "I am having to spend hours chasing down payments from clients and getting the run around"); Deal at 5 ("I am not interested in chasing clients who fail to pay. It is usually a waste of time and money.").

cause substantial injury to consumers; (2) the injury is not outweighed by countervailing benefits to consumers or competition; and (3) the injury is not reasonably avoidable by consumers themselves.[281] To prevent this injury, the Final Rule bans MARS providers from collecting advance fees for their services.

(1) Consumer Injury from Advance Fees

The record shows that charging fees for MARS prior to delivering results—the most common business model in this industry [282]—causes or is likely to cause substantial injury to consumers. Consumers in financial distress suffer monetary harm—in the hundreds or thousands of dollars—when, following sales pitches frequently characterized by high pressure and deception, they use their scarce funds to pay in advance for promised results that rarely materialize.[283] When MARS providers fail to perform, consumers may lose funds they need to make monthly mortgage payments and thus may lose their homes as well.

(a) Consumers Are Injured Because They Pay for Services That Are Never Provided

The record shows that MARS providers do not achieve successful results for the vast majority of their customers. Consumers who pay advance fees but do not receive promised benefits lose the often considerable sums they have paid for MARS services (typically hundreds or thousands of dollars), funds financially-distressed consumers often need to make mortgage payments or meet other basic needs.[284]

The FTC and state law enforcement agencies have collectively filed over two hundred cases against MARS providers.[285] These cases typically have alleged that the defendants employed deceptive success claims to entice consumers to purchase their services, and then did not produce the results they promised.[286] In one recent FTC action, for example, the court found that defendants successfully obtained loan modifications for fewer than 5% of their customers, despite their frequent claims of a 90% or 100% success rate.[287] Similarly, the court in another FTC lawsuit concluded that the defendants had a success rate of "no more than between 1% and 10%." [288] The Illinois Attorney General likewise submitted a comment stating that in the majority of its lawsuits against MARS providers, virtually none of the defendants' customers appear to have receive promised services or results.[289]

Consumers are especially unlikely to obtain the claimed results if the MARS provider has promised a loan modification.[290] Many consumers who purchase services from MARS providers are not even eligible for the government programs that offer incentives for lenders and servicers to make loan modifications.[291] Apart from these programs, lenders and servicers often are unwilling to modify the terms of loans or forgive fees and penalties as an alternative to foreclosure.[292] Even if lenders and servicers might be amenable to modification, many MARS providers often do little or no work for their customers—for example, neglecting to contact lenders or servicers or failing to respond to their requests for basic information—thereby increasing the

[281] 15 U.S.C. 45(n).

[282] *See supra* notes 47–49 and accompanying text. In the Commission's law enforcement actions, MARS providers uniformly have charged advance fees to consumers. *See* FTC Case List, *supra* note 28. *But see* USHS at 1 (MARS provider stating that he only collects fees after obtaining a trial modification for his customers).

[283] *See TSR; Final Rule,* 75 FR at 48482. Moreover, this practice creates incentives for MARS providers that are fundamentally at odds with the interests of consumers—to expend their resources on soliciting customers and collecting fees, rather than providing services. *See also id.* at 48484.

[284] *See, e.g.,* NCRC (ANPR) at 3 ("The high costs of loan modification and foreclosure rescue services may also prevent financially stressed consumers from being able to pay their regular mortgage payment, if they buy into companies' promises. If the company does not deliver, they may be unable to correct the delinquency for lack of these funds."); NAAG (ANPR) at 10 ("Paying the fee upfront likely means that some of the consumer's other bills will not be paid or that the consumer will have to use credit cards or funds from friends or family."); MN AG (ANPR) at 2 ("These advance fees often make it even more difficult for the homeowner—and the loan modification or foreclosure rescue consultant—to effectively resolve the homeowner's financial dilemma."); *see also TSR; Final Rule,* 75 FR at 48484.

[285] *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, Hearing Before the S. Comm. on Commerce, Sci. & Transp.,* 111th Cong. 6 (2010) (testimony of FTC).

[286] *See, e.g.,* FTC Case List, *supra* note 28; NAAG (ANPR) at 6 ("In our experience, we have found that services provided by foreclosure rescue services companies result only in costs to consumers. There are no benefits. The companies collect an upfront fee that consumers can ill-afford to pay. Consumers then submit financial information to the companies and the companies promise to forward the information to the consumers' loan servicers and obtain a loan modification offer. In the majority of cases, the companies do nothing with the consumers' information. The consumers then end up turning to a non-profit for help, calling their servicers themselves, or falling further behind on their mortgage payments as they wait for the promised loan modification offer that never materializes."); *see also, e.g.,* Press Release, Cal. Att'y Gen., *Four Arrested, Five Wanted for Fleecing Hundreds of Homeowners Seeking Foreclosure Relief* (May 20, 2010) (criminal matter alleging that, "[i]n almost every case, no loan modifications were completed [by defendants], as promised," although they promoted 90% to 100% success rates), *available at http://ag.ca.gov/newsalerts/release.php?id=1923;* NAAG (ANPR) at 3 ("As of July 1, 2009, the Office of the Illinois Attorney General had identified roughly 170 companies operating in Illinois that appeared to have offered or were presently offering foreclosure rescue services that violated Illinois state laws. The majority of these companies take impermissible up-front fees and then fail to deliver promised services."); MN AG (ANPR) at 2 ("As a general rule, these companies provide no service, or at most, simply submit paperwork to the homeowner's mortgage company."); Chase (ANPR) at 1 ("Chase's experience has been that MARS entities disrupt the loan modification process and provide little value in exchange for the high fees they charge.").

[287] *FTC* v. *Data Med. Capital, Inc.,* No. SA–CV–99–1266 AHS (Eex), Contempt Or. at 55 (C.D. Cal. filed Jan. 15, 2010).

[288] *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Order Granting Prelim. Injunct. at 11 (S.D. Fla. entered Jan. 11, 2010); *see also, e.g., FTC* v. *Federal Loan Modification Ctr., LLP,* No. SACV 09–401 CJC (MLGx), Mem. Sup. Pls. Mot. Supp. Summ. J. at 13 (C.D. Cal. filed Oct. 6, 2010) (alleging that company obtained results for consumers at a rate ranging from 8.9% to 17.76%); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Rep. Mem. Supp. Prelim. Injunct. at 2 (C.D. Cal. filed Aug. 13, 2009) (alleging that, even according to statistics self reported by defendant, "only 27% of [defendant's] clients were 'approved' for a loan modification, and only 16% found the modification acceptable"); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Second Int. Rep. Temp. Receiver at 4 (C.D. Cal. filed Sept. 17, 2009) (estimating that 21% of defendants' customers were approved for loan modifications); *FTC* v. *LucasLawCenter "Inc.",* No. SACV–09–770 DOC (ANX), Mem. Supp. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that "[n]early every consumer who is promised a loan modification never received any offer to modify their home loans"); *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09–cv–01167–FJM (D. Ariz. June 1, 2009) (alleging that defendants only completed loan modifications for about 6% of customers).

[289] *See* IL AG (June 30, 2010) at 2–4; *see also* GAO Report, *supra* note 45, Executive Summary (finding that "the most active [MARS] scheme is one in which individuals or companies charge a fee for services not rendered").

[290] *See, e.g.,* FTC Case List, *supra* note 28.

[291] *See, e.g.,* Manuel Adelino et al., *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization* 3 (Federal Reserve Bank of Atlanta, Working Paper No. 2009–17a, 2009), *available at http://www.bos.frb.org/economic/ppdp/2009/ppdp0904.pdf* (finding that lender provided monthly payment-lowering modifications to only 3% of seriously delinquent loans in 2007 and 2008); NCLC at 6 (pointing to "[o]ne analysis of statistics for modifications made in May 2009 [which] showed that only 12% reduced the interest rate or wrote-off fees or principal").

[292] *See supra* note 291; *see also, e.g.,* Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications,* 41 Conn. L. Rev. 1107, 1111 (2009) (arguing, *inter alia,* that "[n]o single servicer or group of servicer * * * has any incentive to organize a pause in foreclosures or organized deleveraging program to benefit the group"). *But see* Press Release, HOPE NOW, *HOPE NOW Reports More Than 476,000 Loan Modifications in First Quarter of 2010* (May 10, 2010) (coalition including mortgage servicers announcing that its members have offered 2.88 million loan modifications to consumers), *available at http://www.hopenow.com/press_release/files/1Q%20Data%20Release_05_10_10.pdf.*

odds even further that their customers will not receive the promised results.[293]

In addition to past law enforcement actions, the significant and growing number of consumer complaints about MARS providers strongly suggests that they are continuing to fail to deliver the results they promise. For example, one coalition of government and private groups that collects consumer complaints regarding MARS received 3,461 consumer complaints against MARS providers between April and August of 2010.[294] Similarly, state and local consumer protection agencies reported that fraudulent offers of help to save homes from foreclosure was the fastest growing complaint category in 2009.[295]

The Commission's extensive experience with consumer complaints teaches that such complaints—while not a representative sample of MARS consumers—are the "tip of the iceberg" in terms of the actual levels of consumer dissatisfaction.[296] The Commission has decades of experience in its law enforcement work in drawing inferences from the number and types of consumer complaints. In this matter, the frequency and consistency of the conduct described in consumer complaints raises, at a minimum, a strong inference that this conduct is widespread in the MARS industry. The complaint data corroborates the other evidence in the record discussed above that MARS providers, after collecting substantial advance fees, fail to deliver promised results for most consumers.

(b) The Context in Which MARS Are Offered Has Contributed to the Substantial Injury

The Commission concludes that several aspects of the marketing of MARS have contributed to the substantial injury caused by charging advance fees. First, MARS providers direct their claims to financially distressed consumers who often are desperate for any solution to their mortgage problems and thus are vulnerable to the providers' purported solutions.[297] The Commission has long held that the risk of injury is exacerbated in situations in which sellers exercise undue influence over susceptible classes of purchasers.[298]

Second, MARS providers frequently use high pressure sales tactics in selling their services.[299] Thus, the manner in which MARS are sold impedes the free exercise of consumer decision making, a traditional hallmark of an unfair practice.[300]

Third, the transactions in which consumers agree to purchase MARS and make advance payments often take place in the context of extensive deception.[301] To induce consumers to purchase their services and pay advance fees, MARS providers make aggressive performance claims. As discussed above, in their ads and in follow-up telemarketing and email interactions with consumers, MARS providers commonly claim that there is a high probability, or even a guarantee, that they will obtain dramatic reductions in payments or other mortgage relief.[302] To increase the credibility of these claims, many MARS providers misrepresent that they have special expertise in mortgage relief assistance and a close affiliation with the government, a non-profit program, or the consumer's lender or servicer.[303] Morever, providers seek to allay concerns consumers might have about paying in advance by falsely claiming that they will provide refunds if they do not obtain the promised results.[304]

Finally, charging advance fees for MARS requires consumers to bear the full risk of the possible failure of the provider to perform, even though the provider is in a better position to assume risk. When selling MARS to consumers, only the MARS provider knows how frequently, and under what circumstances, it has been successful in the past. Consumers, in contrast, are not likely to know whether a successful outcome is likely for them. Consumers are injured by a business model that forces them to bear the full risk of nonperformance and the resulting harm, particularly, as in this context, where the seller is in a better position to know and account for the risks.[305]

[293] *See supra* note 79.

[294] *See* Loan Modification Scam Prevention Network (LMSPN), *National Loan Modification Scam Database Report—August 2010, available at http://www.preventloanscams.org/tools/assets/files/August-LMSPN-Report-Final.pdf;* LMSPN, *National Loan Modification Scam Database Report—July 2010, available at http://www.preventloanscams.org/tools/assets/files/July-LMSPN-Report-Final.pdf;* LMSPN, *National Loan Modification Scam Database Report—June 2010,* available at *http://www.preventloanscams.org/newsroom/publications_and_testimony?id=0011;* LMSPN, *National Loan Modification Scam Database Report—May 2010, available at http://www.preventloanscams.org/tools/assets/files/May-LMSPN-Report-Final.pdf;* LMSPN, *National Loan Modification Scam Database Report—April 2010, available at http://www.preventloanscams.org/tools/assets/files/April-LMSPN-Report-Final.pdf.*

[295] Consumer Fed'n of Am., *2009 Consumer Complaint Survey Report* 25 (July 27, 2010) (surveying state and local government agencies regarding their consumer complaints), *available at http://www.consumerfed.org/elements/www.consumerfed.org/file/Consumer_Complaint_Survey_Report072009.pdf.* Moreover, the Financial Crimes Enforcement Network reported that financial institutions submitted about 3,000 suspicious activity reports related to loan modification and foreclosure rescue scams in 2009. FinCEN, *Loan Modification and Foreclosure Rescue Scams—Evolving Trends and Patterns in Bank Secrecy Act Reporting* at 10 (May 2010), *available at http://www.fincen.gov/news_room/rp/files/MLFLoanMODForeclosure.pdf (FinCEN, Foreclosure Rescue Fraud Report May 2010).*

[296] *See, e.g.,* Dennis E. Garrett, *The Frequency and Distribution of Better Business Bureau Complaints: An Analysis Based on Exchange Transactions,* 17 J. Consumer Satisfaction, Dissatisfaction, & Complaining Behav. 88, 90 (2004) (noting that only a small percentage of dissatisfied consumers complain to third-party entities or agencies); Jeanne Hogarth et al., *Problems with Credit Cards: An Exploration of Consumer Complaining Behaviors,* 14 J. Consumer Satisfaction, Dissatisfaction, & Complaining Behav. 88, 98 (2001) (finding that only 7% of consumers having problems with their credit card company complain to third-party entities or agencies).

[297] *See* Unfairness Policy Statement, *supra* note 187, at 1074 (noting that the Commission may consider the "exercise [of] undue influence over highly susceptible classes of purchasers" as part of the unfairness analysis).

[298] *Id.* at 1074 n.3.

[299] *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. TRO at 17 (C.D. Cal. filed July 13, 2009) ("Defendants [allegedly] create[d] an atmosphere of pressure and urgency to encourage consumers to pay the up-front fee. In numerous instances, Defendants' representatives have sent consumers emails transmitting [defendants'] loan modification application that includes arbitrary deadlines and other warnings to pressure consumers to return the information fast * * * [including statements that] '[i]f the Application Process and Mitigation Process are not handled with precision and a sense of urgency you could very likely lose your home' and '[i]t is extremely important that this application be faxed back by the (3) day deadline to avoid cancellation of the file.'"); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Mem. Supp. P.I. at 14–15 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendants' Web sites stated, "[t]he single-most important factor in stopping your foreclosure is SPEED! Time is not your friend" and that defendants' solicitations stated "[y]ou must act immediately," and "URGENT NOTICE: Please Call Immediately!"); *FTC* v. *Data Med. Capital Inc.,* No. SA–CV–99–1266 AHS (Eex), Mem. Supp. App. Contempt at 8 (C.D. Cal. filed May 27, 2009) ("The fuel for [defendant's alleged] scheme was the desperate plight of consumers facing a recessionary economy and a free falling real estate market. * * * [T]elemarketers were trained to * * * 'capitalize on fear' and 'create urgency.' ").

[300] *See TSR; Final Rule,* 75 FR at 48485 & n.379 (citing Unfairness Policy Statement, *supra* note 187, at 1074); *In re Amrep,* 102 F.T.C. 1362 (1983), *aff'd,* 768 F. 2d 1171 (10th Cir. 1985); *In re Horizon Corp.,* 97 F.T.C. 464 (1981); *In re Sw. Sunsites,* 105 F.T.C. 7, 340 (1985), aff'd, 785 F. 2d 1431 (9th Cir. 1986).

[301] As the Commission recently concluded in promulgating the debt relief amendments to the TSR, transactions characterized by deception exacerbate the potential for consumer injury. *See TSR; Final Rule,* 75 FR at 48485.

[302] *Supra* note 75.

[303] *Supra* notes 72–74.

[304] *See supra* note 77.

[305] *See TSR; Final Rule,* 75 FR at 48485 (citing *Cooling Off Period For Door-to-Door Sales; Trade Regulations Rule and Statement of Basis and Purpose,* 37 FR 22934, 22947 (Oct. 26, 1972) (codified at 16 CFR 429)); *Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose,* 40 FR 53506, 53523 (Nov. 18, 1975) (codified at 16 CFR 433) (same); *In re Orkin Exterminating,* 108 F.T.C. 263, 364 ("By raising the

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Thus, the Commission concludes that the practice of charging an advance fee for MARS causes or is likely to cause substantial consumer injury.[306]

(2) Benefits to Consumers or Competition From Advanced Fees

The second factor in the unfairness analysis under Section 5(n) of the FTC Act is a consideration of whether an act or practice has benefits to consumers and competition and, if so, whether they outweigh the actual or likely harm to consumers. MARS provider commenters posited two main arguments to support their contention that charging advance fees is beneficial to consumers.

First, the providers argued that, in exchange for their upfront fees, they provide significant benefits to consumers in the form of completed services and successful results.[307] However, the rulemaking record demonstrates that the vast majority of consumers fail to receive successful loan modifications or other forms of mortgage assistance promised.[308] In the ANPR and NPRM, the Commission specifically requested empirical evidence on the success rates of MARS providers in delivering promised results.[309] No such evidence was submitted. Although a few comments from MARS providers included anecdotes and unsupported assertions of success,[310] the bulk of the comments[311] and the Commission's law enforcement experience provide strong evidence that MARS providers rarely deliver the results they promise.

Second, MARS providers have asserted that an advance fee ban would impose undue burdens on them, because: (1) They would not have the cash flow necessary to fund their day-to-day operations;[312] and (2) they might not get paid for the services they rendered given the precarious financial situation of their customers.[313] As a result, according to these commenters, many MARS providers could not afford to stay in business, and would therefore no longer be able to provide consumers the benefits of their services.[314]

There is scant evidence in the rulemaking record to support this argument, and no industry members submitted cost data to back up this claim.[315] The Commission cannot predict with precision the impact of an advance fee ban, but recognizes it may force some MARS providers to capitalize adequately to fund their initial operations, until they begin receiving fees generated by their delivery of services.[316] Companies in many other lines of business capitalize for this purpose. Thus, although the advance fee ban in the Final Rule may result in new business models,[317] there is no evidence in the record to substantiate the claim that MARS providers will not be able to operate if they are paid after they deliver results to their customers.[318]

A ban on advance fees would shift some of the risk of nonperformance under the contract from consumers to MARS providers. At present, consumers bear the full risk—typically, they must pay thousands of dollars up front with no assurance that they will ever receive any benefit in return. The poor performance of this industry makes it likely that consumers will be harmed if they continue to bear the full risk of nonperformance.[319] Prohibiting the charging of advance fees reallocates some of this risk to MARS providers and gives them a powerful incentive to actually deliver results.

In short, the Commission concludes that charging advance fees for MARS

fees, Orkin unilaterally shifted the risk of inflation that it had assumed under the pre-1975 contracts to its pre-1975 customers."), *aff'd* 849 F.2d 1354 (11th Cir. 1988); *In re Thompson Med. Co.,* 104 F.T.C. 648 (1984) (noting that marketers must provide a high level of substantiation to support "claim[s] whose truth or falsity would be difficult or impossible for consumers to evaluate by themselves").

[306] For similar reasons, the TSR prohibits advance fees for three types of services that often are promoted deceptively to consumers in financial crisis: debt relief services, credit repair services, and certain loan offers. *See* 16 CFR 310.4(a); TSR; *Final Rule,* 75 FR at 48484–85. The Credit Repair Organizations Act also bans the collection of advance fees for credit repair services. 15 U.S.C. 1679b(b).

[307] *See supra* § III.E.1.b.

[308] As noted earlier, MARS providers suggest that, even in instances where they do not secure the promised result, they offer consumers other services that are beneficial to them, such as day-to-day assistance in communicating with servicers or lenders, delays in foreclosure proceedings, and emotional support. *See supra* § III.E.1.b. There is no evidence in the record establishing the frequency with which providers deliver these "benefits." In any event, providers generally do not advertise such services or ancillary "benefits," but instead solicit customers by touting the end result, such as a modified loan. Presumably, this is because consumers are much more interested in receiving, and much more willing to pay for, the promised result. *See TSR; Final Rule,* 75 FR at 48479 (dismissing arguments that debt relief service providers offer ancillary services such as education and financial advice because industry members did not provide evidence to establish how many providers offer the services, how extensive they are, or how much they cost to provide).

[309] *MARS ANPR,* 74 FR at 26137; *MARS NPRM,* 75 FR at 10727, 10729.

[310] Only one MARS commenter offered a self-reported success rate, stating that he places over 90% of his clients into trial or permanent loan modifications. *See* Rogers at 1. However, this commenter did not submit any additional information or data supporting this claim. Another commenter reported anecdotal accounts of a small number of consumers for whom he purportedly obtained loan modifications. *See* Parkey (audio files). Another MARS provider reported that it has over "600 success stories" and secures over 80 loan modifications per month. *See, e.g.,* Metropolis at 1. This commenter also failed to submit information or data supporting this claim, defining "success story," or indicating the percentage of its customers who received modifications out of the total who purchased the services.

[311] *See supra* § III.E.1.

[312] *See supra* § III.E.1.b.; *see also, e.g.,* Gutner (ANPR) at 1 ("[L]oan modification is not as simple as filling out a few forms and then it is done. Loan modification is a long and involved process. * * * Loan modification companies have expenses just like any other company—payroll, lease, insurance, equipment etc."); TNLMA (ANPR) at 5 ("[MARS providers] incur significant costs before the consumer's mortgage is ready to be modified.").

[313] *See supra* § III.E.1.b.; *see also, e.g.,* TNLMA (ANPR) at 5 ("Nearly all professions, from attorneys to accountants to personal trainers, charge advance fees. * * * The reason these other professions charge fees 'up-front' is to avoid the risk of being 'stiffed' at the end of a laboriously costly effort.").

[314] *See supra* § III.E.1.b. One commenter argued, alternatively, that the advance fee ban would compel legitimate MARS providers to charge consumers higher fees to account for the risk of nonpayment. Rogers at 18. There is no evidence in the record substantiating this theory. Assuming that MARS providers compete with one another, it is not clear that they would be able to raise prices with impunity, thereby passing this cost on to consumers.

[315] Notably, FTC law enforcement actions suggest that a predominant portion of providers' costs are dedicated to marketing and sales, instead of the process of assisting consumers obtain mortgage relief. *See, e.g., FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Prelim. Rep. Temp. Receiver at 9 (C.D. Cal. filed July 15, 2009) ("[T]he typical commission [for a MARS provider's telephone sales people] was $450 for a fully paid sale—*i.e.,* $2,500—with an extra $25 if the consumer paid by debit card or wire transfer.").

[316] *See, e.g.,* LCCR at 4 ("The for-profit business should be able to capitalize its business in a manner so that it can carry forward these nominal fees as operating costs and then incorporate that operating cost into the fee obtained from the consumer *after* the services are rendered."). *See generally TSR; Final Rule,* 75 FR 48458 (Aug. 10, 2010).

[317] In connection with the FTC's recent amendments to the TSR to curb deception and abuse in debt relief services, industry representatives similarly argued that they would be unable to pay their operating costs without collecting advance fees. *See TSR; Final Rule,* 75 FR at 48486. In fact, after the Commission issued the TSR amendments, a major debt relief trade association stated that the rule, while providing a "significant capital challenge" to the industry, would "allow good companies that are getting results for consumers" to survive. Press Release, The Ass'n of Settlement Cos., *TASC Announces Support for FTC Debt Settlement Rules* (Aug. 17, 2010), *available at http://www.marketwire.com/press-release/TASC-Announces-Support-for-FTC-Debt-Settlement-Rules-1305731.htm.*

[318] *See TSR; Final Rule,* 75 FR at 48486; *Truth in Lending—Final Rule; Fed Res. Brd. Official Staff Commentary,* 75 FR 58509, 58518 (Sept. 24, 2010) (compensation restrictions for mortgage brokers may result in new business models, but "the Board does not believe mortgage brokerage firms will no longer be able to compete in the marketplace unless they can continue to engage in compensation practices the Board has found to be unfair.").

[319] Increased revenue or profit for a seller, alone, is not a benefit to consumers or competition for purposes of unfairness analysis. *See In re Orkin Exterminating Comp., Inc.,* 108 F.T.C. 263, 365–66 (1986), *aff'd,* 849 F.2d 1354, 1363 (11th Cir. 1988).

does not provide benefits to consumers or competition, and, even if such benefits were to exist, they would not outweigh the substantial injury this practice demonstrably causes or is likely to cause to consumers.

(3) Reasonably Avoidable Harm

The third prong of the unfairness analysis under Section 5(n) of the FTC Act requires the Commission to consider whether consumers could reasonably avoid the harm caused by an act or practice. The Commission finds an act or practice unfair "not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making." [320] The extent to which a consumer can reasonably avoid injury is determined in part by whether the consumer can make an informed choice.[321] In this regard, the Unfairness Policy Statement explains that certain types of sales techniques may effectively prevent consumers from making informed decisions and that corrective action may therefore be necessary.[322]

For harm to be reasonably avoidable, consumers must have "reason to anticipate the impending harm and the means to avoid it." [323] As discussed above, the deceptive success and other claims MARS providers disseminate prevent or substantially hinder the ability of consumers to recognize the risks they face in paying advance fees to MARS providers. This is especially so because consumers often are under dire pressure to make decisions quickly. Moreover, consumers have little experience with purchasing services to stave off foreclosure, which is not a routine consumer transaction, whereas the provider has presumably handled the transaction many times.

Once they have paid in advance and learned that a MARS provider has not obtained a result they are willing to accept, consumers cannot reasonably eliminate or mitigate the harm.[324] As discussed above, MARS providers rarely provide refunds for nonperformance.[325] In addition, although consumers may have the right under state law to bring breach of contract actions to recover advance fees from MARS providers who do not perform, many consumers are unaware of their legal rights or are unable to afford the costs and risks of litigation.[326] Thus, the Commission finds that consumers cannot reasonably avoid the injuries they face in connection with MARS providers charging advance fees.

(4) Public Policy Concerning Advance Fees

Section 5(n) of the FTC Act permits the Commission to consider established public policies in determining whether an act or practice is unfair, although those policies cannot be the primary basis for that determination.[327] At least 20 states currently prohibit charging advance fees for MARS because of its adverse impact on consumers.[328] Consistent with these state statutes and their law enforcement experience, over 40 attorneys general filed comments strongly advocating an FTC rule prohibiting advance fees for MARS.[329] Thus, public policies embodied in state laws and law enforcement further support the Commission's finding that this practice is unfair.[330]

For the reasons set forth above, the Commission concludes that charging an advance fee for MARS is an unfair act or practice under Section 5(n) of the FTC Act.[331]

b. The Advance Fee Ban Is Reasonably Related to the Goal of Preventing Deception

As explained above, the Omnibus Appropriations Act, as clarified by the Credit Card Act, authorized the FTC not only to prohibit conduct that is itself unfair or deceptive, but also to adopt rules that are reasonably related to preventing unfair or deceptive conduct in connection with MARS.[332] For the reasons detailed here, the Commission concludes that an advance fee ban for MARS is reasonably related to the goal of protecting consumers from the deception that is widespread in the offering of these services.

As detailed in Section II of this SBP, MARS providers commonly make deceptive claims as to the results they will obtain. These claims induce consumers to pay advance fees of hundreds or thousands of dollars for results the providers typically do not deliver. Because the likelihood of consumers pursuing judicial remedies against nonperformance is small,[333] MARS providers have little incentive to perform, and in fact many do not.[334] The advance fee ban proposed in § 322.5 realigns the incentives of MARS providers to deliver on their promises, because they will not be paid until they deliver results that the consumer finds acceptable.[335] As a result, the ban is

[320] Unfairness Policy Statement, *supra* note 187, at 1074.

[321] *Id.*

[322] *Id.*

[323] *Orkin Exterminating Co.,* 108 F.T.C. 263, 366 (1986), *aff'd,* 849 F.2d 1354, 1368 (11th Cir. 1988); *see Int'l Harvester Co.,* 104 F.T.C. 949, 1061 (1984) ("whether some consequence is 'reasonably avoidable' depends not just on whether they know the physical steps to take in order to prevent it, but also whether they understand the necessity of actually taking those steps.").

[324] *See Int'l Harvester Co.,* 104 F.T.C. at 366 (Consumers "seek to mitigate the damage afterward if they are aware of potential avenues toward that end.").

[325] Even if MARS providers granted refunds, it would not be sufficient to eliminate the harm to consumers from paying the advance fee because financially distressed consumers are deprived of the use of the money from the time of payment to the time of refund and because the process of obtaining a refund from a MARS provider imposes costs on them. *See FTC* v. *Think Achievement Corp.,* 312 F. 3d 259, 261 (7th Cir. 2002) ("This might be a tenable argument if obtaining a refunds were costless, but of course it is not. No one would buy something knowing that it was worthless and that therefore he would have to get a refund of the purchase price.").

[326] See Unfairness Policy Statement, *supra* note 187, at 1074 n.19 ("In some senses any injury can be avoided—for example, * * * by private legal actions for damages—but these courses may be too expensive to be practicable for individual consumers to pursue."); *see also In re Orkin Exterminating,* 108 F.T.C. at 379–80 (Oliver, Chmn., concurring) (suing for breach of contract is not a reasonable means for consumers to avoid injury).

[327] 15 U.S.C. 45(n).

[328] *See supra* note 98.

[329] *See* NAAG at 2–3; NAAG (ANPR) at 9; MN AG (ANPR) at 4; MA AG (ANPR) at 2; OH AG (ANPR) at 3.

[330] Unfairness Policy Statement, *supra* note 187, at 1075 ("Conversely, statutes or other sources of public policy may affirmatively allow for a practice that the Commission tentatively views as unfair. The existence of such policies will then give the agency reason to reconsider its assessment of whether the practice is actually injurious in its net effects.").

[331] As noted earlier, the Commission reached the same conclusion, for similar reasons, with respect to the charging of an advance fee for four other products or services covered by the TSR that have been routinely misrepresented: debt relief services, credit repair services, money recovery services, and guaranteed loans or other extensions of credit. *See Telemarketing Sales Rule Statement of Basis and Purpose,* 68 FR 4580, 4614 (Jan. 29, 2003) (codified at 6 CFR 310.4(a)). Although the TSR declares the charging of advance fees in these contexts to be "abusive"—the term used in the Telemarketing Act—the Commission used the unfairness test set forth in Section 5(n) of the FTC Act in finding that the practice was abusive. *See* 75 FR at 48482–87; *TSR: Notice of Proposed Rulemaking,* 67 FR 4492–4511 (Jan. 30, 2002).

[332] *See supra* note 105.

[333] *See supra* note 326.

[334] *See supra* § III.E.3. In addition, purchases of MARS typically are a one-time event, and thus reputational costs are unlikely to be a major deterrent for providers.

[335] *See, e.g.,* LOLLAF at 4; CRL at 5 ("[W]e are supportive of the comprehensive ban on advance fees proposed by the FTC, which would align the incentives of MARS providers and consumers."); NAAG at 5 ("Requiring these companies to obtain the promised loan modification as a condition of being paid will substantially reduce their incentive for making false or inflated promises of foreclosure assistance."); LCCR at 4 ("The ban will * * * incentiviz[e] MARS providers to represent their capabilities in a way that reflects services they can realistically provide in a timely manner. After all,

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likely to discourage providers from making deceptive claims and is thus reasonably related to the goal of preventing deception.[336] Although the Final Rule prohibits deceptive representations and mandates certain disclosures, there is no assurance that these measures will be effective in every case or that all providers will abide by them. The advance fee ban will provide additional protection against continued deception in this industry,

3. The Ban on Advance Payments

Section 322.5 of the Final Rule provides that:

It is a violation of this rule for any mortgage assistance relief service provider to:

(a) Request or receive payment of any fee or other consideration until the consumer has executed a written agreement between the consumer and the consumer's dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer;

(b) Fail to disclose, at the time the mortgage assistance relief service provider furnishes the consumer with the written agreement specified in paragraph (a) of this section, the following information: "This is an offer of mortgage assistance we obtained from your lender [or servicer]. You may accept or reject the offer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [same amount as disclosed pursuant to § 322.4(b)(1)] for our services." The disclosure required by this paragraph must be made in a clear and prominent manner, on a separate written page, and preceded by the heading: "IMPORTANT NOTICE: Before buying this service, consider the following information." The heading must be in bold face font that is two point-type larger than the font size of the required disclosure; or

(c) Fail to provide, at the time the mortgage assistance relief service provider furnishes the consumer with the written agreement specified in paragraph (a) of this section, a notice from the consumer's dwelling loan holder or servicer that describes all material differences between the terms, conditions, and limitations associated with the consumer's current mortgage loan and the terms, conditions, and limitations associated with the consumer's mortgage loan if he or she accepts the dwelling loan holder's or servicer's offer, including but not limited to differences in the loan's:

(i) Principal balance;

(ii) Contract interest rate, including the maximum rate and any adjustable rates, if applicable;

(iii) Amount and number of the consumer's scheduled periodic payments on the loan;

(iv) Monthly amounts owed for principal, interest, taxes, and any mortgage insurance on the loan;

(v) Amount of any delinquent payments owing or outstanding;

(vi) Assessed fees or penalties; and

(vii) Term

The notice must be made in a clear and prominent manner, on a separate written page, and preceded by the heading: "IMPORTANT INFORMATION FROM YOUR [name of lender or servicer] ABOUT THIS OFFER." The heading must be in bold face font that is two-point-type larger than the font size of the required disclosure.

(d) Fail to disclose in the notice specified in paragraph (c) of this section, in cases where the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer is a trial mortgage loan modification, the terms, conditions, and limitations of this offer, including but not limited to, (i) the fact that the consumer may not qualify for a permanent mortgage loan modification, and (ii) the likely amount of the scheduled periodic payments and any arrears, payments, or fees that the consumer would owe in failing to qualify.

This provision is intended to prevent MARS providers from requesting or receiving any fees or any other form of compensation, including an equity stake in consumers' property, until they have delivered a loan modification or another result the consumer accepts.

a. The Consumer Acceptance Requirement

Section 322.5(a) of the Final Rule prohibits a MARS provider from collecting a fee until "the consumer has executed a written agreement between the consumer and the consumer's dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer." This provision will ensure that MARS providers only collect fees after they have delivered a concession or other result from the lender or servicer and the consumer has accepted that result.

The proposed rule did not require such acceptance, but instead allowed a provider to collect a fee once it had (1) in the case of providers promoting mortgage loan modifications, "[o]btained a mortgage loan modification [as defined in the proposed rule] for the consumer" and delivered a written offer from the lender or servicer for a loan modification to the consumer; or (2) in the case of providers offering MARS other than loan modifications, "[a]chieved all of the results that * * * [t]he provider represented, expressly or by implication, to the consumer that the service would achieve, and * * * [that are] consistent with consumers' reasonable expectations about the service" and delivered documentation of these results to consumers. Under the proposed rule, payment was contingent upon either delivering a specific result defined in the rule (*e.g.,* a "mortgage loan modification") or obtaining the results the MARS provider promised at the time the consumer agreed to use the service. The Final Rule, however, requires that payment be contingent upon consumer acceptance of results the provider presents.[337] Regardless of how the result the provider delivers compares to what it promoted or promised at the time the consumer agreed to use its service, the provider still must secure a written agreement between the consumer and his or her lender or servicer accepting the results delivered before collecting any fees. The Commission has adopted an approach different from that in the proposed rule because it concludes that the new approach strikes a better balance between protecting consumers and ensuring that MARS providers can collect fees for beneficial results they achieve.

At the same time, the Final Rule permits providers to collect fees if they

the sooner the providers are able to make good on the representations to the consumer, the sooner they will be able to charge their fees."); CUUS at 6 ("[W]e believe that imposing this requirement will force for-profit MARS providers to sell their services only to those they can reasonably expect to help rather than anyone they can sign up to generate advance fees even when there is no hope of offering them the help they seek."); *MARS NPRM,* 75 FR at 10719 n.148.

[336] *See supra* note 105.

[337] The Commission cautions that providers not attempt to evade the requirements of § 322.5(a) by entering a contract with consumers signed at the outset specifying the consumer's preapproval, for example, that any offer that involves a certain type of concession from the lender or servicer will be deemed acceptable. Moreover, the provider may not rely on authority obtained through a power of attorney at the time or before the time of contracting to execute an agreement incorporating the offer of mortgage relief from the lender or servicer on the consumer's behalf, because the Commission would not regard the consumer as having accepted the offer—as required under § 322.5(a). The Commission further cautions that providers not use deceptive or unfair practices to convince consumers to accept concessions to which they would not otherwise agree, as doing so may constitute a violation of § 322.5(a) and other provisions of the Rule, including § 322.3(b)(12).

deliver results that, although different from what they promised to consumers, are ultimately acceptable to consumers. It avoids disputes over what the provider actually promised, and allows consumers to make the decision about whether the offered mortgage relief is satisfactory to them. It also ensures that the consumer receives a result that he or she determines to be beneficial—for example, a loan modification with a particular reduction in monthly payments [338] or lasting a specific duration. This approach is similar to the one taken in the TSR's advance fee ban for debt relief services.[339]

The Commission warns that securing consumer acceptance to an offer will not immunize a provider from other violations of the Rule. Providers cannot misrepresent the results consumers will receive if they use MARS. For example, if a provider represents to a consumer that it will obtain a reduction in the amount of interest, principal balance, or monthly payments, but only obtains a forbearance agreement, then, regardless of whether the consumer accepts the forbearance agreement, that provider has made a misrepresentation in violation of § 322.3(b) of the Final Rule. In order to comply with § 322.3(b), the provider should qualify its claims sufficiently so that a reasonable consumer would understand that he or she may not receive a reduction in the amount of interest, principal balance, or monthly payments.

Further, as described above, § 322.5(b) of the Final Rule requires providers to inform consumers: (a) that they do not have to pay any fees to the MARS provider unless and until they accept the result that the provider has delivered, and (b) the total amount in fees consumers will have to pay the provider if they accept that result. Additionally, Section 322.5(c) of the Final Rule requires providers to furnish the consumer with a written notice from the consumer's lender or servicer describing all "material differences" between the terms, conditions, and limitations of the consumer's current mortgage loan and those associated with the offer for mortgage relief, including but not limited to differences in the principal balance; contract interest rate, including the maximum rate and any adjustable rates, if applicable; amount and number of the consumer's scheduled periodic payments on the loan; monthly amounts owed for principal, interest, taxes, and any mortgage insurance on the loan; amount of any delinquent payments owing or outstanding; assessed fees or penalties; or term of the loan. Based on its law enforcement experience and the rulemaking record, the Commission concludes that these factors are essential to consumers' ability to compare the mortgage relief offered with their current mortgage loan and, thus, whether they should accept it. Requiring that the lender or servicer prepare the written disclosure also better ensures that the information provided is consistent with the terms of the offer, and mitigates against the risk that MARS providers would mislead consumers about the offer.

Section 322.5(d) also specifies that in cases where the mortgage relief offer obtained from the lender or servicer is a trial loan modification, the notice from the lender or servicer that the provider must furnish to the consumer with the offer of mortgage assistance must include: (1) that the consumer may not qualify for a permanent modification, and (2) if the consumer does not qualify, the likely amount of the scheduled periodic payments that he will have to pay and any arrearages or fees that may accumulate. Some commenters recommended that the proposed rule be changed to prohibit providers from collecting fees for obtaining a trial modification, because most consumers who receive trial modifications do not receive permanent modifications that would substantially reduce the amount they pay on their loans.[340] The Commission has determined that, in light of the changes in the Final Rule, including the advance fee ban and related disclosures, such a prohibition is unnecessary. As noted above, § 322.5 will ensure that consumers are told that they are being offered a trial modification and ensure that they have the opportunity to reject the offer.

Given that, under the advance fee ban provision, providers must deliver a written agreement from the servicer or lender to the consumer, and obtain the consumer's written acceptance of that agreement, the Final Rule requires that the disclosures in §§ 322.5(b)–(d) also be made in writing, each on a separate page from the agreement. These disclosures must also be made "at the time that the * * * provider furnishes the consumer with a written agreement to be executed" by the consumer. Sections 322.5(b)–(d) will ensure that consumers receive this critical information when they are in a position either to accept or reject the result secured by the provider.[341] These disclosures are necessary to effectuate the advance fee ban and, accordingly, are reasonably related to the prevention of deceptive or unfair practices.

b. Prohibition on Advance Fees for Piecemeal Services

As detailed above, NAAG and several other commenters strongly supported the proposed rule's prohibition on the practice of collecting advance fees for piecemeal services.[342] The Commission agrees that without such a prohibition, many MARS providers would attempt to collect fees for discrete tasks that fall short of, and often may never lead to, the result promised. These individual tasks might include: conducting an initial consultation with the consumer;

[338] In response to the proposed rule, which sets forth specific requirements as to the result that entities promoting loan modifications must deliver before collecting fees, some commenters recommended that the Final Rule add requirements that MARS providers obtain a "sustainable" or "affordable" loan modification for the consumer. *See, e.g.,* LOLLAF at 4, 6; LFSV at 3; CSBS at 4; NCLC at 18; LCCR at 4–5 ("We believe that MARS providers who negotiate mortgage loan modifications for homeowners in exchange for compensation must confer a real benefit in the form of a modified mortgage that is affordable and sustainable."). Some of these commenters noted that many consumers who have obtained loan modifications have subsequently re-defaulted, or are at risk of doing so, and therefore that the Commission should adopt specific benchmarks for determining if a loan modification will benefit the consumer (for example, by reducing their monthly payments by at least 20% for five years or by employing HAMP guidelines for interest rates).

Because the Final Rule requires that the consumer consent to the result delivered by the provider, it will help ensure that consumers only pay fees for loan modifications that they believe to be affordable and sustainable. Consumers' ability to make monthly payments vary depending on their circumstances and over time. The requirements of government programs like the MHA and servicer policies also may change. By making payment of fees contingent upon consumer acceptance, the Final Rule gives each consumer the ability to determine, based on her individual circumstances, the type of loan modification that would best assist her. Therefore, the Commission believes it is unnecessary to adopt an affordability requirement for loan modifications.

[339] *See* 16 CFR 310.4(a)(5)(i)(A) (prohibiting debt relief providers from collecting fees until, *inter alia,* the customer has executed the debt relief agreement).

[340] *See, e.g.,* NYC DCA at 4; NCLC at 17–18 (also arguing that consumers who enter trial modifications frequently suffer a number of negative consequences, including harm to their creditworthiness and, if they do not qualify for a permanent modification, significant arrearages that can result in foreclosure).

[341] This disclosure also complements § 322.3(b)(7), which prohibits providers from misrepresenting that they have the right to claim or charge a fee. Under § 322.3(b)(7), providers may not circumvent this written disclosure by misrepresenting expressly or by implication—orally or otherwise—that the consumer must pay providers' fees.

[342] *See, e.g.,* NAAG (ANPR) at 5 ("We are now seeing consultants offering these services piecemeal. For example, some companies represent they will help consumers gather their financial documents and prepare the information to submit to their mortgage servicer for a fee. Then, for another fee, the companies represent that they will facilitate communication between the consumers and their mortgage servicer."); *see also* CSBS at 4; LCCR at 8; MA AG at 2; NAAG at 3.

reviewing or auditing the consumer's mortgage loan documents;[343] gathering financial or other information from the borrower; sending an application or other request to the lender or servicer; facilitating communications between the borrower and the lender or servicer; or responding on behalf of the consumer to requests from the lender or servicer. The record demonstrates that many MARS providers currently charge discrete fees for these types of tasks, in some instances to evade state advance fee bans.[344]

Section 322.5 of the Final Rule, although modified, still prohibits MARS providers from collecting fees for piecemeal services. Section 322.5(a) requires the provider to secure the consumer's written agreement to accepting the mortgage relief it has obtained; thus, providers will be unable to charge a fee for intermediate services unless and until the consumer accepts the result the MARS provider obtains from the consumer's lender or servicer.

c. Documentation Requirement

Under § 322.5 of the Final Rule, MARS providers must provide consumers with documentary proof of the results they achieved before requesting or receiving payment. Section 322.5(a) of the Final Rule requires providers to give consumers a written offer—for the consumer to accept or reject—from the lender or servicer setting forth the mortgage relief they have obtained for the consumer, such as a forbearance agreement, short sale, or deed-in-lieu of foreclosure transaction; waiver of an acceleration clause; opportunity to cure default or reinstate a loan; or repayment plan. The documentation required is a comprehensive written instrument that memorializes a lender's or servicer's agreement to offer the concession.

4. Additional Provisions Not Adopted in the Final Rule

In the NPRM, the Commission requested comment on whether the Final Rule should: (1) Limit or cap providers' advance fees; (2) allow providers to use independent third-party escrow accounts to hold fees until they achieve results; and (3) include a right to cancel. Based on the record, the Commission declines to adopt any of these approaches.

a. *Fee Caps*

Some commenters recommended that the Commission allow advance fees, but set limits (or caps) on them.[345] Other commenters argued that the FTC should not adopt caps as a substitute for an advance fee ban.[346] Two of the latter group of commenters asserted that providers would abuse such a provision by simply signing up as many consumers as possible and collecting any fees permitted upfront without providing any benefits to consumers.[347] A third group of commenters, although supportive of an advance fee ban, argued that the Commission should also limit MARS providers to charging back-end fees that are "reasonable" or "not excessive."[348]

As in the recent adoption of debt relief amendments to the TSR, and for the same reasons,[349] the Commission declines to set caps on the fees MARS providers can receive. While the FTC concludes that the collection of advance fees by MARS providers is an unfair act or practice, it has made no such determination about the *amount* of fees charged.[350] In general, the competitive market should establish the prices MARS providers charge,[351] and the Commission's role is to remove obstacles to consumers making the informed choices that are necessary to a properly functioning market.

b. Use of Dedicated Accounts

In the NPRM, the Commission requested comment on whether, in the event the Rule bans advance fees, MARS providers should be allowed to request or require that consumers place any such fees in a dedicated bank account.[352] The Final Rule does not permit MARS providers, other than attorneys, to request or require consumers to pay fees into any type of account prior to completing their services.[353] The overwhelming weight of comments opposed allowing the use of such accounts,[354] because, among other things, some unscrupulous MARS providers might misuse funds held in dedicated accounts,[355] and permitting dedicated accounts would place undue burdens on consumers to recover money they paid into the accounts if providers do not deliver the results consumers finds acceptable.[356] There is nothing in

[343] *See supra* note 56 and accompanying text.

[344] *See supra* note 342.

[345] Baughman at 1; Hunter at 1; Casey at 1. Some state statutes include fee caps for MARS providers. For example, Maine limits providers to a $75 up-front fee. *See* Me. Rev. Stat. Ann. tit. 32, § 6174–A.

[346] *See, e.g.,* MBA at 3; CSBS at 4; MA AG at 1; CUUS at 6; CRL at 2.

[347] LOLLAF at 5 ("Allowing any fees to be collected prior to providing a permanent loan modification presents MARS providers with a back door opportunity to extract significant sums of money without any benefit provided to the consumer."); CUUS at 6 ("It may seem innocent enough to allow a small initial fee of $25.00 or $50.00. At first glance, this fee may not seem particularly burdensome to consumers. However, this may incentivize certain for-profit MARS providers to simply sign up as many people as possible only for the initial fee, and nothing else. The small fees could potentially add up to sizeable profits for MARS companies, depending on the aggressive nature of the MARS provider's marketing campaign.").

[348] LFSV at 2–3; LOLLAF at 5; NCLC (ANPR) at 13; *see also* MA AG at 2 (recommending that the Commission consider a "sliding scale" fee cap as a complement to the advance fee ban); LCCR at 7–8 (same).

[349] *See TSR; Final Rule,* 75 FR at 48488 (finding that fee setting is best done by a competitive market, that the Commission's role is to remove obstacles to consumers making informed choices in the market, and that the amended TSR is designed to ensure that the debt relief market functions properly).

[350] The purpose of the FTC's unfairness doctrine is not to allow the Commission to obtain better bargains for consumers than they can obtain in the marketplace. *See, e.g., Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 964 (DC Cir. 1985). Instead, it is to prohibit acts and practices that may unreasonably create or take advantage of an obstacle to consumers' ability to make informed choices. *See id.* at 976.

[351] A federally established maximum advance fee might well become the de facto *actual* fee for MARS. F.M. *Scherer, Focal Point Pricing and Conscious Parallelism, in* Competition Pol'y, Domestic & Int'l 89–97 (2000); F. M. Scherer, Industrial Market Structure and Economic Performance 190–93, 204 (1st ed. 1980). Further, fee caps can quickly become obsolete, as changes in market conditions and technologies render the fixed maximum fee too low (*e.g.,* if the costs of providing the service rise) or too high (*e.g.,* if new technology lowers the cost of providing the service or if market participants would compete on price absent regulation). *United States.* v. *Trenton Potteries Co.,* 273 U.S. 392, 397 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.").

[352] *See* 75 FR at 10721, 10729–30.

[353] As discussed in § III.G., the Final Rule exempts attorneys from the advance fee ban if they meet certain conditions, including depositing such fees into their client trust accounts.

[354] *See, e.g.,* CUUS at 7; CSBS at 4. Only a single commenter recommended that the Rule allow providers (other than attorneys) to use such accounts, and that commenter provided no analysis of the costs and benefits of his proposal. *See* Goldberg at 4 ("Even escrowing funds through dedicated trust accounts is a better alternative and less of a financial burden on the consumer."). An additional comment noted that MARS providers may use dedicated accounts under Nevada's relevant statute. *See* Hirsch at 1; *see also* Nev. Rev. Stat. § 645F.300, et seq.

[355] OPLC at 1; NYC DCA at 5 ("Given the high cost and potential for improper access to funds by MARS providers, the FTC should apply the prohibition on collection of fees in advance of permanent loan modifications to payments held in escrow accounts."); NAAG at 2 ("Likewise, third-party escrow accounts will not protect consumers' interests in the same manner as an advance fee prohibition. Indeed, there is evidence that third-party escrow accounts are subject to manipulation that renders their purported protections ineffective.").

[356] LFSV at 3; NCLC at 15; LOLLAF at 5 ("[E]scrowing funds and not allowing MARS providers to access them without providing a benefit, does not provide a significant safeguard to protect consumers from abusive MARS providers. Consumers who seek to recover fees may have to bring a lawsuit to either recover them from escrow or to claw back the fees paid to a MARS provider.").

the record indicating that non-attorney MARS providers currently use dedicated accounts with any frequency to deposit advance fees or that an infrastructure to support such accounts exists. Without more information as to how MARS providers would use dedicated accounts and whether consumers would be adequately protected, and in light of widespread deceptive and unfair acts and practices by MARS providers, the Commission declines to permit providers to request or require that consumers place advance fees for MARS in such accounts.[357]

c. Right To Cancel

The proposed rule did not include a right to cancel. However, the NPRM solicited comments on whether the Final Rule should give consumers the right to cancel their contracts with MARS providers without obligation for a certain period of time often referred to as a "cooling off period."

Several commenters recommended including a right to cancel in the Final Rule as a complement to the advance fee ban.[358] Many of these commenters observed that consumers considering whether to purchase MARS often are facing an immediate crisis and may not take the time they need to make well-informed decisions.[359] They further noted that MARS providers often engage in aggressive sales tactics that may overcome any hesitancy on the part of consumers.[360] According to these commenters, a right to cancel would provide consumers with an opportunity to discuss purchasing MARS with trusted confidants,[361] reconsider their decision free of aggressive sales tactics,[362] and assess whether the service is beneficial for them.

The Commission declines to include a right to cancel provision in the Final Rule. Under § 322.5 of the Final Rule, even if a consumer enters into an agreement to use a MARS provider in circumstances undermining his or her ability to make a well-informed decision, the consumer has no obligation to pay any money to the MARS provider until he or she accepts an offered result. The consumer is free to reject offers that he or she believes are unsatisfactory. If the consumer never accepts an offer, he or she is never obligated to pay the provider. Thus, a right to cancel would provide little additional benefit to consumers.[363]

F. Section 322.6: Substantial Assistance or Support

The proposed rule prohibited any person within the FTC's jurisdiction under the FTC Act[364] from providing "substantial assistance or support" to any MARS provider if the person "knows or consciously avoids knowing that the provider is engaged in any act or practice that violates this rule." The Final Rule adopts the proposed provision with a single, minor modification.

Public comments generally supported a prohibition on providing substantial assistance or support to another who is violating the Rule.[365] Several commenters asserted that such a measure would prevent MARS providers from using "lead generators" or mortgage brokers to supply contact information for potential customers,[366] thus making it more difficult for deceptive MARS providers to operate. For example, a consumer group explained that such a provision would be valuable because entities that assist and facilitate fraudulent MARS providers often receive a substantial portion of the funds obtained from consumers for mortgage assistance relief services.[367] As discussed below, a number of commenters supported a substantial assistance or support provision, but recommended including a different knowledge standard in a final rule than in the proposed rule.[368]

1. Substantial Assistance

Many MARS providers rely on, or work in conjunction with, other entities to advertise their services and operate their businesses. The Final Rule provision applies to substantial—i.e., more than casual or incidental—assistance or support that such entities provide to MARS providers.[369] Substantial assistance could include such critical support functions as lead generation, telemarketing and other marketing support,[370] payment processing,[371] back-end handling of consumer files,[372] and customer referrals.

A common example of those who provide substantial assistance to MARS providers are so-called "lead generators." Lead generators obtain the contact information of consumers, i.e. leads, who have indicated interest in MARS by visiting the lead generator's

[357] The amended TSR allows debt relief providers to establish dedicated accounts for consumer payments pending completion of the services, subject to several conditions to ensure that consumers are protected. 16 CFR 310.4(a)(5)(ii). There are fundamental differences between debt settlement services and MARS, however, that make this distinction an appropriate one. Consumers typically pay for debt settlement services by making monthly payments, which include a portion of the provider's fees as well as savings towards settlements. It is only after consumers save enough money to fund a likely settlement—a process that can take many months or years—that the provider begins negotiating with the creditor to reduce the debt. MARS services, on the other hand, generally do not include this "forced savings" function; rather, consumers simply pay the provider's fees in a single or small number of payments. Any relief, such as a loan modification, that the MARS provider obtains typically would not involve a lump sum payment for which the consumer would have to save. Moreover, the record in the TSR proceeding showed that it is the usual practice in the debt settlement industry to use dedicated accounts and that a structure is already in place to administer these accounts, consisting of established, independent firms that manage accounts that the consumers own and control. *TSR; Final Rule,* 75 FR at 48490–91 & n.451. One such firm manages approximately 250,000 accounts for consumers enrolled with various debt settlement companies. Global Client Solutions, (Oct. 9, 2009) at 2, available at *http://www.ftc.gov/os/comments/tsrdebtrelief/543670-00138.pdf.* No such infrastructure exists in the MARS industry.

[358] *See* LOLLAF at 6; NCLC at 13; CUUS at 7; LFSV at 1–2.

[359] *See, e.g.,* CSBS at 4; CUUS at 7; LFSV at 2; NYC DCA at 10; NCLC at 14; LOLLAF at 6.

[360] *Id.*

[361] *See* NCLC at 14; LFSV at 2.

[362] *See* LOLLAF at 6; NCLC at 14.

[363] The Commission also declined to include a right to cancel in the debt relief amendments to the TSR. *See TSR; Final Rule,* 75 FR at 48488.

[364] The Final Rule explicitly exempts from the definition of "person" any individuals or entities outside the FTC's jurisdiction. *See* § 322.2(k).

[365] *See* CSBS at 4 ("The state regulators support the Commission's proposal to prohibit any person from providing substantial assistance or support to a MARS provider if that person knows or consciously avoids knowing that the provider is violating any provision of the proposed rule."); *see also* CUUS at 8 (supporting prohibition but suggesting alternate standard); NYC DCA at 9 (same); NAR at 2 (same).

[366] *See, e.g.,* CUUS at 8; NY DCA at 9.

[367] CUUS at 8.

[368] *See* CUUS at 8; NYC DCA at 9.

[369] *See TSR Statement of Basis and Purpose,* 60 FR 43842, 43852 (1995) ("The Commission further believes that the ordinary understanding of the qualifying word 'substantial' encompasses the notion that the requisite assistance must consist of more than mere casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the Rule.").

[370] *See, e.g., FTC* v. *Kirkland Young, LLC,* No. 09–23507, Mem. Supp. TRO at 9 (S.D. Fla. filed Nov. 24, 2009) (alleging that Defendant employed another entity to make some of its telemarketing calls to consumers).

[371] Frequently, MARS providers rely on the services of payment processors to handle credit card payments. *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANx) (C.D. Cal. filed July 13, 2009); *FTC* v. *LucasLawCenter "Inc.",* No. SACV09–770 DOC(ANx) (C.D. Cal. filed July 7, 2010) (third-party papers filed by payment processor); Pls. Opp. Mot. Decl. Relief (C.D. Cal. filed Nov. 20, 2009). In other industries, the FTC has sued payment processors that billed consumers for products or services despite indications that those products or services were illusory on an assistance and facilitating theory. *See, e.g., FTC* v. *InterBill, Ltd.,* No. 06–cv–01644–JCM–PAL (D. Nev. Dec. 26, 2006); *FTC* v. *Your Money Access, LLC,* No. 07–5174 (E.D. Pa. filed Dec. 6, 2007).

[372] *See, e.g., FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx), Reply to Resp. Order To Show Cause at 9 (C.D. Cal. filed April 22, 2009) (alleging that defendants contracted with another entity to process backlog of consumer files and negotiate with lenders on behalf of those consumers).

website in response to advertisements disseminated either by the lead generators themselves,[373] or through a network of Internet advertisers.[374] Lead generators then sell the consumer information to MARS providers.[375] In some instances, lead generators route consumers who run Internet searches for government foreclosure assistance programs directly to MARS providers' websites.[376]

2. The Knowledge Standard

Under the proposed rule, those who provided substantial assistance to MARS providers would be liable if they knew or consciously avoided knowing that the providers were violating the rule. Some commenters suggested modifications to this knowledge standard. Specifically, two commenters advocated changing the "knows or consciously avoids knowing" standard to a "knew or should have known" standard, claiming that the former standard would allow those who provide substantial assistance to escape liability by failing to monitor the conduct of the MARS providers they are assisting.[377] Conversely, another commenter argued that the "knows or consciously avoids knowing" standard in the proposed rule was too strong, expressing concern that those who provide substantial assistance would be presumed to know of the rule violations of the MARS providers they are assisting.[378]

The Commission retains the "knows or consciously avoids knowing" standard in the Final Rule. As the Commission stated in including the same standard in the assisting and facilitating provision of the TSR:

> [t]he 'conscious avoidance' standard is intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance on the part of a person that [the wrongdoer] is engaged in an act or practice that violates [the Rule]."[379]

The standard thus neither permits third parties providing substantial assistance and support to turn a "blind eye" to the Rule violations of MARS providers, nor presumes that such third parties have the requisite knowledge simply because they provided the assistance or support. If those who provide substantial assistance or support to MARS providers receive or become aware of information that reasonably calls into question the legality of the MARS provider's practices, they will be liable if they continue to assist and support that provider.[380] In general, the determination of whether a person had the requisite knowledge will depend on a variety of factors such as the person's relationship to the MARS provider, the nature and extent of the person's degree of involvement in the operations of the MARS provider, and the nature of the provider's violations.

3. Legal Basis

a. Preventing Deception

The Commission concludes that § 322.6 is reasonably related to preventing deceptive conduct by MARS providers. As noted above, MARS providers frequently rely upon the assistance and support of other persons for essential tasks such as identifying potential customers, marketing, back-room operations, and payment processing. This support makes it possible for MARS providers engaged in deception to efficiently operate on a wide scale. Prohibiting such persons from providing substantial and knowing assistance or support to MARS providers is likely to make it more difficult for providers to engage in deceptive conduct.

b. Unfairness

Applying the three-prong test under Section 5(n) of the FTC Act, the Commission concludes that it is an unfair practice to knowingly, or with conscious avoidance of knowledge, provide substantial assistance to a MARS provider engaged in violations of the Rule.[381] First, this practice causes or is likely to cause substantial consumer injury by enhancing and expanding the provider's ability to engage in the harmful conduct. For example, using lead generators often allows MARS providers to promote their services more widely and effectively, leading to substantial injury to consumers if those providers engage in violations of the Rule.[382] Second, no commenters submitted information suggesting that there were any benefits to consumers or competition from knowingly giving substantial assistance to MARS providers who are violating the Rule,[383]

[373] Lead generators themselves often may also qualify as "mortgage assistance relief service providers" and thus be liable for primary violations of the Rule, because many of these entities "arrang[e] for others to provide" MARS. *See* § 322.2(j). For example, if a lead generator disseminates advertisements containing misrepresentations to entice consumers to provide their contact information, and then passes that information on to another entity that will provide MARS, the lead generator would likely be in violation of § 322.3 of the Final Rule. The Commission also has brought actions under Section 5 of the FTC Act against lead generators for the deceptive claims they disseminated. *See e.g. FTC* v. *Dominant Leads, LLC,* No. 1:10–cv–0997 (D.D.C. filed Jun. 15, 2010); *see also United States* v. *Ryan,* No. 09–00173–CJC (C.D. Cal. filed July 14, 2009) (criminal complaint against lead generator named as defendant in FTC action); *FTC* v. *Ryan,* No. 1:09–00535 (HHK) (D.D.C. filed Mar. 25, 2009); *FTC* v. *Cantkier,* No. 1:09–cv–00894 (D.D.C. Am. Complaint filed July 10, 2009).

[374] Additionally, advertising affiliate network companies may serve as intermediaries between advertisers and lead generator Web sites. Such companies also could be held liable if they knowingly provide substantial assistance to MARS providers who violate the Rule.

[375] *See, e.g., FTC* v. *Kirkland Young, LLC,* No. 09–23507, Mem. Supp. TRO at 9 (S.D. Fla. filed Nov. 24, 2009) (alleging that defendant employed lead generators to leave messages with consumers via outbound telemarketing calls); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009); *FTC* v. *Hope Now Modifications, LLC,* No. 1:09–cv–01204–JBS–JS (D.N.J. filed Mar. 17, 2009).

[376] *See, e.g., FTC* v. *One or More Unknown Parties Misrepresenting their Affiliation with the Making Home Affordable Program,* No. 09–894 (D.D.C. filed May 14, 2009).

[377] *See* CUUS (Mar. 26, 2010) at 8 ("Failure to verify a company's integrity in the face of clear and reasonable evidence to the contrary should expose an entity or individual to liability."); NYC DCA (Mar. 29, 2010) at 9.

[378] *See* NAR at 2 (provision would implicate real estate professionals who help consumers conduct short sales, when the consumers are referred to them by MARS providers).

[379] *TSR Statement of Basis and Purpose,* 60 FR 43842, 43852 (Aug. 23, 1995).

[380] *United States.* v. *Dish Network, L.L.C.,* 667 F. Supp. 2d 952, 961 (C.D. Ill. 2009) (finding United States properly pled knowledge or conscious avoidance of knowledge when it alleged that defendant received complaints that its dealers were violating the TSR but continued paying the dealers to telemarket); *FTC* v. *Global Mkting Group, Inc.,* 594 F. Supp. 2d 1281, 1288 (M.D. Fla. 2008) (finding that defendant at a minimum consciously avoided knowing of TSR violations where it processed consumer payments to telemarketers; reviewed, edited, and approved telemarketers' sales scripts; and handled complaints and law enforcement inquiries).

[381] Federal courts have held that providing knowing substantial assistance to others who engaged in unlawful conduct is an unfair practice. *See, e.g., FTC* v. *Neovi, Inc.,* 598 F. Supp. 2d 1104 (S.D. Cal. 2008), *aff'd,* 604 F.3d 1150 (9th Cir. 2010) (holding that defendants engaged in unfair acts by creating checks they knew were often requested by unauthorized parties); *FTC* v. *Accusearch, Inc.,* No. 06–CV–105–D, 2007 WL 4356786 (D. Wyo. Sept. 28, 2007) (holding that defendants engaged in unfair practices by selling phone records obtained by other parties through deception); *FTC* v. *Windward Mktg.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380 (N.D. Ga. Sept. 30, 1997) (holding that defendants engaged in unfair acts by depositing unauthorized bank drafts obtained by a deceptive telemarketing operation).

[382] Lead generators may possess the contact information of thousands of consumers that otherwise might be unavailable to a small MARS provider. The MARS provider can use that information to target more consumers with deceptive advertisements, contact consumers less expensively, or both, than it could in the absence of such information. *See, e.g.,* CUUS at 8, NY DCA at 9.

[383] To the extent the substantial assistance and facilitation provision makes it more difficult or expensive for MARS providers to hire third-party service providers, the Commission concludes that any such costs are outweighed by the benefits of more effectively preventing deceptive or unfair conduct by MARS providers.

and the Commission is not aware of any such benefits. To the extent any such benefits exist, they clearly are outweighed by the substantial injury this conduct causes consumers. Finally, the consumer injury caused by Rule violations that are substantially facilitated by third parties is not reasonably avoidable by consumers, who have no way of knowing that the MARS providers with whom they contract are engaged in violations of the Rule.

G. Section 322.7: Exemptions

The proposed rule exempted attorneys licensed to practice law in the state where the consumer resides from: (1) The prohibition on instructing consumers not to contact or communicate with their lenders; and (2) the advance fee ban, but only if the attorney was providing legal counsel in connection with preparing or filing legal documents in a bankruptcy or other legal proceeding. As the Commission explained in the NPRM, this proposed exemption was intended to allow attorneys who provide MARS as part of the practice of law to perform without undue burden useful legal services for consumers, while still covering attorneys who might harm consumers in offering or providing MARS.[384]

The Commission received numerous comments on this proposed exemption from attorneys and attorney organizations, consumer groups, and others. Indeed, the proposed rule's treatment of attorneys was the issue most addressed in the comments. Several commenters, including NAAG, an association of mortgage bankers, consumer groups, and others supported a limited exemption like that in the proposed rule.[385] Other commenters, including several consumer groups, a public interest law firm, and a consortium of state banking regulators, supported a broader exemption (especially with regard to the prohibition on advance fees),[386] or a complete exemption for attorneys.[387]

Based on the record, the Commission has determined to include a broader exemption for attorneys in the Final Rule. Generally speaking, attorneys who provide MARS are exempt from the Rule if they: (1) Provide MARS as part of the practice of law; (2) are licensed to practice law in the state where their clients or their clients' dwellings are located; and (3) comply with all state laws and licensing regulations covering the same subjects as the Final Rule. Attorneys who meet these standards are exempt from all of the provisions of the Final Rule except its advance fee ban. Such attorneys will be exempt from the advance fee ban in § 322.5, but only if they deposit advance fees received from their clients into a "client trust account" (as defined in a new provision, § 322.2(b)) and comply with all state laws and licensing regulations governing these accounts.[388]

1. Comments in Support of a Limited Exemption

In support of a limited attorney exemption, several commenters cited significant (and increasing) attorney involvement in MARS, both in affiliation with non-attorney providers or as providers themselves.[389] According to these commenters, attorneys frequently have engaged in the same deceptive or unfair conduct as that of other MARS providers.[390] For example, the Illinois Attorney General asserted that, since approximately December 2009, attorneys played some role (including participating in or assisting others in the conduct at issue) in 40% of the MARS companies reviewed by that agency in response to complaints.[391]

In addition, NAAG asserted that attorneys, and MARS providers who affiliate with them, have been successful in circumventing state MARS laws by invoking attorney exemptions in these laws.[392] NAAG's comment also discussed the propensity of attorneys to act as fronts for MARS companies and the recent trend of national MARS providers to retain "local counsel" to attempt to take advantage of attorney exemptions in state MARS laws.[393] Other commenters, echoing the concerns of state law enforcers, contended that unscrupulous MARS providers would evade the Rule if its

[384] *MARS NPRM,* 75 FR at 10724–25.

[385] NAAG at 3–4; MBA at 4 (The definition in the rule should retain the integrity of the licensed attorney within state laws and rules regulating the practice of law to remain effective and those outside that standard should be prosecuted."); NYC DCA at 4 (recommending that the Commission prohibit collection of advance fees by attorneys "not directly involved with legal services in connection with either the preparation and filing of a bankruptcy petition or court proceedings to avoid a foreclosure"); IL AG (ANPR) at 2; MA AG (ANPR) at 9 (recommending that the Commission adopt a provision similar to Massachusetts state law). One commenter argued that attorneys should not be exempted from the advance fee ban restrictions, even when performing legal services in connection with a bankruptcy petition or some other legal proceeding. CUUS at 8–9.

[386] NCLC at 7 ("[L]egitimate attorneys play a critical role in providing bona fide and valuable assistance to consumers seeking loan modifications and other forms of mortgage-related assistance."); LSFV at 4 ("Those seeking advice, who are likely in or facing mortgage default, may need specific advice regarding the contractual and tax implications of a loan modification, which HUD-approved counselors may not be qualified to provide."); Lawyers' Committee at 9 ("[I]n many situations short of legal action, there is a legitimate need for attorneys to provide legal advice or transactional services to their clients."); CSBS at 4 ("[W]e believe that limiting the exemption to preparing and filing for bankruptcy petitions or other documents in a bankruptcy or other court or administrative proceeding, is unduly narrow and might interfere with the ability of attorneys to offer legitimate counsel and advice to their clients.").

[387] ABA at 1 ("[T]he ABA urges the FTC to modify the rule to expand its existing attorney exemption to exclude lawyers engaged in the practice of law from the entire proposed rule, not just certain narrow provisions of the rule."); Rogers at 15 ("Prohibit loan modification companies from taking up-front fees unless they are licensed attorneys regularly conducting business out of publicly accessible office space in the state in which they provide loan modification services."); IL RELA at 1.

[388] As discussed in Section I.A, the Dodd-Frank Act will transfer rulemaking authority with respect to this Rule to a new Bureau of Consumer Financial Protection, effective as of the transfer date, Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376, which is currently designated as July 21, 2011. *BCFP; Designated Transfer Date,* 75 FR 57252. The new Bureau will not have authority with respect to activities engaged in as part of the practice of law, but will retain authority over attorneys to the extent they offer consumer financial products or services outside the scope of an attorney-client relationship and to the extent they are subject to certain enumerated consumer laws or authorities transferred to the agency, including the Final Rule in this proceeding. Dodd-Frank Act § 1027(e)(3). The Commission will continue to have authority to enforce the Rule, including against attorneys.

[389] *See, e.g.,* Lawyers' Committee at 9 (attorneys team up with MARS providers, or act independently to scam consumers); NAAG at 3 (attorneys' participation ranged from working as employees of MARS companies to operating their own companies); MBA at 4 ("[W]e are aware of attorneys who have 'rented' their licenses to mortgage assistance relief providers."); *see also* IL AG (ANPR) (reporting that "33 percent of the [MARS] companies we have dealt with are owned by attorneys, while 38 percent have some link to the legal profession").

[390] *See, e.g.,* CSBS at 4 ("[A]n increasing number of attorneys have engaged in deception and unfairness in connection with mortgage assistance relief services."); NAAG at 3 (by way of example reporting that attorneys participated in half of the mortgage foreclosure rescue companies for which the Illinois Attorney General received complaints on March 18 and 19, 2010); CUUS at 8 (commenter has "received many complaints about attorneys' involvement in fraudulent MARS schemes"); Lawyers' Committee at 9 ("The intersection between legal services and mortgage assistance relief services is well documented in the increasing number of reports of attorneys teaming up with MARS providers to scam consumers."); NCLC at 4 (acknowledging that "attorneys have been among those perpetrating abusive MARS activities"); *see also* NAAG (ANPR) at 13 ("[W]e have received many complaints regarding attorneys who are offering loan modification business. These attorneys generally provide no legal services for consumers and present the same problems as mortgage consultants in general.").

[391] IL AG at 2.

[392] NAAG at 3 ("The exemption for attorneys has been particularly abused."); MN AG (ANPR) at 5 ("This Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law.").

[393] NAAG at 3.

attorney exemption were not sufficiently limited.[394]

2. Comments in Support of a Broader Exemption

Despite their recognition that some attorneys have engaged in unfair or deceptive practices in connection with MARS, several commenters argued that broadening the attorney exemption was necessary to preserve consumers' access to valuable legal services.[395] These commenters contended that many consumers who are having difficulty paying their mortgages may benefit from legal services, but that such assistance may be considered MARS and thus subject to the Rule.[396] The commenters claimed the proposed rule would cover legal services such as advising consumers on bankruptcy laws, unwinding sale-leaseback transactions,[397] resolving violations of fair lending laws, disputing charges that servicers had assessed improperly, and counseling on the tax implications of short sales.[398] The commenters asserted that a significant portion of the MARS work attorneys perform does not involve litigation and thus would not be eligible for the proposed rule's exemption from the advance fee ban.[399] Absent a broader exemption from the advance fee ban, according to these commenters, many attorneys would stop performing legal services for consumers seeking to avoid foreclosure.[400]

The comments favoring a broader attorney exemption suggested a number of changes to the proposed rule. A few commenters asserted that the exemption from the advance fee ban should apply to all legal services, not just legal services related to litigation[401] or those provided by attorneys in the same state where the consumer resides.[402] Several commenters recommended that, in lieu of an advance fee ban, attorneys be permitted to place fees in a client trust account and draw on them as legal work is completed.[403] State banking regulators asked the Commission to consider creating an exemption based on state law attorney exemptions, noting that the Michigan Credit Services Act exempts attorneys who do not provide covered credit services on a regular and continuing basis.[404]

Many commenters, nearly all of whom are attorneys who provide MARS[405] or organizations that represent them,[406] including the American Bar Association (ABA)[407] and some state bars,[408] recommended that the Commission completely exempt attorneys engaged in the practice of law.[409] In particular, the ABA proposed that the Commission exempt any "licensed attorney engaged in the practice of law and those individuals acting under the direction of the attorney."[410]

[394] NCLC at 2–3; Lawyers' Committee at 9; LSFV at 4.

[395] NCLC at 7 ("[L]egitimate attorneys play a critical role in providing bona fide and valuable assistance to consumers seeking loan modifications and other forms of mortgage-related assistance."); LSFV at 4 ("Those seeking advice, who are likely in or facing mortgage default, may need specific advice regarding the contractual and tax implications of a loan modification, which HUD-approved counselors may not be qualified to provide."); Lawyers' Committee at 9 ("[I]n many situations short of legal action, there is a legitimate need for attorneys to provide legal advice or transactional services to their clients.").

[396] *See supra note* 395. Attorney commenters also asserted that they provide useful legal services to consumers facing the possible loss of their homes. *See, e.g.,* ABA at 1 ("[T]he rule would make it difficult or impossible for many consumer debtors to obtain the legal services that they desperately need to help negotiate changes to their residential mortgages with their lenders and keep their homes"); Mobley at 1 ("It is essential to have competent legal representation when negotiating a loan modification. While the government and servicers continually advise homeowners that loan modifications can be done without a third party's help and that free help is available, statistics show that this advice has done nothing to help homeowners."); Carr at 2 ("[M]any lawyers also offer their client a defense against foreclosure, mitigation or diversionary representation (where available) and ultimately (if necessary) a bankruptcy petition filing to protect their homes if the negotiation attempt should fail. Further, lawyers are uniquely qualified to assist the homeowner to understand the legal implications of and determine which of the bewildering panoply of alternatives facing them will be the most effective in their unique circumstances."); E. Davidson at 1 ("Involvement of an attorneys at the earliest possible time, is an important vehicle for borrowers in either litigating or settling with the servicer or holder of the loan."); Legalprise at 1 (adversarial system works best if both lender and consumer have legal counsel); Greenfield at 3 (distressed homeowners have a "significant need for legal services"); Dargon at 3 ("But don't strangle legitimate attorneys in your efforts to regulate hucksters and scam artists. Putting us out of business would harm our clients greatly, and will only make the foreclosure crisis worse and punish the very people who most need the services."); Giles at 1–2 (discussing representation of clients in foreclosure mediation with lenders).

[397] *See supra* note 43.

[398] *See supra* notes 396–97; *see also* NCLC (ANPR) at 14 (noting that "an attorney's more beneficial and traditional role of analyzing a client's paperwork and advising the client of potential claims and options may also fit within the definition of mortgage assistance relief").

[399] In its survey of NACA and NABCA members, *see supra* note 44, NCLC reported that 38% of the 298 attorneys who responded claimed that they perform MARS "not in connection with a court or administrative proceeding or bankruptcy petition." NCLC at 6.

[400] LFSV at 4 ("Licensed attorneys and public accountants in our community are prepared and capable of providing this important and potentially useful advice, but may choose to avoid contracting with consumers to address these questions for fear that they may run afoul of the Commission's proposed Rule."); NCLC at 6 ("Attorneys are likely to cease representing homeowners because of the risk that clients with unreasonable expectations would not pay."); *see also* CSBS at 4.

[401] *See, e.g.,* CSBS at 4 ("[W]e believe that limiting the exemption to preparing and filing for bankruptcy petitions or other documents in a bankruptcy or other court or administrative proceeding, is unduly narrow and might interfere with the ability of attorneys to offer legitimate counsel and advice to their clients.").

[402] *See, e.g.,* NCLC at 8 ("The [proposed rule] overlooks circumstances in which a homeowner would need to retain an attorney in another state. This is most likely to occur with second homes and rental properties. When a mortgage holder or servicer initiates a foreclosure action, the foreclosure process will take place where the dwelling is located and the homeowner will need an attorney licensed in that jurisdiction, even if it is not where the homeowner resides.").

[403] *See, e.g.,* NCLC at 15; *see also* Mobley at 2; Rogers at 20–21; Carr at 10; Bronson at 9. A coalition of consumer groups cautioned that attorneys should be allowed to collect fees in client trust accounts only if they offer MARS as part of the authorized practice of law and do not split fees with non-attorneys. NCLC at 15.

[404] CSBS at 5; *see also* NCLC at 13 (suggesting that the Commission should consider allowing the states to adopt alternative methods of regulating attorney conduct). *But see* NAAG at 3 ("It is important that exemptions to the rule's coverage be limited and narrow. As detailed in our earlier submission, companies are now exploiting exemptions in state mortgage rescue statutes in order to evade compliance with state laws. The exemption for attorneys has been particularly abused.").

[405] *See, e.g.,* Deal; Greenfield; Rogers; Carr, Davidson, Dix, Holler, Shaw, Peters, Dargon; Giles.

[406] *See, e.g.,* IL RELA.

[407] ABA at 11.

[408] IL St. Bar Assoc.; ME St. Bar Assoc., MO Bar, WI St. Bar, MI St. Bar., GA St. Bar, OR St. Bar.

[409] *See, e.g.,* ABA at 1 ("[T]he ABA urges the FTC to modify the rule to expand its existing attorney exemption to exclude lawyers engaged in the practice of law from the entire proposed rule, not just certain narrow provisions of the rule."); Rogers at 15 ("Prohibit loan modification companies from taking up-front fees unless they are licensed attorneys regularly conducting business out of publicly accessible office space in the state in which they provide loan modification services."); IL RELA at 1.

[410] ABA at 11. The issue of the jurisdiction in which an attorney must be licensed to qualify for the exemption is discussed *infra* § III.G.3.c.(2).

The ABA also urged the Commission to reconcile the exemption in the Final Rule with the attorney exemption in HUD's proposed rule under the SAFE Act. *See supra* notes 99–103 and accompanying text. As discussed in Section II.C., HUD's proposed rule imposes standards for the licensing and registration of loan originators, which HUD intends to encompass third-party loan modification specialists. The HUD proposed rule would exempt licensed attorneys who provide covered services "as an ancillary matter to the attorney's representation of the client," unless the attorney is compensated by a mortgage loan originator. Safe Mortgage Licensing Act, 24 CFR 3400.103(e)(6). The Commission declines to adopt the exemption proposed by HUD. As a matter of law, the Commission in this proceeding would not be bound by a decision on the part of HUD to adopt a certain exemption for licensed attorneys based on a rulemaking record in a different proceeding to implement a different statute. In any event, reconciliation of two rules is premature given that the HUD Rule is only at the proposal stage. As discussed below, the FTC has concluded that the record in this proceeding warrants a different treatment of attorneys than the exemption in the proposed HUD Rule.

a. General Objections to Covering Attorneys

Comments advocating for a broader or complete attorney exemption made the following main points: (1) It is unnecessary to cover attorneys because strict state laws and licensing regulations governing attorney behavior already provide adequate protection for consumers;[411] (2) the proposed rule's requirements conflict with the manner in which attorneys traditionally have offered and charged for their legal services;[412] and (3) the proposed rule would cause attorneys to stop providing legal services to financially distressed consumers.[413]

Attorney commenters contended that federal regulation of attorneys who provide MARS is unnecessary, because existing state laws and licensing regulations impose extensive restrictions and duties on attorneys.[414] For example, according to commenters, these laws and regulations obligate attorneys to work diligently and competently on behalf of their clients and to charge only reasonable fees.[415] Several commenters also argued that state laws and regulations offer unique protections when attorneys collect fees and expenses in advance of providing services.[416] According to the ABA, nearly every state court system has adopted laws and regulations requiring attorneys to deposit advance payments of fees and expenses into a client trust account that must comply with certain requirements.[417] Violations of state laws and regulations governing attorney conduct can result in sanctions and other disciplinary action, including disbarment.[418] Accordingly, these commenters urged the Commission to exempt attorneys entirely from the Final Rule and defer entirely to state enforcement against attorneys who violate applicable state laws or licensing regulations.[419]

b. Objections to Specific Provisions Covering Attorneys

In addition to their general objections to the proposed rule applying to attorneys, the commenters objected to applying some of its provisions to attorneys. These comments, submitted by attorneys and organizations representing them, contended that a number of the proposed rule's provisions were inconsistent with the practice of law and the state laws and regulations that govern it.[420] In some instances, according to these commenters, the requirements would undermine attorneys' ethical obligations to their clients. In other instances, the requirements would be cumbersome or excessive in light of comprehensive state laws governing how attorneys promote and charge for their services. In particular, they raised concerns about subjecting attorneys to the advance fee ban, the prohibition on instructing consumers not to communicate with their lenders or servicers, the required disclosures, and recordkeeping and compliance requirements.

First, several commenters urged the FTC to exempt attorneys entirely from the advance fee ban. According to the ABA, the advance fee ban in the proposed rule, which conditioned the receipt of payment on achieving the promised result, conflicted with well-established state laws and regulations permitting attorneys and clients to agree to a variety of fee arrangements, including flat fees, contingency fees, or hourly fees.[421] According to the ABA, the advance fee ban effectively would restrict attorneys to charging contingency fees for MARS.[422]

Attorney commenters contended that an advance fee ban would render them unable to pay their operating costs[423] and expose them to a high risk of non-payment,[424] thereby causing many

[411] *See* ABA at 8 ("The primary reason to regulate those providing mortgage assistance relief services to consumers is to keep them honest and ensure proper government oversight over them. But because lawyers already have substantial fiduciary duties to their clients that are strictly enforced by the state supreme courts and state bars that license and oversee the lawyers, this rationale for regulating MARS providers simply does not apply to lawyers who are already licensed by their state courts and bars."); Lawson at 1 ("Attorneys are regulated by the bar associations, they do not need to be regulated on another level."); Mobley at 2 ("In deciding to provide broader attorney exemptions in the rule, the FTC should consider that attorneys already are regulated by the states, are subject to strict ethical standards, and misconduct leads to severe sanctions. In fact, the Rules of Professional Conduct implemented in most states already provide for the investigation and discipline of the majority of the dishonest and unfair acts this rule is written to prevent."); Carr at 5 ("In addition lawyers are licensed professionals bound to follow a code of ethics promulgated by the bar associations in the states in which they practice and hence the activities described in the rule are already in effect 'policed' at the state level, when in my opinion all regulation of this type more properly resides.").

[412] *See* ABA at 3–5; Deal at 8 ("Attorneys are well regulated by their bar associations."); Carr at 5.

[413] *See* ABA at 8 ("As a result of these burdensome mandates, many lawyers who currently help consumers renegotiate their mortgages or avoid foreclosure as a part of their practice might stop handling these types of cases altogether rather than comply with these new regulations."); Greenfield at 3–4 (reporting that many attorneys, including herself, discontinued providing MARS after California passed a law that prohibited attorneys from collecting advance fees); Mobley at 2 ("Reputable attorneys experienced in loan modifications and other mortgage law issues would not be able to continue to practice. * * *"); Carr at 5 ("I and many others in the profession predict that lawyers will henceforth shun this field if the rule is adopted in its present form. * * *"); Deal at 4 ("The practical effect of [the Rule] is that attorneys will not be willing to work for clients needing these services, and people who need legal services will not be able to obtain them."); Giles at 4 ("If you pass this rule, it will drive lawyers like myself out of the market, and the number of permanent HAMPs that are executed will drop precipitously."); Rogers at 1 ("The proposed FTC rules, as they stand, will result in the wholesale elimination of reputable and capable attorneys who help desperate homeowners.").

[414] *See, e.g.,* Deal at 1 ("[The FTC] proposes to regulate the relationship between the attorney and client, which up until now has been the jurisdiction of state bar associations and state supreme courts."). The ABA also emphasized that the agents and employees of attorneys must comply with the same ethical rules. ABA at 8.

[415] *See, e.g.,* ABA at 8.

[416] *See, e.g.,* ABA at 6–9; Mobley at 2; Rogers at 16; Bronson at 5.

[417] ABA at 9; *see also* NCLC at 11 ("Attorneys in many states have long been required to escrow unearned fees, and client trust accounts are recognized as an appropriate method of protecting money that remains the property of the client until earned by the attorney.").

[418] ABA at 9; Mobley at 2; Rogers at 16, 20–21 ("Violation of the rules of an IOLTA account, which is often audited, can easily result in the disbarment of an attorney. Therefore, it is unlikely attorneys would often violate the escrow requirements."); Carr at 10; *see also* NCLC ("A client who is injured by an attorney removing funds from a trust account will have recourse to the jurisdiction's attorney discipline system, many of which include client recovery funds to provide redress in exactly this situation."); Deal at 1 ("If I fail to behave ethically and fairly towards my clients I can be disciplined and ordered to refund fees.").

[419] *See, e.g.,* ABA at 9; Mobley at 2.

[420] *See, e.g.,* ABA at 3–7; IL RELA at 1–2; IL St. Bar Assoc. at 1; Carr at 4–5; Bronson at 9.

[421] *See, e.g.,* ABA at 6–7; *see also* Bronson at 2 ("Historically, attorneys have billed either on an hourly basis, a flat rate basis or on a contingency basis. All of these methods are legal and within the boundaries of the rules of ethics governing attorneys as long as they are clearly described in a written retainer agreement provided to the client."); Dargon at 2 (charges clients a flat fee of $2500; clients value a "predictable, definitive fee that includes representation throughout the process regardless of the complexity or duration").

[422] ABA at 7; *see also* Bronson at 2 ("Without the ability to take a retainer and charge for their time and effort regardless of whether they are successful, most attorneys will not be able to offer expert loan modification advice and services."); Greenfield at 5 ("An attorney who attempts to negotiate but is unable to achieve a mortgage loan modification for her client is still entitled to be paid for legal services actually rendered."); Dargon at 2 ("If the FTC removes the up-front fee, it will effectively create a contingency area of law akin to personal injury—only without an insurance company or solvent defendant at the end of the case to absorb the attorneys' fees.").

[423] *See, e.g.,* Mobley at 2 ("Attorneys simply cannot operate a firm without collecting upfront fees."); Greenfield at 5 ("Requiring an attorney to wait to be paid until a permanent modification is approved by the servicer is unreasonable when the actual time that elapses could be six months to one year."); Rogers at 9–10; Giles at 3; Dargon at 1, 3; Carr at 5; Deal at 4.

[424] *See, e.g.,* ABA at 8 ("[L]awyers who try to help their consumer clients to renegotiate their mortgages or avoid foreclosure * * * would be prohibited from charging an advance fee, thereby greatly increasing the risk that the lawyer would not receive payment for the legal services provided.");

Continued

attorneys to discontinue providing these types of services.[425] According to the commenters, the proposed rule's limitation of the exemption to attorneys engaged in bankruptcy or other legal proceedings would exclude many forms of legal work for which attorneys regularly collect fees in advance.[426] Therefore, these commenters recommended that a final rule should allow them to place advance fees in a client trust account and withdraw them as they perform services.[427]

Second, some attorney commenters recommended exempting attorneys from the prohibition on instructing consumers not to contact their lenders or servicers. According to the ABA, clients typically expect attorneys they retain to act as their representative in dealing with other parties, such as lenders and servicers.[428] In general, the commenters argued that imposing this prohibition would undermine attorneys' effectiveness as legal counsel and possibly jeopardize the attorney-client privilege.[429] Some commenters also recommended that the exemption from this prohibition apply to attorneys who are lawfully licensed in any state,[430] noting that the exemption in the proposed rule would prevent attorneys from giving such an instruction to their out-of-state clients.[431]

Third, some commenters argued that attorneys should not be subject to the proposed rule's disclosure requirements.[432] The ABA criticized two disclosures in particular: (1) The disclosure that providers are for-profit businesses not affiliated with the government or the consumer's lender or servicer, because in the attorney context this non-affiliation disclosure is unnecessary and potentially confusing to consumers;[433] and (2) the total cost disclosure, because it would mandate that attorneys charge a flat fee for their services even though they commonly charge fees on an hourly or other basis.[434]

Finally, several commenters argued that attorneys should be exempt from the proposed rule's record keeping and compliance requirements. The ABA and other attorney organizations claimed that requiring attorneys to comply with the requirements to maintain records of their interactions and transactions with clients and to produce them for FTC inspection during an investigation or law enforcement action would undermine attorney-client confidentiality and the attorney-client relationship.[435]

3. The Attorney Exemption in the Final Rule

In the Final Rule, the Commission has broadened the attorney exemption. An attorney is exempt from the Rule, except the advance fee ban, if he or she: (1) Provides MARS as part of the practice of law; (2) is licensed to practice law in the state where the client or the client's dwelling is located; and (3) complies with applicable state laws and regulations relating to the same general types of conduct the Rule addresses, namely, the competent and diligent provision of legal services, communication with clients, charging and receipt of fees, promotion of services, and not engaging in fraudulent or deceitful conduct. In addition, an attorney that meets these criteria is exempt from the advance fee ban if the attorney deposits any advance fees in a client trust account and complies with all state laws and licensing regulations relating to the use of those accounts. The attorney exemption in the Final Rule strikes a balance between allowing consumers to continue to have access to bona fide legal assistance,[436] while at the same time preventing or deterring unfair or deceptive practices by attorneys.[437]

a. The Commission's Determination Not To Exempt All Attorneys

As discussed above, some commenters advocated exempting from the Rule all attorneys, regardless of their activities. The Commission declines such a blanket exemption to attorneys. The record shows that a substantial number of attorneys have engaged in the types of deceptive and unfair conduct the Rule prohibits. For example, approximately 22% of the complaints that a coalition of government agencies, nonprofits, and service providers has received from consumers about loan modification fraud involve some form of

Mobley at 2 ("It is unreasonable for anyone to believe that clients are just as likely to pay their attorney bill after their legal matter is resolved as before."); Greenfield at 5 ("The Commission's position that attorneys who represent that they will 'negotiate' a mortgage loan modification cannot be compensated until a permanent modification is offered to the borrower is unreasonable and unrealistic."); Rogers at 8, 10 ("[The proposal] will virtually eradicate the practical ability of ethical, law abiding loan modification attorneys to ever get paid."); Carr at 4 ("[T]he attorneys is relegated to filing a multitude of small claims cases against clients who are largely 'judgment proof.'"); GLS at 1 ("You are telling attorneys, many of them younger (like myself), newly out of law school (like myself), and with little to no ability to carry the overhead costs of providing assistance absent receipt of some fees, that they can't collect a fee from clients who are the very definition of a credit risk until the very close of the matter. These matters typically take over 6 months to as long as a year. Statistically something like only 10% of these are 'successful'. * * * As a result, your attorneys are under mountains of debt from student loans and struggling to stay out of foreclosure themselves have only a 10% chance of getting paid after 6 months to a year of work.").

[425] *See, e.g.,* Greenfield at 4; Giles at 3 ("If the FTC says I can't collect a fee in advance, I will have to exit this field of practice."); Lawson at 2 ("Without the ability to take a retainer and charge for their time and effort regardless of whether they are successful, most attorneys will not be able to offer expert loan modification advice and services."); Dargon at 3 ("Attorneys will be loathe to take modification cases if they have no assurance of being paid for their time and effort"); IL RELA at 1; WI St. Bar at 1.

[426] *See, e.g.,* Greenfield at 5; ABA at 6–7. Alternatively, some commenters argued that the proposed rule would create incentives for attorneys to file a lawsuit or a petition for bankruptcy on behalf of their client instead of finding another potentially appropriate solution. *See, e.g.,* Mobley at 2; FL Bar at 1; OR St. Bar at 1; IL RELA at 2.

[427] *See, e.g.,* Greenfield at 4–6 (arguing that "attorneys should be permitted to request a client retainer to be held in a regulated account, and to bill a client for legal work performed on an interim basis"); Rogers at 20–21; Mobley at 2; Carr at 10; Bronson at 9.

[428] ABA at 4.

[429] *See, e.g.,* ABA at 4–5 ("Section 322.3 of the Proposed Rule would seriously undermine the confidential attorney-client relationship by prohibiting lawyers from giving certain proper legal advice to their consumer clients who live in another state, including advice to 'not contact or communicate with his or her lender or servicer'."); IL St. Bar at 1 (arguing that proposed rule "prohibits lawyers from giving their clients who live in another state appropriate legal advice by prohibiting them from advising these clients not to communicate directly with the lenders"); IL RELA at 2 (same); CCRL at 10 (arguing that it is unclear why rule should cover attorneys engaged in the "ethical practice of law"); Bronson at 9 (arguing that it is "dangerous to pass a rule that supercedes the judgment of attorneys as to whether their clients should talk to the lender or servicer"); MI St. Bar at 1; Rogers at 10–12.

[430] *See* ABA at 5; Bronson at 5.

[431] *See supra* note 430. A consortium of consumer groups also argued that the proposed exemption would not permit attorneys to represent consumers who own property in a state other than where they reside, for example, members of the military who commonly rent property in one state but reside in another. See NCLC at 8.

[432] *See* ABA at 4, 8 ; MO Bar at 1; OR St. Bar at 1; IL St. Bar Assoc. at 1; IL RELA at 2; MI St. Bar at 1; FL Bar at 1; ME St. Bar Assoc. at 1; GA St. Bar at 1; WI St. Bar at 1.

[433] ABA at 3. A consumer group also opposed requiring attorneys to make this disclosure, contending that there is little evidence that the misimpression that the disclosure is designed to cure—that the provider is affiliated with the government or the consumer's lender or servicer—actually exists with respect to attorneys. NCLC at 9.

[434] ABA at 7.

[435] *See, e.g.,* ABA at 4; IL St. Bar Assoc. at 1; OR St. Bar at 1; FL Bar at 1; NCLC at 9; Rogers at 22.

[436] As discussed above, both attorney practitioners, *see, e.g.,* ABA at 7, and consumer advocates, *see, e.g.,* NCLC at 7; LFSV at 4, have argued that the Final Rule should not curtail consumer access to legal help.

[437] As discussed above, consumer groups, law enforcers, and regulators have argued that the Final Rule should protect consumers from harm by attorneys. *See* NCLC at 8; CSBS at 4; LSFV at 4; Lawyers' Committee at 9; *see also* NAAG at 3–4; MBA at 4; NYC DCA at 4; IL AG (ANPR) at 2; MA AG (ANPR) at 9; CUUS at 8–9.

attorney participation.[438] Similarly, of the 342 MARS companies investigated by the Illinois Attorney General's Office, over 38% appeared to have had some attorney involvement, and attorneys owned—at least in part—over 17% of those companies.[439] This data is consistent with the many FTC[440] and state[441] law enforcement actions in which attorneys were found or alleged to have engaged in unfair or deceptive practices in offering or providing MARS to consumers.

Additionally, the record, including FTC and state law enforcement actions,[442] demonstrates that MARS providers have used state law exemptions for attorneys to circumvent the law and harm consumers.[443] The NAAG comment, for example, explained that the attorney exemptions in many state MARS laws have created loopholes that MARS providers have exploited to harm consumers.[444] As discussed above, these state MARS laws often exempt attorneys if they have attorney-client relationships with the consumers for whom they are providing services.[445] An attorney-client relationship by itself, however, provides no guarantee that the attorney will act in a fair and honest fashion. Not only have MARS attorneys engaged in unfair and deceptive acts and practices and used such exemptions to circumvent state law requirements, but many non-attorney MARS providers have employed or affiliated with attorneys for that same purpose.[446] MARS providers

[438] Of the 6,473 total complaints in the LMSPN database as of August 25, 2010, *see supra* note 75, the Network determined that 1,510 involved legal representation. This level of reported attorney involvement has remained consistent over the past several months. *See* Loan Modification Scam Prevention Network *June 2010 National Loan Modification Scam Database Report,* at 1 ("(LMSPN, June 2010 Report),"), *available at http://www.preventloanscams.org/tools/assets/files/June-LMSPN–Report-Final.pdf.* (noting that 33% percent of persons aged 51 and older reported attorney involvement in the loan modification scam); *Loan Modification Scam Prevention Network May 2010 National Loan Modification Scam Database Report,* at 1 ("LMSPN, *May 2010 Report*), *available at http://www.preventloanscams.org/tools/assets/files/May-LMSPN–Report-Final.pdf.* ("At the end of May, almost one-third of our reports indicated that legal representation was a part of the reported scam."); *Loan Modification Scam Prevention Network April 2010 National Loan Modification Scam Database Report,* at 2 ("LMSPN, *April 2010 Report*), *available at http://www.preventloanscams.org/tools/assets/files/April-LMSPN–Report-Final.pdf.* (noting that 20% of complaints involve attorney representation). A May 2010 LMSPN Report also found that the names of more than 20 law firms or attorneys had appeared in multiple complaints. *See* LMSPN, *May 2010 Report* at 1.

[439] *See* IL AG (June 30, 2010) at 2. More specifically, this comment stated that 17.5% of these companies were owned, at least in part, by attorneys; 15% had affiliations with attorneys; and 6% showed evidence of attorneys on their staffs.

[440] *See, e.g., FTC* v. *Washington Data Res., Inc.,* No. 8:09-cv-02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *FTC* v. *LucasLawCenter "Inc.",* No. SACV09–770 DOC (ANX) (C.D. Cal. filed July 7, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal., Amd. Compl. filed Mar. 8, 2010); *FTC* v. *Fed. Loan Modification Law Ctr., LLP,* Case No. SACV09–401 CJC (MLGx) (C.D. Cal., Am. Compl. filed Oct. 1, 2010).

[441] *See, e.g., Florida* v. *Kirkland Young,* No. 09–90945–CA–03 (Fla. Cir. Ct. Dade-County Dec. 17, 2009); *North Carolina* v. *Campbell Law Firm, P.A.,* No. 09cv023738 (N.C. Super. Ct.—Wake filed Nov. 11, 2009); *Assurance of Voluntary Compliance & Discontinuance In re Airan2* (Nov. 9, 2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Airan2.pdf;* Press Release, Conn. Att'y Gen., *Attorney General Warns Consumers About Foreclosure Rescue Company Masquerading As Law Firm* (Aug. 10, 2009), *available at http://www.ct.gov/ag/cwp/view.asp?Q=444786&A=3673; California* v. *United First, Inc.,* No. BC 417194 (Cal Super. Ct. Los Angeles filed July 6, 2009) (alleging attorney Mitchell Roth and his law firm MW Roth, PLC falsely promised to eliminate mortgages on consumers' homes and improve their credit); *Assurance of Voluntary Compliance & Discontinuance In re Law Office of Eugene S. Alkana* (Jun. 12, 2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Legal%20Home%20Solutions.pdf; Assurance of Voluntary Compliance & Discontinuance In re Traut Law Group* (Jun. 11, 2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Traut%20Law%20Group.pdf; see also* Press Release, Office of the Cal. Att'y Gen., *Brown Sues 21 Companies and 14 Individuals Who Ripped Off Consumers Desperate For Mortgage Relief* (July 15, 2009), *available at http://ag.ca.gov/newsalerts/release.php?id=1767* (among the defendants that the California Attorney General sued were 4 attorneys and three law firms); *Cincinnati Bar Ass'n.* v. *Mullaney,* 119 Ohio St. 3d 412 (2008). Federal and state criminal authorities also have prosecuted attorneys who have engaged in foreclosure rescue fraud. *See, e.g.,* Amanda Bronstad, *Crackdown on California Attorneys For Mortgage Fraud a State-Federal Joint Effort,* Nat'l L.J., Oct. 12, 2010 (Orange County district attorney's office brought criminal charges against an attorney in connection with his defrauding more than 400 homeowners with promises to modify mortgage loans in exchange for advance fees); Ameet Sachdev, *Lawyer Convicted of Mortgage-Rescue Fraud,* Chi. Trib., July 13, 2010 (Attorney radio personality found guilty of federal criminal charges in connection with bilking homeowners in fraudulent foreclosure rescue scheme), *available at http://www.chicagotribune.com/business/ct-biz-0713-chicago-law-20100713,0,3981512.column;* Press Release, Dist, Att'y Queens Cnty., *Seventeen Individuals—Including Two Attorneys—Charged in Massive Multi-Million Dollar Real Estate Fraud: Ringleaders Allegedly Targeted Distressed Homeowners in Mortgage Rescue Scams* (May 13, 2010), *available at http://www.queensda.org/newpressreleases/2010/may/huggins_sookraj_et%20al_05_13_2010_cmp.pdf.*

[442] *See supra* notes 55–61 and accompanying text; *see also FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendants told consumers that they were affiliated with law firm or attorneys); *FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 16, 2009) (alleging that defendants falsely claim to have attorneys or forensic accountants on staff); *FTC* v. *Loan Modification Shop, Inc.,* No. 3:09-cv-00798 (JAP), Mem. Supp. TRO at 14 (D.N.J. filed Aug. 4, 2009) (alleging that defendants misrepresent "that it is an attorney-based company").

[443] *See, e.g.,* NAAG at 3 ("As detailed in our earlier submission, companies are now exploiting exemptions in state mortgage rescue statutes in order to evade compliance with state laws. The exemption for attorneys has been particularly abused."); IL AG (ANPR) at 2 ("Attorneys are using the [state] exemption to market and sell the same mortgage consulting services provided by non-attorneys."); *see also* NAAG at 3–4 (arguing that it is a "difficult and fact-intensive inquiry" to prove attorneys are not engaged in the practice of law, and thus they are not exempted from state laws exempting those activities).

In addition, some state consumer fraud statutes explicitly exempt attorneys, further impeding state enforcers from prosecuting attorney MARS providers for unfair or deceptive practices. *See* D.C. Code Ann. § 28–3903(c)(2)(C) (prohibiting the Department of Consumer Protection from applying the statute to the "professional services of clergymen, lawyers [and others]"); Md. Code Ann., Com. Law § 13–104(1) (the statute "does not apply to * * * [t]he professional services of a * * * lawyer"); N.C. Gen. Stat. § 75–1.1 (2005) (exempting "member[s] of a learned profession"); *see also Sharp* v. *Gailor,* 510 S.E.2d 702, 704 (N.C. App. 1999) (holding that unfair and deceptive trade practice claims against attorney are barred by a statutory exemption for "member[s] of learned profession"); Ohio Rev. Code Ann. § 1345.01(A) (consumer transactions under the Ohio Consumer Sales Practices Act do not include "transactions between attorneys, physicians, or dentists and their clients or patients").

[444] NAAG at 4 ("We expect the trend of using attorneys as fronts for mortgage rescue companies to continue. We have noticed that national companies are recruiting for attorney 'partners' or 'local counsel' in all of the states they work in to evade states' mortgage rescue fraud statutes * * * Based on the continued—and increasing—number of complaints we are receiving against companies exploiting the attorney exemption, we support only a narrowly-crafted exemption for attorney services."); IL AG (ANPR) at 2 ("Attorneys are using the exemption to market and sell the same mortgage consulting services provided by non-attorneys.").

[445] *See supra* notes 58–60, 98; *see also, e.g.,* Colo. Rev. Stat. § 6–1–1103(4)(b)(I) (exempts Colorado attorneys "while performing any activity related to the person's attorney-client relationship with a homeowner"); 765 Il. Comp. Stat. Ann. 940/5 (exempts Illinois attorneys engaged in the practice of law); Mo. Rev. Stat. § 407.935(2)(b)a9 (exempts Missouri attorneys rendering service in the course of practice); *see also* NAAG (ANPR) at 13 ("Currently, most states exempt attorneys from their mortgage rescue consultant laws."); CMC (ANPR) at 9–10. In California, the state legislature eliminated the attorney exemption from its law regulating foreclosure consultants because of concerns about evasion. *See supra* note 61.

[446] *See, e.g.,* CSBS (ANPR) at 2 (noting "attorneys who lend their name to a loan modification company, but play, little, if any direct role, in helping consumers obtain actual loan modifications"); MN AG (ANPR) at 5 ("The Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law."); CRC (ANPR) at 2 ("An increasing number of attorneys are involving themselves in these unethical practices without providing any legal (or other) services, sometimes engaging in fee-splitting or even simply acting as fronts for loan modification companies who are seeking to avoid state laws that prohibit some of the practices described above but exempt attorneys."); Cal. State Bar Ethics Alert at 2 ("There is evidence that some foreclosure consultants may be attempting to avoid the statutory prohibition on collecting a fee before any services have been rendered by having a lawyer work with them in foreclosure consultations.").

increasingly have induced consumers to purchase their services by making claims that their services include specialized legal assistance from attorneys,[447] with some attorneys lending their names and credentials to these operations.[448] In these arrangements, however, the attorneys often do little or no work on behalf of consumers,[449] with non-attorneys handling most functions, including communicating with the lender or servicer.[450]

Given the prevalence of attorneys engaged in unfair and deceptive practices in providing MARS and the experience of the states with categorical exemptions for all attorneys, the Commission has decided not to exempt attorneys across-the-board from the Final Rule. The record demonstrates that such a categorical exemption would open a large loophole to the Rule that MARS providers would exploit to the detriment of consumers.

b. The Rationale for the Attorney Exemption in the Final Rule

As discussed above, attorneys' activities related to mortgage assistance relief run the gamut. At one end of the spectrum, attorneys may provide a host of valuable services for consumers unable to pay their mortgages.[451] For instance, some attorneys represent in legal proceedings consumers who are in or at risk of foreclosure,[452] or provide such consumers with non-litigation legal services, such as advising them on bankruptcy laws, unwinding sale-leaseback transactions, resolving violations of fair lending laws, disputing charges that servicers had assessed improperly, and counseling on the tax implications of short sales.[453] The Commission concludes that some attorneys might cease providing such beneficial services if they were required to comply with the provisions of the Rule.

At the other end of the spectrum, individuals with law licenses frequently engage in deceptive or unfair MARS practices or assist others who do. As with other services sold routinely through deceptive or unfair means, a broad attorney exemption can become an easy way for fraud artists to ply their trade without fear of law enforcement. Thus, the Commission concludes that merely possessing a law degree or a license to practice law is not an adequate basis for an exemption from the Rule.

The Commission's goal is to craft an exemption that enables attorneys to engage in the bona fide practice of law, but does not create a loophole for unscrupulous attorneys who themselves engage in unfair or deceptive acts and practices in selling MARS or lend their credentials to others who do so. The attorney exemption described below is designed to achieve that goal.

c. Requirements for the Exemption

(1) Practice of Law

As described above, the services that attorneys may deliver to consumers with mortgage problems can be legal or non-legal in nature. Limiting the exemption to attorneys engaged in the "practice of law" is intended to draw the distinction between legal and non-legal services, even though performed or supervised by an attorney. The "practice of law" generally encompasses providing advice or counsel that requires knowledge of the law and preparing documents, including court

[447] The FTC's review of the information produced by a media monitoring company, *see supra* note 66, showed that 25 of the 140 companies advertising MARS made reference to being attorneys or providing some form of legal assistance.

[448] *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. Pls. Ex Parte App. at 3 (C.D. Cal. filed Aug. 3, 2009) (alleging that "Walker Law Group" was "a sham legal operation designed to evade state law restrictions on the collection of up-front fees for loan modification and foreclosure relief"); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Prelim. Rep. Temp. Receiver at 2–3 (C.D. Cal. filed July 7, 2009) (stating that defendants' "relationship with two different lawyers was nominal at best and served primarily as a cover to dignify the business and invoke the attorney exception to advance fee prohibitions"); *FTC* v. *LucasLawCenter* "*Inc.*", No. SACV–09–770 DOC (ANX), Mem. Supp. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that "[d]espite promises to the contrary, consumers have no contact with the purported attorneys who are supposed to be negotiating with their lenders"); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx), Mem. Supp. *Ex Parte* TRO at 6 & n.2; (C.D. Cal. filed Apr. 6, 2009) (alleging non-attorney defendants partnered with a California-licensed attorney to exploit attorney exemption in state law); *see also* Drexel Testimony at 6 ("In exchange for the use of the attorney's name and his or her ability to charge and receive advance fees, the foreclosure consultant typically offers to perform most or all of the loan modification services. * * *"); Press Release, State Bar of Cal., *State Bar Takes Action to Aid Homeowners in Foreclosure Crisis* (Nov. 25, 2009) ("[T]he attorneys work with untrained non-attorney staff engaging in the unlawful practice of law by offering legal advice to prospective clients. [The Office of Trial Counsel] also is investigating the non-attorney staff for possible referral to law enforcement."), *available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96395;* CMC (ANPR) at 10 ("[The attorneys'] communications [with the consumer] are generally 'boilerplate' that does not appear to reflect any considered review by an attorney."); OH AG (ANPR) at 5 ("[O]ur office sees foreclosure rescue companies advertise that they will provide a lawyer or legal help to that consumer. The lawyer's client, however, is actually the company, not the consumer, and at most the lawyer will file a brief template response on behalf of the consumers."); IL AG (ANPR) at 2. Similarly, financial service companies report receiving letters from attorneys who do no work but lend their names to out-of-state attorneys. AFSA at 5.

[449] IL AG (ANPR) at 2 ("While attorney mortgage consultants charge a premium for their services and aggressively market their status as legal professionals, they generally exclude—either expressly or in practice—actual legal representation or legal work from the scope of provided services."). Some MARS providers advertise the provision of legal services to consumers but then later disclaim, in fine print contracts, that they will actually provide such services. *See id.* at 2–4, 7.

[450] *See, e.g., FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal., Amd. Compl. filed Mar. 8, 2010) (alleging defendants falsely claimed a lawyer would negotiate the terms of consumers' home loans); *FTC* v. *FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx), Mem. Supp. *Ex Parte* TRO at 6 & n.2 (C.D. Cal. filed Apr. 6, 2009) (alleging "despite promises to the contrary, consumers have no contact with purported attorneys who are supposed to be negotiating with their lenders"); *see also* Chase (ANPR) at 5 ("Many MARS providers claim to be affiliated with attorneys, but typically the people performing the services are not attorneys, and the connection with the attorney is very tenuous. Calls to the MARS provider do not go to the attorney's office and addresses used by the providers are not the same as the attorney's."); OH AG (ANPR) at 5 ("[A]t most the lawyer [advertised to consumers by foreclosure rescue companies] will file a brief template response on behalf of the consumers.").

[451] In today's financial crisis, many consumers have turned to attorneys for help with their mortgages. *See, e.g.,* LFSV at 1 ("During the recent mortgage crisis, we have been dealing with a flood of borrowers whose mortgages are distressed and who have been subject to abuses by companies and individuals promising assistance with obtaining modification of those loans."); Central California Legal Services: State Bar's First Foreclosure Forum in Fresno, *available at http://www.centralcallegal.org/ccls/index.php* (call for volunteer assistance to handle the sheer number of clients who need assistance to avoid foreclosure). Many consumers at risk of losing their homes must rely on for-profit attorneys to receive legal assistance because their income levels disqualify them for non-profit legal aid. *See Income Levels for Individuals Eligible for Assistance,* 45 CFR part 1611 (2010) (publishing 2010 maximum income levels for individuals who are permitted to receive free or low cost legal help from programs funded by the Legal Services Corporation).

[452] As one example, in several states borrowers have the right to participate in supervised mediation with lenders before the home goes into judicial foreclosure. *See, e.g.,* Conn. Gen. Stat. Ann. § 8–265ee (2009) (providing for court-sponsored mediation prior to foreclosure); Nev. Rev. Stat. Ann. § 107.086 (2009) (providing for court-supervised mediation prior to foreclosure). Attorneys often represent clients in these mediation proceedings and may in some states file a petition for review on behalf of consumers if the mediation fails because lenders have acted in bad faith. *See, e.g.,* Giles at 1–2; *see also* Nev. Rev. Stat. Ann. § 107.086(5) (requiring loan holder to participate in mediation in good faith and to bring all necessary documents).

[453] *See, e.g.,* NCLC (ANPR) at 14 (noting that "an attorney's more beneficial and traditional role of analyzing a client's paperwork and advising the client of potential claims and options may also fit within the definition of mortgage assistance relief"); LSFV at 4 ("Those seeking advice, who are likely in or facing mortgage default, may need specific advice regarding the contractual and tax implications of a loan modification, which HUD-approved counselors may not be qualified to provide.").

pleadings and contracts, to secure clients' legal rights.[454] The activities that constitute the "practice of law," however, may vary based on state laws and licensing regulations, as interpreted by state courts and state bars. The Final Rule only allows an exemption for attorneys who are engaged in the "practice of law," as interpreted by the jurisdiction where the consumer or the consumer's dwelling is located.

(2) Licensing Jurisdiction

To qualify for the exemption in the Final Rule, attorneys must be licensed to practice law in the state where their clients reside or where their clients' dwellings that are the subject of the MARS are located. State attorney licensing regulations can provide an important check on the conduct of attorneys. The record shows, however, that in many cases attorneys have provided MARS in jurisdictions in which they are not licensed.[455] To ensure that exempt attorneys would be subject to the oversight and regulation of state officials, the proposed rule limited the exemption to those attorneys who were licensed to practice in the state where the consumer resides.

Some commenters, including several consumer groups, argued that the exemption in the proposed rule was too narrow because it did not include attorneys who represent clients who live in one state, but whose dwelling that is the subject of the MARS is located in another state.[456] The Commission recognizes that some consumers who are in or at risk of foreclosure may need legal assistance concerning dwellings located in a state other than the one where they reside. As an example, older persons who live in assisted living facilities located close to family may continue to own homes in other states.[457] Therefore, the Final Rule expands the attorney exemption to encompass attorneys who are licensed in the state where the consumer resides or where the dwelling is located.

The Commission declines to expand the exemption to attorneys licensed in any state, as recommended by some commenters.[458] The record, including state and FTC law enforcement, consumer complaints, and comments, demonstrates that many attorneys who have engaged in deceptive and unfair conduct that harms consumers operated on an interstate basis, including in states where they were not licensed.[459] Requiring that attorneys be licensed where the consumer or the property is located makes it more likely that state bar officials will be a "cop on the beat," deterring and preventing unlawful conduct by attorneys.

(3) Compliance With State Laws and Licensing Regulations

In addition to being licensed, attorneys must comply with all relevant state laws and licensing regulations governing their conduct for the state in which the client or the client's dwelling is located to qualify for the exemption. Specifically, these attorneys must abide by all such laws and regulations relating to the following subject matters: (1) Competent and diligent representation of clients; (2) disclosure of material information regarding their services to clients; (3) the accuracy of representations of material aspects of their legal services; (4) the request, receipt, handling, and distribution of fees from clients; and (5) prohibitions on fee-splitting with non-attorneys or aiding others in the unauthorized practice of law.

The record in this proceeding demonstrates that many attorneys involved in the provision of MARS have engaged in practices that violate one or more aspects of the applicable state laws or licensing regulations.[460] To protect consumers and avoid duplicative or inconsistent standards, the Commission has determined that it is appropriate to

[454] *See, e.g., Baron* v. *Los Angeles,* 469 P.2d 353, 357 (Cal. 1970) (adopting the definition articulated in *In re Eley* v. *Miller,* 34 N. E. 836, 837–38 (Ind. App. 1893), that the practice of law "includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court."); *State Bar Ass'n of Conn.* v. *Conn. Bank & Trust Co.,* 140 A.2d 863, 870 (Conn. 1958) (The practice of law "embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field."); Ga. Code Ann. § 5–19–50 (defining practice of law as "(1) Representing litigants in court and preparing pleadings and other papers incident to any action or special proceedings in any court or other judicial body; (2) Conveyancing; (3) The preparation of legal instruments of all kinds whereby a legal right is secured; (4) The rendering of opinions as to the validity or invalidity of titles to real or personal property; (5) The giving of any legal advice; and (6) Any action taken for others in any matter connected with the law.").

[455] *See, e.g., FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx) (law firm advertised MARS nationally while attorneys who purportedly worked for company were only licensed to practice law in California); *Assurance of Voluntary Compliance & Discontinuance In re: Airan2,* (Nov. 9, 2009) (out-of-state attorney provided MARS to Colorado consumers), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Airan2.pdf; see also* CMC at 9–10 ("These attorneys are often not licensed to practice in either the borrower's or servicer's state * * *."); CSBS at 2 ("This [increase of involvement by attorneys] includes out-of-state attorneys, many of whom are not licensed to practice law in the state where the homeowner lives * * *.").

[456] *See, e.g.,* Greenfield at 5; NCLC at 10.

[457] *See* NCLC at 4.

[458] *See* ABA at 5; Bronson at 5.

[459] *See, e.g.,* FTC Case List, *supra* note 28; *Assurance of Voluntary Compliance & Discontinuance In re Airan2* (Nov. 9, 2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Airan2.pdf* (alleging out-of-state attorney sold MARS without proper licenses to Colorado residents); *Assurance of Voluntary Compliance & Discontinuance In re Law Office of Eugene S. Alkana* (Jun. 12, 2009) (same), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Legal%20Home%20Solutions.pdf; Assurance of Voluntary Compliance & Discontinuance In re Traut Law Group* (Jun. 11, 2009) (same), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Traut%20Law%20Group.pdf; cf.* Model Rules of Prof'l. Conduct R. 5.5 (prescribing that an attorney may practice law in a jurisdiction other than the one in which she is admitted only under limited circumstances, and even then only on a temporary basis).

[460] *See, e.g.,* Press Release State Bar of Cal., *State Bar Takes Action to Aid Homeowners in Foreclosure Crisis* (Sept. 18, 2009) (alleging that attorneys took "fees for promised services and then failed to perform those services, communicate with their clients or return the unearned fees"), *available at http://www.calbar.ca.gov/AboutUs/News/200934.aspx; see also* Helen Hierschbiel, Working with Loan Modification Agencies, Or. St. Bar Bull. (Aug./Sept. 2009) (warning Oregon attorneys of potential ethical violations associated with working with loan modification companies), *available at http://www.osbar.org/publications/bulletin/09augsep/barcounsel.html;* Bob Lipson & David Huey, Lawyers and Buyers Beware, Was. St. Bar J. (Aug. 2009) (warning attorneys of the "potential ethical pitfalls" of "working with a loan modification company in conjunction with your practice"), *available at http://www.wsba.org/media/publications/barnews/aug09-lawyersbeware.htm;* N. J. Sup. Ct. Adv. Comm. On Prof. Ethics, Op. 716, *Lawyers Performing Loan or Mortgage Modification Services for Homeowners,* 197 N.J.L.J. 59 (Jun. 26, 2009) (citing two ethics opinions in holding that attorneys cannot pay fees to loan modification companies for referring clients, act as in-house counsel to a for-profit loan modification company, or engage in prohibited fee sharing with loan modification companies), *available at http://www.state.nj.us/dobi/bulletins/ACPE_716_UPL_45_loanmod.pdf;* Diane Karpman, Beware the Meltdown's Temptations, Cal. Bar J. (Dec. 2008) (warning the legal community about the potential ethical violations that could occur if attorneys were to go into business with non-attorneys in the loan modification market) *available at http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/December2008&MONTH=December&YEAR=2008&sCatHtmlTitle=Discipline&sJournalCategory=YES&sCatHtmlPath=cbj/2008-12_Discipline_Ethics-Byte.html&sSubCatHtmlTitle=Ethics%20Byte;* Florida Bar, *Ethics Alert: Providing Legal Services to Distressed Homeowners* (cautioning attorneys against entering into arrangements with non-lawyers to provide services associated with loan modifications, short sales, and other forms of foreclosure-related rescue), *available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/872C2A9D7B71F05785257569005795DE/$FILE/loanModification20092.pdf.* Additionally, the Ohio Supreme Court has sanctioned attorneys hired by a foreclosure rescue company for, *inter alia,* failing to engage in adequate preparation and failing to properly pursue clients' individual objectives. *See Cincinnati Bar Ass'n* v. *Mullaney,* 894 N.E. 2d 1210 (Ohio 2008).

generally exempt from the Final Rule attorneys who comply with the applicable state laws and regulations. Attorneys not in compliance with those laws and regulations, however, remain subject to the Rule. Examples of activities that may be in violation of state laws and regulations, and thus would render attorneys ineligible for the exemption, include: (1) Failing to work diligently and competently on behalf of clients, *i.e.,* not taking reasonable efforts to obtain mortgage assistance relief;[461] (2) neglecting to keep clients reasonably informed as to the status of their matters, including the potential for adverse outcomes;[462] (3) misrepresenting any material aspect of the legal services,[463] including the likelihood they will achieve a favorable result,[464] an affiliation with a government agency,[465] or the cost of their services;[466] (4) sharing legal fees for MARS-related services with non-attorneys;[467] (5) forming partnerships with non-attorneys in connection with offering MARS;[468] and (6) aiding MARS providers in engaging in the unauthorized practice of law, i.e., providing legal services without a license to do so.[469] If attorneys do not comply with all of these state requirements, they must comply with all of the requirements in the Final Rule.

Some state bars have initiated an increasing number of investigations of attorneys who provide MARS and, in many instances, have brought misconduct cases against them.[470] For example, the Florida Bar submitted a comment stating that it is investigating 155 pending complaints against 42 lawyers engaged in providing MARS.[471] The California Bar is currently conducting roughly 2,000 investigations related to MARS providers.[472] Vigorous state monitoring and enforcement play a vital role in reducing the incidence of unfair or deceptive conduct by attorneys involved in the provision of MARS.

Nevertheless, many state bars have limited resources for investigating and taking action against unethical attorneys involved in providing MARS.[473] State bars also typically respond only to client and competitor complaints rather than actively monitoring and investigating possible violations on their own initiative.[474] As a result, as the record demonstrates, numerous attorneys have engaged and continue to engage in unfair or deceptive practices in the provision of MARS without states taking action against them. The Commission encourages all state courts and bars to follow the example of states like Florida and California and aggressively enforce their laws and regulations covering attorneys who provide MARS as part of the practice of law. The record demonstrates, however, that the threat of bar sanctions has not been a sufficient deterrent to attorney misconduct in the sale or provision of MARS, and thus it is necessary to cover certain conduct of attorneys under the Final Rule.

d. Exemption From the Advance Fee Ban

The practices of attorneys who meet the conditions listed in 322.7(a) are entitled to a general exemption from the Final Rule. The one exception relates to the prohibition on advance fees. Under § 322.7(b) of the Final Rule, attorneys are exempt from the advance fee ban only if they: (1) Meet all of the conditions required for the general exemption; (2) deposit any advance fees they receive into a client trust account; and (3) comply with all state laws and licensing regulations governing the use of such accounts.

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[461] *See, e.g.,* Model Rules of Prof'l Conduct R. 1.1 & 1.3 (requiring attorneys to provide competent and diligent legal services).

[462] *See, e.g.,* Model Rules of Prof'l Conduct R. 1.4 (governing attorney communications with clients about their cases); *see also* Model Rules of Prof'l Conduct R. 2.1 (calling for attorneys to exercise independent professional judgment and render candid advice).

[463] *See, e.g.,* Model Rules of Prof'l Conduct R. 7.1 (general prohibition on making "false or misleading communications about the lawyer or the lawyer's services"). Attorneys also cannot engage in conduct that is dishonest, fraudulent, or deceitful. *See* Model Rules of Prof'l Conduct R. 8.4.

[464] *Id.* In some cases, state laws and regulations would prohibit attorneys from promising that they will obtain any particular mortgage relief for their clients. *See, e.g.,* FL. Rules of Prof'l Conduct R. 4–7.2(c)(F) & (G) (2010) (prohibits any communication that "contains any reference to past successes or results obtained" or "promises results").

[465] *Id.; see also* Model Rules of Prof'l Conduct R. 7.5 (generally prohibits use of firm name, letterhead, or other professional designation that is misleading, and specifies that attorneys in private practice cannot use a trade name that implies a connection with a government agency).

[466] *See* Model Rules of Prof'l Conduct R. 7.1, 7.2, & 8.4; *see also* Model Rules of Prof'l Conduct R. 1.5 (must communicate to clients the scope of representation and the basis and rate for fees, preferably in writing, before or within a reasonable time after commencing the representation).

[467] *See* Model Rules of Prof'l Conduct R. 5.4 (only under certain circumstances can lawyers or law firms share legal fees with non-lawyers).

[468] *Id.* (lawyers cannot form business partnerships with non-lawyers if any of the activities involve the practice of law). State bars have warned attorneys about the ethical problems of partnering with non-attorneys to perform MARS. *See, e.g.,* Helen Hierschbiel, *Working with Loan Modification Agencies,* Or. St. Bar Bull. (Aug./Sept. 2009) (warning Oregon attorneys of potential ethical violations associated with working with loan modification companies), *available at http://www.osbar.org/publications/bulletin/09augsep/barcounsel.html;* Bob Lipson & David Huey, Lawyers and Buyers Beware, Wash. St. Bar J. (Aug. 2009) (warning attorneys of the "potential ethical pitfalls" of "working with a loan modification company in conjunction with your practice"), *available at http://www.wsba.org/media/publications/barnews/aug09-lawyersbeware.htm;* N. J. S. Ct. Adv. Comm. Prof. in Ethics & Comm. on Unauthorized Practice of Law, *Lawyers Performing Loan or Mortgage Modification Services for Homeowners,* (Jun. 26, 2009) (citing two ethics opinions in holding that attorneys cannot pay fees to loan modification companies for referring clients, act as in-house counsel to a for-profit loan modification company, or engage in prohibited fee-sharing with loan modification companies), *available at http://www.state.nj.us/dobi/bulletins/ACPE_716_UPL_45_loanmod.pdf.*

[469] *See* Model Rules of Prof'l Conduct R. 5.5 (lawyer is not permitted to practice law in violation of the laws that regulate the legal profession in that state, nor assist another to do so). In addition, attorneys who operate what have come to be known as "loan modification mills" may violate state law if they provide MARS as part of their legal services, but delegate most of the work to non-attorneys without properly supervising the delegated work or retaining control over it. *See* Model Rules of Prof'l Conduct R. 5.3.

[470] *See, e.g.,* Press Release, State Bar of Cal., *State Bar Continues Pursuit of Attorney Modification Fraud* (Aug. 12, 2009), *available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96096;* Fl. Bar, *Ethics Alert: Providing Legal Services to Distressed Homeowners, available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/872C2A9D7B71F05785257569005795DE/$FILE/loanModification20092.pdf?; see also Cincinnati Bar Assoc.* v. *Mullaney,* 119 Ohio St. 3d 412 (2008) (disciplining attorneys involved in mortgage assistance relief services).

[471] FL Bar (July 1, 2010) at 1. In the past year, Florida has brought 32 cases alleging neglect by attorneys in providing loan modification services, which resulted in disciplinary action against four attorneys. During that time, the Florida Bar disciplined another four attorneys in connection with their advertising of MARS. *Id.*

[472] Press Release, State Bar of Cal., *Two More Loan Foreclosure Lawyers Placed on Involuntary Inactive Enrollment* (June 2, 2010), available at *http://www.calbar.ca.gov/AboutUs/News/201012.aspx.*

[473] *See, e.g.,* Deborah L. Rhode, *Institutionalizing Ethics,* 44 Case W. Res. L. Rev. 665, 694 (1994) (discussing funding constraints of bar disciplinary system).

[474] *See* ABA, Ctr. For Prof'l Responsibility. *Lawyer Regulation for A new Century: Report of the Commission on the Evaluation of Disciplinary Enforcement* vi–vii, 9–11, 75 (1992); *see also* Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation,* 44 Ariz. L. Rev. 829, 871 (2002) ("[State bars] have tended to focus exclusively on cases that come to their attention easily, through complaints by allegedly aggrieved persons."); Julie Rose O'Sullivan, *Professional Discipline For Law Firms? A Response to Professor Scheneyer's Proposal,* 16 Geo. J. Legal Ethics 1, 51–52 (2002) ("[O]verwhelming majority of [bar disciplinary] proceedings continue to be founded upon complaints rather than proactive investigations").

The Commission, in contrast, frequently initiates investigations based on its own monitoring of industry practices or information from third party sources, even in the absence of a consumer or competitor complaint. The Commission also has a number of important remedial powers that bar associations may lack, including the ability to file an immediate action in Federal court for a temporary restraining order to halt ongoing violations and freeze the defendant's assets for ultimate return to injured consumers. *See* 15 U.S.C 53(b).

Given the frequency with which attorneys, and those affiliated with attorneys, have engaged in unfair and deceptive practices in connection with MARS, the Commission believes that a blanket exemption from the advance fee ban for attorneys is unwarranted and would not adequately protect consumers. At the same time, the Commission is mindful of the possible adverse consequences from imposing unnecessary fee restrictions on attorneys that would reduce the availability of beneficial legal services. On balance, the Commission has concluded that a modified, broader attorney exemption with regard to the advance fee ban is appropriate. The Final Rule therefore permits attorneys who provide MARS as part of their provision of legal services to collect advance fees if, in compliance with applicable state laws and licensing regulations, the attorney deposits such payments into a client trust account [475] and draws on them as work is performed.

Unlike other MARS providers, attorneys commonly deposit advance fees in client trust accounts and, in some jurisdictions, are legally required to do so.[476] State laws and licensing regulations strictly limit attorneys' use of funds in these accounts.[477] For example, state laws and licensing regulations mandate that attorneys keep fees deposited in the client trust accounts separate from their own funds,[478] only withdraw funds as fees are earned or expenses are incurred,[479] maintain complete records as to transactions,[480] notify clients of any withdrawals,[481] and keep the client's funds separate from other clients' funds if a dispute as to ownership of the funds is pending.[482] In some cases, attorneys also are prohibited from "front-loading" fees to expedite their withdrawal of funds from client trust accounts.[483] In addition, as discussed above, in the event attorneys misappropriate funds, state court systems and bars can take, and have taken, disciplinary action, including license revocation. Finally, state bars typically maintain client-security funds, which are capitalized by licensing fees that attorneys pay, for the purpose of compensating injured clients.[484]

To qualify for the exemption from the requirements of the advance fee ban, the Commission concludes that attorneys not only must deposit advance fees in a client trust account, but also must comply with all state laws and licensing regulations governing their use of client trust accounts for these funds.[485] The Rule does not restrict attorneys as to the type of fees they charge clients, including flat fees, contingency fees, or hourly fees, but requires that they withdraw their fees from the client trust accounts consistent with state laws and licensing regulations. These conditions are appropriate for ensuring that such attorneys do not collect and handle fees in a manner harmful to consumers. Attorneys who do not comply with all of these state requirements must comply with the advance fee ban in the Final Rule.[486]

H. Section 322.8: Waiver Not Permitted

Section 322.8 of the Final Rule, which includes only non-substantive

[475] The Final Rule defines "client trust account" to mean a "separate account created by a licensed attorney for the purpose of holding client funds, which is: (1) [m]aintained in compliance with all applicable state laws and regulations, including licensing regulations; and (2) [l]ocated in the state where the attorney's office is located, or elsewhere in the United States with the consent of the consumer on whose behalf the funds are held." § 322.2(b). This definition is consistent with the requirements of the Model Rules of Professional Conduct. *See* Model Rules of Prof'l Conduct R. 1.15.

[476] Indeed, some state laws and licensing regulations mandate that attorneys deposit flat fees, also known as fixed fees, collected in advance of performing legal services into client trust accounts, unless the client provides informed consent to a contrary fee arrangement. *See, e.g., In re Mance,* 980 A.2d 1196 (DC 2009); DC Bar, Formal Op. 355 (2010) (providing guidance to attorneys on *Mance* opinion); Minn. Lawyers Prof'l. Responsibility Bd., Formal Op. 15 (1991) (advising that attorneys must deposit advance payments into lawyer trust accounts); *see also* Colo. Rules of Prof'l Conduct R. 1.15.

[477] *See, e.g.,* Model Rules of Prof'l Conduct R. 1.15 (restrictions on the safekeeping of client property that is "in a lawyer's possession in connection with a representation"); *see also* Cal. Rules of Prof'l Conduct R. 4–100 (Preserving Identity of Funds and Property of a Client); Fla. Rules of Prof'l Conduct R. 4–1.15 (Safekeeping of Property); Ill. Rules of Prof'l Conduct R. 1.15 (same); Nev. Rules of Prof'l Conduct R. 169 (same).

[478] Model Rules of Prof'l Conduct R. 1.15(a) (funds shall be held "separate from the lawyers' own property and in a separate account where the lawyer's office is situated, or elsewhere with the consent of the client or third person").

[479] *See* Model Rules of Prof'l Conduct R. 1.15(c) ("A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."); *see also, e.g.,* Cal. Rules of Prof'l Conduct R. 3–700 (when client representation terminates, attorneys must promptly return any part of a fee paid in advance that has not been earned); Fla. Rules of Prof'l Conduct R. 4–1.16 (same); Ill. Rules of Prof'l Conduct R. 116 (same); Nev. Rules of Prof'l Conduct R. 166 (same).

[480] Attorneys must retain complete records as to transactional activity on the accounts. See Model Rules of Prof'l Conduct R. 1.15(a) ("Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation."); *see also* Cal. Rules of Prof'l Conduct R. 4–100; Fla. Rules of Prof'l Conduct R. 4–1.15; Ill. Rules of Prof'l Conduct R. 1.15; Nev. Rules of Prof'l Conduct R. 169.

[481] *See, e.g. Mance,* 980 A. 2d at 1204 (attorney should notify client of any withdrawal so that she has an opportunity to review the amount withdrawn and, if warranted, contest it).

[482] Model Rules of Prof'l Conduct R. at 1.15(e) ("When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claims interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.").

[483] State courts have advised that attorneys should avoid excessive "front-loading" of fees. *See, e.g., Mance,* 980 A. 2d at 1204–05. Fees are withdrawn from client trust accounts pursuant to a mutual agreement between the attorney and client, which allows for withdrawals once attorneys achieve certain milestones. *See, e.g., id.* at 1202; *see also* Model Rules of Prof'l Conduct R. 1.15(a).

[484] *See, e.g.* State Bar of California: Client Security Funds, *available at http://www.calbar.ca.gov/Attorneys/LawyerRegulation.aspx* ("client security fund" hyperlink) (fund set up to reimburse losses resulting from attorney dishonesty); Florida State Bar: Clients' Security Fund, *available at http://www.floridabar.org/tfb/flabarwe.nsf* (follow "pubic information" hyperlink, then follow "clients' security fund" hyperlink) (fund created to help compensate losses of money or property due to attorney misappropriation or embezzlement); Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois: Client Protection Program, *available at https://www.iardc.org/index.html* ("client protection program" hyperlink) (fund provided to reimburse losses resulting from dishonest conduct by attorneys); State Bar of Nevada: Clients' Security Fund, *available at http://www.nvbar.org/clientsecurityfund.htm* (fund reimburses losses to clients when attorney "betrays client's trust or misappropriates the client's funds"). There is no guarantee that consumer losses will be reimbursed from these funds. In some cases, the amount in dues collected from attorneys may be insufficient to cover reported losses from attorney misconduct. *See, e.g.,* Valerie Miller, New President Points State Bar Toward Future, Las Vegas Business Press, July 12, 2010 *available at http://www.lvbusinesspress.com/articles/2010/07/12/news/iq_36736725.txt* (reporting that in 2009, claims against the State Bar of Nevada's client-security account exceeded the amount in dues collected from attorneys). In addition, state bars often impose strict limitations on what types of losses qualify for reimbursement. For example, the Illinois client security fund limits reimbursement to losses that result from "intentional dishonesty" by the attorney. *See* Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois: Client Protection Program, *available at https://www.iardc.org/index.html* ("client protection program" hyperlink).

[485] As noted in § III.E.5. of this SBP, the advance fee ban does not take effect until 60 days after issuance of the Final Rule. However, given that some states' attorney regulations require the use of client trust accounts, many lawyers who have accepted advance fees from consumers for MARS should have already placed them in trust accounts to comply with these regulations.

[486] A public interest law firm recommended that the Commission also allow state-licensed accountants to collect fees for preliminary mortgage default counseling to consumers. LFSV at 4. The comment did not elaborate on this recommendation. The Commission declines to exempt accountants from the advance fee ban. Apart from this one comment, nothing submitted on the record indicates that accountants regularly perform MARS. No accountant or organization representing that profession submitted comments in this proceeding. Moreover, accountants typically do not receive payment prior to completing their services, nor do laws or licensing regulations governing the accounting profession address this issue. *See, e.g.,* Va. Code Ann. § 54.1–4400, *et seq.*

modifications to the proposal, provides that "[i]t is a violation of this rule for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this rule."[487] No comments were received addressing this provision. Several states include similar provisions in their statutes restricting MARS.[488] The Commission concludes that this provision is necessary to prevent MARS providers from attempting to circumvent the Rule, and, therefore, adopts this prohibition.

I. Section 322.9: Recordkeeping and Compliance Requirements

Section 322.9 of the proposed rule set forth specific categories of records MARS providers were required to retain. It also contained four compliance requirements. The Final Rule is very similar to the proposed rule, except that MARS providers no longer are required to record telephone communications with consumers unless they telemarket their services.[489]

1. Proposed Recordkeeping and Compliance Requirements

Section 322.9(a) of the proposed rule set forth specific categories of records MARS providers would be required to keep and contained a time period for retention. Specifically, for a period of 24 months from the date records are produced, the proposed rule required MARS providers to keep:

(1) All contracts or other agreements between the provider and any consumer for any mortgage assistance relief service;

(2) Copies of all written communications between the provider and any consumer occurring prior to the date on which the consumer enters into a contract or other agreement with the provider for any mortgage assistance relief service;

(3) Copies of all documents or telephone recordings created in connection with § 322.9 (b), which sets forth compliance requirements;

(4) All consumer files containing the names, phone numbers, dollar amounts paid, quantity of items or services purchased, and descriptions of items or services purchased, to the extent MARS providers obtain such information in the ordinary course of business;

(5) Copies of all materially different sales scripts, training materials, commercial communications, or other marketing materials, including websites and weblogs; and

(6) Copies of the documentation provided to the consumer in order to comply with the advance fee ban in § 322.5.

In addition, §§ 322.9(b)(1)–(4) of the proposed rule contained four compliance requirements. To monitor whether their employees and contractors are complying with the Rule, § 322.9(b)(1) required providers to:

- Conduct random, blind recording and testing of the oral representations made by persons in sales or other customer service functions;
- Establish a procedure for receiving and responding to consumer complaints; and
- Ascertain the number and nature of consumer complaints regarding transactions handled by individual employees or independent contractors.

Proposed §§ 322.9(b)(2) and (3) required that MARS providers investigate promptly and fully any consumer complaints they receive and take corrective action with respect to any employee or contractor whom the provider determines is not complying with the Rule. Finally, proposed § 322.9(b)(4) required MARS providers to create and retain documentation of their compliance with proposed § 322.9(b)(1)–(3).

2. Comments Regarding Proposed Recordkeeping and Compliance Requirements

State attorneys general and other state regulators, legal aid groups, and consumer advocates, while not addressing these recordkeeping and compliance requirements specifically, endorsed the proposed rule generally.[490] One commenter expressly stated that it supported the recordkeeping and compliance provisions.[491] Several comments proposed additional or modified compliance or recordkeeping requirements,[492] including mandating that MARS providers: (1) Upon request, provide consumers with copies of any contracts or other documents in the providers' files related to the services provided to them;[493] (2) maintain records in a form in which searches can be conducted electronically based on the name, address, and zip code of the consumer;[494] (3) keep comprehensive records of all consumers contacted, as well as the employees, independent contractors, and subcontractors of the provider;[495] (4) make available to the FTC all data, records, and other information collected in processing a consumer's case;[496] and (5) respond to consumer complaints within 14 days of receipt, resolve complaints within 30 days, and submit records of complaints and their resolution to the FTC.[497] Two commenters also recommended that the Rule require a longer recordkeeping retention period.[498]

A number of commenters—in particular, members of the legal profession—objected to the recordkeeping and compliance requirements.[499] Those commenters generally argued that the recordkeeping and compliance requirements in the proposed rule were ill-suited to attorneys and would interfere with their client relationships. These comments and the Commission's response to them are discussed above in § III.G. of this SBP.

3. Final Recordkeeping and Compliance Provisions

With one exception, the Commission adopts in the Final Rule recordkeeping and compliance requirements that are very similar to those set forth in the proposed rule. As discussed throughout this SBP, the rulemaking record, including the Commission's law enforcement experience, indicates that MARS providers frequently engage in unfair and deceptive acts and practices. The recordkeeping and compliance requirements in the Final Rule will assist the Commission in investigating and prosecuting law violations, including identifying injured consumers for purposes of paying consumer redress. Both the recordkeeping[500] and

[487] The Commission merely modified this provision to make it clearer and easier to understand. The proposed provision stated that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this rule constitutes a violation of the rule." *MARS NPRM,* 75 FR at 10737.

[488] *See supra* note 98.

[489] The Commission also made minor, non-substantive changes to the language of § 322.9 in the proposed rule, to make the Final Rule provisions clearer and easier to understand.

[490] *See, e.g.,* NAAG at 2,5; OH AG at 1; MA AG at 1; MN AG at 1, 3; NY DCA at 2; CSBS at 1; CUUS at 9; LOLLAF at 1; Lawyer's Committee at 11; LFSV at 1.

[491] CUUS at 9.

[492] OPLC at 3–4; NYC DCA at 9–10; CUUS at 9; LFSV at 4.

[493] OPLC at 3–4 (provide documents in a timely manner upon written request); LFSV at 4 (provide documents within 10 days of a consumer's requests).

[494] NYC DCA at 9.

[495] *Id.* at 9–10.

[496] CUUS at 9.

[497] *Id.*

[498] *See* LFSV at 4; CUUS at 9 (recommending a retention period of five years, the statute of limitations for FTC civil penalty actions).

[499] *See* ABA at 4, 8 ; MO Bar at 1; OR Bar at 1; IL BA at 1; IRELA at 2; MI Bar at 1; FL Bar at 1; ME BA at 1; GA Bar at 1; WI Bar at 1; Shaw at 1; GLS at 1.

[500] The recordkeeping requirements in the Final Rule are similar to those imposed in the TSR, 16 CFR part 310; The Franchise Rule, 16 CFR part 436;

compliance[501] requirements are similar to those imposed in other FTC consumer protection rules. In addition, MARS providers would likely retain these records in the ordinary course of business even in the absence of the Rule. The Commission adopts these recordkeeping and compliance requirements to promote effective and efficient enforcement of the Rule, thereby deterring and preventing deception and unfairness.

The Commission has decided to make one substantive modification to the compliance requirements in the proposed rule. The proposed rule required all MARS providers to conduct random blind recording of their sales and customer service calls. Some MARS providers who do not telemarket their services, including many attorneys, argued that it would be unduly costly for them to record such calls.

To foster compliance with the Rule without imposing undue burdens, the Commission has decided to modify the telephone call recording requirement so that it applies to MARS providers only if they telemarket their services.[502] Specifically, § 332.9(b)(1)(i) of the Final Rule states:

> If the mortgage assistance relief service provider is engaged in the telemarketing of mortgage assistance relief services, [it must perform] random, blind recording and testing of the oral representations made by individuals engaged in sales or other customer service functions

Further, in order to effectuate this provision, the Final Rule defines "telemarketing" as "a plan, program, or campaign which is conducted to induce the purchase of any service, by use of one or more telephones and which involves more than one interstate telephone call."[503] This is similar to the definition of this term used in the TSR.[504]

The Commission declines to make the other changes in the recordkeeping and compliance requirements advocated in the comments. With respect to suggestions that the Rule require the retention of additional records, the FTC concludes that the records specified in § 322.9(a) are sufficient for the Commission to make an initial determination about whether a provider's practices merit further investigation. If its practices do, the Commission has substantial authority under the FTC Act[505] to compel MARS providers and others to produce additional information and records. With regard to comments suggesting that the recordkeeping retention period be extended, the Commission concludes,[506] based on its law enforcement experience, that a two-year retention period is sufficient to investigate violations of the Rule. Extending the retention period beyond two years also might impose additional costs on MARS providers.

Finally, comments suggested that the Final Rule should include provisions intended to make it easier for consumers to obtain information about the conduct of the MARS providers with whom they contract. In particular, comments recommended that the Commission require that MARS providers create and maintain electronically searchable records[507] and give consumers copies of any documents related to the services they provided or promised to provide.[508] Although having such information or having access to it may make the conduct of MARS providers more transparent to their customers, it is not clear to what extent these requirements prevent unfairness or deception, or are reasonably related to the prevention of such conduct. In addition, there is no information in the rulemaking record assessing possible benefits to consumers that might result from such requirements, nor is there anything addressing the costs to MARS providers of creating, maintaining, and providing access to information in their files and databases. The Commission therefore declines to impose these suggested recordkeeping and compliance requirements.[509]

J. Section 322.10: Actions by States

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, permits states to enforce the Rules issued in connection with the MARS rulemaking.[510] States may enforce the Rules, subject to the notice requirements of the Omnibus Appropriations Act, by bringing civil actions in federal district court or another court of competent jurisdiction. Section 322.10 tracks the statute, stating that states have the authority to file actions against those who violate the Rule.[511]

K. Section 322.11: Severability

Section 322.11 states that the provisions of the Rule are separate and severable from one another. This provision, which is modeled after a similar provision in the TSR,[512] also states that if a court stays or invalidates any provisions in the proposed rule, the Commission intends the remaining provisions to continue in effect. This provision was included in the proposed rule and no comments were received addressing it. The Commission has determined to adopt the proposed provision as the Final Rule.

L. Effective Dates

The Final Rule, with the exception of the advance fee ban in § 322.5, becomes effective on December 29, 2010. Given the widespread deceptive and unfair conduct of MARS providers, and the urgency of protecting consumers of these services, the Commission concludes that this effective date is appropriate.

The advance fee ban provision, § 322.5 of the Final Rule, takes effect on January 31, 2011.[513] The Commission is providing MARS providers an additional month after the effective date of the other provisions of the Rule because compliance with the advance

and the Funeral Industry Practices Rule, 16 CFR part 453.

[501] The compliance requirements in the Final Rule are similar to those imposed in the Standards for Safeguarding Customer Information, 16 CFR part 314; the TSR, 16 CFR part 310; and the Trade Regulation Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (*900 Number Rule*), 16 CFR part 308.

[502] The Commission notes, however, that MARS providers who do not telemarket their services remain subject to the other recordkeeping and compliance requirements in the Final Rule.

[503] Section 322.2(m). This definition was not included in the proposed rule.

The Final Rule also clarifies, in § 322.9(b)(4), that providers must "maintain any information and material necessary to demonstrate [their] compliance"—as opposed, merely, to "maintain[ing] documentation" of compliance—as the proposal required. This modification makes it clear that the information providers must maintain to demonstrate compliance is not limited to paper documents, but instead includes other media such as audio or computer files.

[504] Unlike the TSR, the definition of telemarketing in the MARS Rule does not cover the purchase of goods or a charitable contribution.

[505] *See* 15 U.S.C. 46, 49, 57b–1; 19 CFR 2.7.

[506] *See* LFSV at 4; CUUS at 9 (recommending a retention period of five years because it is similar to the FTC statute of limitation for civil penalties).

[507] NYC DCA at 9.

[508] OPLC at 3–4 (provide documents in a timely manner upon written request); LFSV at 4 (provide documents within 10 days of a consumer's requests).

[509] Another comment suggested that the Commission mandate that MARS providers respond to consumer complaints within 14 days of receipt and resolve complaints within 30 days of receipt. LFSV at 4. Prompt resolution of consumer complaints certainly is good business practice, but in the absence of information as to the costs and the benefits of such requirements, as well as information as to whether they prevent unfairness or deception or are reasonably related to the prevention of such conduct, the Commission declines to specify such requirements in the Final Rule.

[510] Credit CARD Act § 511(b).

[511] NAAG stated that the Rule "would work harmoniously with existing state laws." NAAG at 5.

[512] *See* 16 CFR 310.9.

[513] The Final Rule does not apply retroactively; thus, the advance fee ban does not apply to contracts with consumers executed prior to the effective date.

fee ban may entail substantial adjustments to many providers' operations.

IV. Paperwork Reduction Act

The Commission is submitting this Final Rule and a Supplemental Supporting Statement to the Office of Management and Budget for review under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–21. The disclosure and recordkeeping requirements of the Rule constitute "collection[s] of information" for purposes of the PRA.[514] The associated PRA burden analysis follows.

A. Disclosure Requirements

As discussed above, the Rule requires several disclosures that MARS providers must place in commercial communications for MARS and must state to specific consumers who seek such services. Generally, commenters strongly supported the disclosures.[515]

In each general commercial communication and consumer-specific communication, providers must state that: (1) "(Name of company) is not associated with the government, and our service is not approved by the government or your lender;" and (2) "Even if you accept this offer and use our service, your lender may not agree to change your loan." In consumer-specific communications, providers also must disclose the total cost of MARS.

Based on the rulemaking record,[516] the Final Rule adds two new disclosures to consumers seeking MARS, and it modifies one existing disclosure substantially. First, if MARS providers advise consumers, expressly or by implication, to stop making mortgage payments, they must warn consumers in all communications that: "If you stop paying your mortgage, you could lose your home and damage your credit rating."[517] Second, at the time providers furnish the consumer with a written agreement from the lender or servicer memorializing the result the providers have obtained, they must disclose: "This is an offer of mortgage assistance we obtained from your lender [or servicer]. You may accept or reject the offer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [same amount as disclosed pursuant to § 322.4(b)(1)] for our services." At the same time, providers also must provide consumer's with a notice from the consumer's loan holder or servicer that describes material differences between the terms, conditions, and limitations associated with the consumer's current mortgage and the terms, conditions, and limitations associated with the consumer's mortgage if he or she accepts the loan holder's or servicer's offer.

The Final Rule also expands the proposed disclosure of total cost in § 322.4(b)(1), such that the provider must now disclose: "You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (insert amount or method for calculating the amount) for our services." The Rule also broadens when the required disclosures must be made in commercial communications, such that all of the disclosures—with the exception of the disclosures regarding total cost and the obligation to pay fees—must be made in every general and consumer-specific commercial communication.

B. Recordkeeping Requirements

The Rule also imposes several recordkeeping requirements. Several commenters argued generally that the proposed recordkeeping requirements were burdensome, in particular for attorney providers.[518] To address those concerns, the Final Rule exempts attorney providers from the recordkeeping provision. Most record retention requirements, however, pertain to records customarily kept in the ordinary course of business. This includes copies of contracts and consumer files containing the name and address of the borrower, telephone correspondence and written communications, and materially different versions of sales scripts and related promotional materials. As such, their retention does not constitute a "collection of information," as defined by OMB's regulations that implement the PRA.[519]

In other instances, the Rule requires MARS providers to create as well as retain documents demonstrating their compliance with specific Rule requirements. These include the requirement that providers document the following activities: (1) The mortgage relief obtained by the provider from the lender or servicer before seeking payment from a consumer; (2) monitoring of sales presentations by recording and testing of oral representations if they engage in the telemarketing of their services; (3) establishing a procedure for receiving and responding to consumer complaints; (4) ascertaining, in some instances, the number and nature of consumer complaints; and (5) taking corrective action if sales persons fail to comply with the Rule, including training and disciplining sales persons. To lessen the burden of providers who do not telemarket their services, the Commission streamlined the compliance requirements by limiting the need to record communications to providers who telemarket their services.

C. Estimated Hours Burden and Associated Labor Costs

Commission staff believes that the above noted disclosure and recordkeeping requirements will impact approximately 500 MARS providers. No comments specifically addressed and refuted this estimate nor staff's associated PRA burden assumptions and calculations. Apart from more recent available data to update staff's labor cost estimates, the FTC retains its previously published estimates without modification. The related PRA burden assumptions and calculations follow.

(1) Disclosure Requirements

The Final Rule calls for the disclosure of specific items of information to consumers and adds two additional disclosures for MARS providers. Largely, the content of the disclosures is prescribed. Thus, the PRA burden on providers is greatly reduced.[520] Staff conservatively estimates, however, that the incremental burden to prepare these documents will be approximately 2 hours. Staff assumes that management personnel will implement the disclosure requirements, at an hourly rate of $46.65.[521] Based upon these estimates and assumptions, total labor cost for 500 MARS providers to prepare the required documents is $46,650 (500 providers × 2 hours each × $46.65 per hour).

[514] *See* 44 U.S.C. 3502(3)(A).

[515] *See, e.g.,* NAAG at 4; MA AG at 3; CUUS at 4–5; LOLLAF at 3; CSBS at 2–3; AFSA at 4–5.

[516] *See supra* § III.D.2.

[517] Section 322.4 sets forth the format and content of the notice, which varies depending upon the medium used.

[518] *See supra* § III.H.2 and accompanying text and § III.G.

[519] *See* 5 CFR 1320.3(b)(2).

[520] According to OMB, the public disclosure of information originally supplied by the Federal government to a recipient for the purpose of disclosure to the public is excluded from the definition of a "collection of information." *See* 5 CFR 1320.3(c)(2).

[521] This estimate is based on an averaging of the mean hourly wages for sales and financial managers provided by the Bureau of Labor Statistics. Bur. of Labor Statistics, National Compensation Survey: Occupational Earnings in the United States, 2009, tbl. 3, at 3–1 (2010), *available at http://www.bls.gov/ncs/ncswage2009.htm* ("Occupational Earnings Survey").

(2) Recordkeeping Requirements

As noted above, the Rule contemplates that MARS providers will create and retain records demonstrating their compliance with several obligations set forth in the Rule. Staff estimates that each of the estimated 500 providers will spend approximately 25 hours to institute procedures to monitor sales presentations. Although Commission staff cannot estimate with precision the time required to document compliance with the Rule provisions, it is reasonable to assume that providers will each spend approximately 100 hours to do so. This includes preparing records demonstrating steps taken to seek payment for services performed, handling consumer complaints, and conducting training. Additionally, staff estimates that retention and filing of these records will require approximately 3 hours per year per provider.

Commission staff assumes that management personnel will prepare the required disclosures at an hourly rate of $46.65.[522] Based upon the above estimates and assumptions, the total labor cost to prepare the required documents to demonstrate compliance is $2,915,625 (500 providers × 125 hours each × $46.65 per hour).

Commission staff further assumes that office support file clerks will handle the Rule's record retention requirements at an hourly rate of $13.63.[523] Based upon the above estimates and assumptions, the total labor cost to retain and file documents is $20,445 (500 providers × 3 hours each × $13.63 per hour).

D. Estimated Capital/Other Non-Labor Cost Burden

The Rule should impose no more than minimal non-labor costs. Staff assumes that each of the estimated 500 MARS providers will make required disclosures in writing to approximately 1,000 consumers annually.[524] Under these assumptions, non-labor costs will be limited mostly to printing and distribution costs. At an estimated $1 per disclosure, total non-labor costs would be $1,000 per provider or, cumulatively for all providers, $500,000.

V. Regulatory Analysis and Regulatory Flexibility Act Requirements

The Regulatory Flexibility Act of 1980 ("RFA")[525] requires a description and analysis of proposed and Final Rule that will have a significant economic impact on a substantial number of small entities.[526] The RFA requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA")[527] with the proposed rule and a Final Regulatory Flexibility Analysis ("FRFA")[528] with the Final Rule, if any. The Commission is not required to make such analyses if a Rule would not have such an economic effect.[529]

As of the date of the NPRM, the Commission did not have sufficient empirical data regarding the MARS industry to determine whether the Rule would impact a substantial number of small entities as defined in the RFA. It was also unclear whether the Rule would have a significant economic impact on small entities. Thus, to obtain more information about the impact of the proposed rule on small entities, the Commission decided to publish an IRFA pursuant to the RFA and to request public comment on the impact on small businesses of its proposed amended Rule. In response to questions in the NPRM, the Commission did not receive any comprehensive empirical data regarding the revenues of MARS providers or the impact on small businesses of the Rule.

A. Need for and Objectives of the Rule

The objective of the proposed rule is to curb deceptive and unfair practices occurring in the MARS industry. As described in Sections II and III, above, the Rule is intended to address consumer protection concerns regarding MARS and is based on evidence in the record that deceptive and unfair acts are common in the provision of MARS to consumers.

B. Significant Issues Raised by Public Comment, Summary of the Agency's Assessment of These Issues, and Changes, If Any, Made in Response to Such Comments

As discussed in Section III above, commenters raised concerns about the burden of the proposed rule. One consumer advocacy group stated that the Rule would "not eliminate competition; it will simply get rid of bad actors who take consumers money while failing to deliver results. MARS providers who are engaged in legitimate practices should have no added burden."[530] In contrast, another consumer advocacy group stated that complying with the disclosure and compliance requirements would be "prohibitively expensive" for consumer protection attorneys with small practices and impossible for sole practicioners.[531] However, commenters raised more significant concerns about the potential costs and burdens of the advance fee ban, as discussed in Sections III.E.1.b. Several small firms and sole practitioners owned by attorneys asserted that they would go out of business if the Commission imposed an advance fee ban.[532] Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms. Rather, they argued that the costs to be borne by all firms—including small firms—would be excessive.

The Commission concludes that the Final Rule's modifications to the recordkeeping and compliance requirements and the advance fee ban reduce the economic impact of compliance on all MARS providers, including small businesses. For example, attorney providers who meet certain conditions are exempt from the recordkeeping and compliance requirements and only providers who engage in telemarketing must comply with the telephone call taping requirement. Moreover, the Final Rule permits attorney providers who are exempt to receive payments from a client trust account, provided certain conditions are met.

As noted above, the Rule will prevent unfair and deceptive conduct by MARS providers through a combination of conduct prohibitions, disclosures, affirmative compliance obligations, and recordkeeping provisions. As discussed in detail in the NPRM, the Rule's reach is limited. First, the Rule will only cover entities that are within the FTC's jurisdiction under the FTC Act. The FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's jurisdiction. Further, the definition of "mortgage assistance relief service provider" is limited to third parties offering for-fee services and does not extend to free services provided by lenders or mortgage servicers and their agents. In addition, the Rule would give attorney providers who meet certain conditions with a limited exemption from the advance fee ban, as well as

[522] *Id.*

[523] This estimate is based on mean hourly wages for office file clerks found at Occupational Earnings Survey, *supra* note 521, tbl. 3, at 3–23.

[524] Associated costs would be reduced if the disclosures are made electronically.

[525] 5 U.S.C. 601–612.

[526] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small-business concern" as a business that is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. 632(a)(1).

[527] 5 U.S.C. 603.

[528] 5 U.S.C. 604.

[529] 5 U.S.C. 605.

[530] CUUS at 9–10.

[531] NCLC at 4. The commenter does not indicate how many attorney MARS providers are small business or solo practitioners.

[532] *See, e.g.,* SJMA at 2; Rogers at 1; GLS at 1; LCL at 8; Holler at 1.

with an exemption from the conduct prohibitions, disclosures, substantial assistance or support prohibition, and recordkeeping and compliance provisions of the Rule.

C. Description and Estimate of the Number of Small Entities Subject to the Final Rule or Explanation Why No Estimate Is Available

The Rule will apply to MARS providers. Based upon its knowledge of the industry, the Commission believes that a variety of individuals and companies provide or purport to provide such services, including telemarketers, mortgage brokers, lead generators, payment processors, contractors that provide back-room services, and attorneys.

Comments in response to the NPRM suggest that the number of MARS providers purporting to assist distressed homeowners is growing in response to the crisis in the home mortgage industry, but do not offer empirical data on the number of such entities.[533] The available data suggest that there are a few hundred such providers. For example, FTC staff sent warning letters to 71 MARS providers in the course of its investigation of the industry. In its comments to the ANPR, NAAG stated that its members have investigated 450 companies and brought suits against 130 under state law.[534] Accordingly, Commission staff has taken a conservative approach and estimates that there are approximately 500 MARS providers. Determining a precise estimate of how many of these are small entities, or describing those entities further, is not readily feasible because the staff is not aware of published data that reports annual revenue figures for MARS providers.[535] Further, the Commission's requests for information about the number and size of MARS providers yielded virtually no information. Based on the absence of available data, the Commission believes that a precise estimate of the number of small entities that fall under the Rule is not currently feasible.

D. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Rule and the Type of Professional Skills That Will Be Necessary to Comply

The Final Rule sets forth specific recordkeeping requirements to ensure efficient and effective law enforcement, to identify individual wrongdoers, and to identify potential injured consumers. In large measure, the recordkeeping provisions require MARS providers to retain documents—consumer files and documentation of consumer transactions—that are kept in the ordinary course of business. Other recordkeeping requirements would ensure covered entities can demonstrate compliance with specific Rule provisions, which are discussed below.

The Rule has three other kinds of compliance requirements: (1) Prohibited acts and practices that are deceptive or unfair; (2) disclosures to ensure that consumers receive the truthful and accurate information they need to make an informed decision whether to purchase MARS; and (3) compliance obligations to monitor sales promotions and consumer complaints. As discussed above, these requirements are necessary to prevent unfair or deceptive acts and practices, to ensure compliance with the Rule, and to achieve effective law enforcement.

The classes of small entities, if any, covered by the rule have been discussed in the preceding section of this analysis.[536] The professional or other skills necessary for compliance with the Rule are discussed in the Paperwork Reduction Act analysis elsewhere in this document.[537]

E. Steps the Agency Has Taken To Minimize Any Significant Economic Impact on Small Entities, Consistent With the Stated Objectives of the Applicable Statutes

As previously noted, the Final Rule is intended to prevent deceptive and unfair acts and practices in the MARS industry. In drafting the Rule, the Commission has made every effort to avoid unduly burdensome requirements for entities. The Commission believes that the Rule—including the conduct prohibitions, disclosures, advance fee ban, affirmative compliance obligations and recordkeeping provisions—are necessary in order to protect consumers considering the purchase of MARS. For each of these provisions, the Commission has attempted to tailor the provision to the concerns evidenced by the record to date. For example, to reduce the burden on business, including small entities, the Commission limited the compliance requirement to record telephone calls to MARS providers who telemarket. On balance, the Commission believes that the benefits to consumers of each of the Rule's requirements outweighs the costs to industry of implementation.

The Commission considered, but decided against, providing an exemption for small entities in the Rule. The protections afforded to consumers are equally important regardless of the size of the MARS provider with whom they transact. Indeed, small MARS providers have no unique attributes that would warrant exempting them from provisions, such as the required disclosures or conduct prohibitions. The information provided in the disclosures is material to the consumer regardless of the size of the entity offering the services. Similarly, the protections afforded to consumers by the advance fee ban are equally necessary regardless of the size of the entity providing the services. Thus, the Commission believes that creating an exemption for small businesses from compliance with the Rule would be contrary to the goals of the Rule because it would arbitrarily limit its reach to the detriment of consumers.

Nonetheless, the Commission has taken care in developing the Rule to set performance standards, which establish the objective results that must be achieved by regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the Rule must be kept. Moreover, the Rule's disclosure requirements are format-neutral; they would not preclude the use of electronic methods that might reduce compliance burdens. In sum, the agency has worked to minimize any significant economic impact on small entities.

[533] *See, e.g.,* MN AG at 1; CRL at 2–3; CUUS at 2.

[534] NAAG (ANPR) at 4.

[535] Covered entities under the proposed rule are classified as small businesses under the Small Business Size Standards component of the North American Industry Classification System ("NAICS") as follows: All Other Professional, Scientific and Technical Services (NAICS code 541990) with no more than $7.0 million dollars in average annual receipts (no employee size limit is listed). *See* SBA, Table of Small Business Size Standards Matched to North American Industry Classification System codes (Aug. 22, 2008), *available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[536] *See supra* § V.C.

[537] *See supra* § IV.

LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS

Short-name/Acronym	Commenter
1st ALC	1st American Law Center, Inc.
ABA	American Bar Association
Am. Bankers Assoc.	American Bankers Association
AFSA	American Financial Services Association
ALMSC	American Loss Mitigation Solutions Corp.
ARS	ARS Financial Group (Rob Peters)
Baker	David Baker, Esq.
Baughman	Derek Baughman
Carr	Christopher C. Carr, Esq.
Casey	Catherine Casey
CRC	California Reinvestment Coalition, et al.
CRL	Center for Responsible Lending
CMC	Consumer Mortgage Coalition
CUUS	Consumers Union of United States, Inc.
CSBS	Conference of State Bank Supervisors
CUNA	Credit Union National Association
Chase	Chase Home Finance, LLC
Chucales	Nick Chucales
CJI	Civil Justice, Inc. (Phillip Robinson)
Dargon	Dargon Law Firm PLLC
Davidson	[Unidentified] Davidson
E. Davidson	EDLAW (Edward Davidson)
Deal	James Robert Deal, Esq.
Dix	Chris Dix
FL Bar	The Florida Bar
Francis	Crystal Francis
Franzen	Terry Franzen and Michael Pierce
GLS	Gabel Legal Services, L.L.C. (John Gabel)
Giles	Geoffrey Lynn Giles
GA	Bar Georgia State Bar
Goldberg	[Unidentified] Goldberg
Greenfield	Julia Leah Greenfield, Esq.
Gutner	John Gutner
HPC	Housing Policy Counsel
Hirsch	Ian Hirsch
Holler	George Holler
Hunter	Josiah Hunter
IL AG	Illinois Office of the Attorney General
IL RELA	Illinois Real Estate Lawyers Association
IL BA	Illinois State Bar Association
Lawson	Carol Lawson
Lawyer's Committee	The Lawyers Committee for Civil Rights Under Law
LAF	The Legal Assistance Foundation of Metropolitan Chicago
Legalprise	Legalprise, Inc.
LCL	Liberty Credit Law (H. Bruce Bronson, Jr.)
LOLLAF	Land of Lincoln Legal Assistance Foundation, Inc.
LFSV	Law Foundation of Silicon Valley
ME BA	Maine State Bar Association
MA AG	Massachusetts Office of the Attorney General
Matejcek	Karen Matejcek
McLaughlin	Heidi McLaughlin
Metropolis	Metropolis Loans (Camerin Hawthorne)
MBA	Mortgage Bankers Association
MI Bar	Michigan State Bar
MN AG	Office of the Minnesota Attorney General
MO Bar	The Missouri Bar
NAAG	National Association of Attorneys General
NAR	National Association of Relators
NCRC	National Community Reinvestment Coalition
NCLC	National Consumer Law Center, et al.
NCLR	National Council of La Raza
NV DML	Nevada Division of Mortgage Lending
NYC DCA	New York City Department of Consumer Affairs
OTS	Office of Thrift Supervision
OH AG	Ohio Attorney General
OPLC	Ohio Poverty Law Center
OR Bar	Oregon State Bar
Parkey	Aaron Parkey
Peters	Michele Peters
RMI	Rate Modifications, Inc. (David Deal)
Rodriguez	Jesse Rodriguez
Rogers	The Rogers Law Group (Rick Rogers)

LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS—Continued

Short-name/Acronym	Commenter
SJMA	S.J. Mobley & Associates, LLC (Sara Mobley)
Schertzing	Eric Schertzing, Treasurer, Ingham County, MI
Seise	Char Seise
Shriver	Sargent Shriver National Center on Poverty Law
Shaw	Ann Shaw, Esq.
Smith	Stewart Smith
Sygit	Drew Sygit
TNLMA	The National Loss Mitigation Association
USHLA	US Home Loan Advocates
USHS	U.S. HomeSupport (Thomas Kim)
Wallace	Lawrence Wallace
WMC	Westside Ministers Coalition
WI Bar	Wisconsin State Bar

List of FTC MARS Law Enforcement Actions

• *FTC* v. *Residential Relief Found., Inc.,* No. 1:10-cv-3214–JFM (D. Md. filed Nov. 15, 2010)

• *FTC* v. *U.S. Homeowners Relief, Inc.,* No. SA–CV–10–1452 JST (PJWx) (C. D. Cal. filed Sept. 27, 2010)

• *FTC* v. *Nat'l Hometeam Solutions, LLC,* No. 4:08-cv-067 (E.D. Tex. filed Aug. 30, 2010) (contempt action)

• *FTC* v. *Dominant Leads, LLC,* No. 1:10-cv-00997–PLF (D. D.C filed June 15, 2010)

• *FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322 (S.D. Fla. filed Nov. 18, 2009)

• *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009)

• *FTC* v. *Debt Advocacy Ctr, LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009)

• *FTC* v. *Kirkland Young, LLC,* No. 09–23507 (S.D. Fla. filed Nov. 18, 2009)

• *FTC* v. *1st Guar. Mortgage Corp.,* No. 09–CV–61840 (S.D. Fla. filed Nov. 17, 2009)

• *FTC* v. *Washington Data Res., Inc.,* No. 8:09-cv-02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009)

• *FTC* v. *Fed. Housing Modification Dep't, Inc,* No. 09–CV–01753 (D.D.C. filed Sept. 16, 2009)

• *FTC* v. *Infinity Group Servs.,* No. SACV09–00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009)

• *FTC* v. *United Credit Adjusters, Inc.,* No. 3:09-cv-00798 (JAP) (D.N.J., Amend. Compl. filed Aug. 4, 2009)

• *FTC* v. *Apply2Save, Inc.,* No. 2:09-cv-00345–EJL–CWD (D. Idaho filed July 14, 2009)

• *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009)

• *FTC* v. *Cantkier,* No. 1:09-cv-00894 (D.D.C., Amend. Compl. filed June 18, 2009)

• *FTC* v. *LucasLawCenter "Inc.",* No. SACV09–770 DOC (ANX) (C.D. Cal. filed July 7, 2009)

• *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009)

• *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09-cv-01167–FJM (D. Ariz. filed June 1, 2009)

• *FTC* v. *Data Med. Capital, Inc.,* No. SACV–99–1266 AHS (Eex) (C.D. Cal., App. Contempt filed May 27, 2009)

• *FTC* v. *Dinamica Financiera LLC,* No. 09–CV–03554 CAS PJWx (C.D. Cal. filed May 19, 2009)

• *FTC* v. *Fed. Loan Modification Law Ctr., LLP*, No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009)

• *FTC* v. *Ryan,* No. 1:09–00535 (HHK) (D.D.C., Amend. Compl. filed Mar. 25, 2009)

• *FTC* v. *Home Assure, LLC,* No. 8:09–CV–00547–T–23T–Sm (M.D. Fla. filed Mar. 24, 2009)

• *FTC* v. *New Hope Prop. LLC,* No. 1:09-cv-01203–JBS–JS (D.N.J. filed Mar. 17, 2009)

• *FTC* v. *Hope Now Modifications, LLC,* No. 1:09-cv-01204–JBS–JS (D.N.J. filed Mar. 17, 2009)

• *FTC* v. *Nat'l Foreclosure Relief, Inc.,* No. SACV09–117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009)

• *FTC* v. *United Home Savers, LLP,* No. 8:08-cv-01735–VMC–TBM (M.D. Fla. filed Sept. 3, 2008)

• *FTC* v. *Foreclosure Solutions, LLC,* No. 1:08-cv-01075 (N.D. Ohio filed Apr. 28, 2008)

• *FTC* v. *Mortgage Foreclosure Solutions, Inc.,* No. 8:08-cv-388–T–23EAJ (M.D. Fla. filed Feb. 26, 2008)

• *FTC* v. *Nat'l Hometeam Solutions, LLC.,* No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008)

• *FTC* v. *Safe Harbour Found. of Florida, Inc.,* No. 08–C–1185 (N.D. Ill. filed Feb. 27, 2008).

VI. Final Rule

List of Subjects in 16 CFR Part 322

Consumer protection, Trade practices, Telemarketing.

■ For the reasons set forth in the preamble, the Federal Trade Commission amends title 16, Code of Federal Regulations, by adding a new part 322, to read as follows:

PART 322—MORTGAGE ASSISTANCE RELIEF SERVICES

Sec.

322.1 Scope of regulations in this part.
322.2 Definitions.
322.3 Prohibited representations.
322.4 Disclosures required in commercial communications.
322.5 Prohibition on collection of advance payments and related disclosures.
322.6 Assisting and facilitating.
322.7 Exemptions.
322.8 Waiver not permitted.
322.9 Recordkeeping and compliance requirements.
322.10 Actions by states.
322.11 Severability.

Authority: Public Law 111–8, section 626, 123 Stat. 524, as amended by Public Law 111–24, section 511, 123 Stat. 1734.

§ 322.1 Scope of regulations in this part.

This part implements the 2009 Omnibus Appropriations Act, Public Law 111–8, section 626, 123 Stat. 524 (Mar. 11, 2009), as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111–24, section 511, 123 Stat. 1734 (May 22, 2009).

§ 322.2 Definitions.

For the purposes of this part:

(a) "Clear and prominent" means:

(1) In textual communications, the required disclosures shall be easily readable; in a high degree of contrast from the immediate background on which it appears; in the same languages that are substantially used in the commercial communication; in a format

so that the disclosure is distinct from other text, such as inside a border; in a distinct type style, such as bold; parallel to the base of the commercial communication, and, except as otherwise provided in this rule, each letter of the disclosure shall be, at a minimum, the larger of 12-point type or one-half the size of the largest letter or numeral used in the name of the advertised website or telephone number to which consumers are referred to receive information relating to any mortgage assistance relief service. Textual communications include any communications in a written or printed form such as print publications or words displayed on the screen of a computer;

(2) In communications disseminated orally or through audible means, such as radio or streaming audio, the required disclosures shall be delivered in a slow and deliberate manner and in a reasonably understandable volume and pitch;

(3) In communications disseminated through video means, such as television or streaming video, the required disclosures shall appear simultaneously in the audio and visual parts of the commercial communication and be delivered in a manner consistent with paragraphs (a)(1) and (2) of this section. The visual disclosure shall be at least four percent of the vertical picture or screen height and appear for the duration of the oral disclosure;

(4) In communications made through interactive media, such as the Internet, online services, and software, the required disclosures shall:

(i) Be consistent with paragraphs (a)(1) through (3) of this section;

(ii) Be made on, or immediately prior to, the page on which the consumer takes any action to incur any financial obligation;

(iii) Be unavoidable, *i.e.*, visible to consumers without requiring them to scroll down a webpage; and

(iv) Appear in type at least the same size as the largest character of the advertisement;

(5) In all instances, the required disclosures shall be presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them; and

(6) For program-length television, radio, or Internet-based multi-media commercial communications, the required disclosures shall be made at the beginning, near the middle, and at the end of the commercial communication.

(b) "Client trust account" means a separate account created by a licensed attorney for the purpose of holding client funds, which is:

(1) Maintained in compliance with all applicable state laws and regulations, including licensing regulations; and

(2) Located in the state where the attorney's office is located, or elsewhere in the United States with the consent of the consumer on whose behalf the funds are held.

(c) "Commercial communication" means any written or oral statement, illustration, or depiction, whether in English or any other language, that is designed to effect a sale or create interest in purchasing any service, plan, or program, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, onhold script, upsell script, training materials provided to telemarketing firms, program-length commercial ("infomercial"), the Internet, cellular network, or any other medium. Promotional materials and items and Web pages are included in the term "commercial communication."

(1) "General Commercial Communication" means a commercial communication that occurs prior to the consumer agreeing to permit the provider to seek offers of mortgage assistance relief on behalf of the consumer, or otherwise agreeing to use the mortgage assistance relief service, and that is not directed at a specific consumer.

(2) "Consumer-Specific Commercial Communication" means a commercial communication that occurs prior to the consumer agreeing to permit the provider to seek offers of mortgage assistance relief on behalf of the consumer, or otherwise agreeing to use the mortgage assistance relief service, and that is directed at a specific consumer.

(d) "Consumer" means any natural person who is obligated under any loan secured by a dwelling.

(e) "Dwelling" means a residential structure containing four or fewer units, whether or not that structure is attached to real property, that is primarily for personal, family, or household purposes. The term includes any of the following if used as a residence: an individual condominium unit, cooperative unit, mobile home, manufactured home, or trailer.

(f) "Dwelling loan" means any loan secured by a dwelling, and any associated deed of trust or mortgage.

(g) "Dwelling Loan Holder" means any individual or entity who holds the dwelling loan that is the subject of the offer to provide mortgage assistance relief services.

(h) "Material" means likely to affect a consumer's choice of, or conduct regarding, any mortgage assistance relief service.

(i) "Mortgage Assistance Relief Service" means any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of the following:

(1) Stopping, preventing, or postponing any mortgage or deed of trust foreclosure sale for the consumer's dwelling, any repossession of the consumer's dwelling, or otherwise saving the consumer's dwelling from foreclosure or repossession;

(2) Negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;

(3) Obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;

(4) Negotiating, obtaining, or arranging any extension of the period of time within which the consumer may:

(i) Cure his or her default on a dwelling loan,

(ii) Reinstate his or her dwelling loan,

(iii) Redeem a dwelling, or

(iv) Exercise any right to reinstate a dwelling loan or redeem a dwelling;

(5) Obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling; or

(6) Negotiating, obtaining or arranging:

(i) A short sale of a dwelling,

(ii) A deed-in-lieu of foreclosure, or

(iii) Any other disposition of a dwelling other than a sale to a third party who is not the dwelling loan holder.

(j) "Mortgage Assistance Relief Service Provider" or "Provider" means any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service. This term does not include:

(1) The dwelling loan holder, or any agent or contractor of such individual or entity.

(2) The servicer of a dwelling loan, or any agent or contractor of such individual or entity.

(k) "Person" means any individual, group, unincorporated association,

limited or general partnership, corporation, or other business entity, except to the extent that any person is specifically excluded from the Federal Trade Commission's jurisdiction pursuant to 15 U.S.C. 44 and 45(a)(2).

(l) "Servicer" means the individual or entity responsible for:

(1) Receiving any scheduled periodic payments from a consumer pursuant to the terms of the dwelling loan that is the subject of the offer to provide mortgage assistance relief services, including amounts for escrow accounts under section 10 of the Real Estate Settlement Procedures Act (12 U.S.C. 2609); and

(2) Making the payments of principal and interest and such other payments with respect to the amounts received from the consumer as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract.

(m) "Telemarketing" means a plan, program, or campaign which is conducted to induce the purchase of any service, by use of one or more telephones and which involves more than one interstate telephone call.

§ 322.3 Prohibited representations.

It is a violation of this rule for any mortgage assistance relief service provider to engage in the following conduct:

(a) Representing, expressly or by implication, in connection with the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, that a consumer cannot or should not contact or communicate with his or her lender or servicer.

(b) Misrepresenting, expressly or by implication, any material aspect of any mortgage assistance relief service, including but not limited to:

(1) The likelihood of negotiating, obtaining, or arranging any represented service or result, such as those set forth in § 322.2(i);

(2) The amount of time it will take the mortgage assistance relief service provider to accomplish any represented service or result, such as those set forth in § 322.2(i);

(3) That a mortgage assistance relief service is affiliated with, endorsed or approved by, or otherwise associated with:

(i) The United States government,

(ii) Any governmental homeowner assistance plan,

(iii) Any Federal, State, or local government agency, unit, or department,

(iv) Any nonprofit housing counselor agency or program,

(v) The maker, holder, or servicer of the consumer's dwelling loan, or

(vi) Any other individual, entity, or program;

(4) The consumer's obligation to make scheduled periodic payments or any other payments pursuant to the terms of the consumer's dwelling loan;

(5) The terms or conditions of the consumer's dwelling loan, including but not limited to the amount of debt owed;

(6) The terms or conditions of any refund, cancellation, exchange, or repurchase policy for a mortgage assistance relief service, including but not limited to the likelihood of obtaining a full or partial refund, or the circumstances in which a full or partial refund will be granted, for a mortgage assistance relief service;

(7) That the mortgage assistance relief service provider has completed the represented services or has a right to claim, demand, charge, collect, or receive payment or other consideration;

(8) That the consumer will receive legal representation;

(9) The availability, performance, cost, or characteristics of any alternative to for-profit mortgage assistance relief services through which the consumer can obtain mortgage assistance relief, including negotiating directly with the dwelling loan holder or servicer, or using any nonprofit housing counselor agency or program;

(10) The amount of money or the percentage of the debt amount that a consumer may save by using the mortgage assistance relief service;

(11) The total cost to purchase the mortgage assistance relief service; or

(12) The terms, conditions, or limitations of any offer of mortgage assistance relief the provider obtains from the consumer's dwelling loan holder or servicer, including the time period in which the consumer must decide to accept the offer;

(c) Making a representation, expressly or by implication, about the benefits, performance, or efficacy of any mortgage assistance relief service unless, at the time such representation is made, the provider possesses and relies upon competent and reliable evidence that substantiates that the representation is true. For the purposes of this paragraph, "competent and reliable evidence" means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by individuals qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

§ 322.4 Disclosures required in commercial communications.

It is a violation of this rule for any mortgage assistance relief service provider to engage in the following conduct:

(a) *Disclosures in All General Commercial Communications*—Failing to place the following statements in every general commercial communication for any mortgage assistance relief service:

(1) "(Name of company) is not associated with the government, and our service is not approved by the government or your lender."

(2) In cases where the mortgage assistance relief service provider has represented, expressly or by implication, that consumers will receive any service or result set forth in § 322.2(i)(2) through (6), "Even if you accept this offer and use our service, your lender may not agree to change your loan."

(3) The disclosures required by this paragraph must be made in a clear and prominent manner, and—

(i) In textual communications the disclosures must appear together and be preceded by the heading "IMPORTANT NOTICE," which must be in bold face font that is two point-type larger than the font size of the required disclosures; and

(ii) In communications disseminated orally or through audible means, wholly or in part, the audio component of the required disclosures must be preceded by the statement "Before using this service, consider the following information."

(b) *Disclosures in All Consumer-Specific Commercial Communications*—Failing to disclose the following information in every consumer-specific commercial communication for any mortgage assistance relief service:

(1) "You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (insert amount or method for calculating the amount) for our services." For the purposes of this paragraph, the amount "you will have to pay" shall consist of the total amount the consumer must pay to purchase, receive, and use all of the mortgage assistance relief services that are the subject of the sales offer, including, but not limited to, all fees and charges.

(2) "(Name of company) is not associated with the government, and our service is not approved by the government or your lender."

(3) In cases where the mortgage assistance relief service provider has represented, expressly or by implication, that consumers will receive any service or result set forth in § 322.2(i)(2) through (6), "Even if you accept this offer and use our service, your lender may not agree to change your loan."

(4) The disclosures required by this paragraph must be made in a clear and prominent manner, and—

(i) In textual communications the disclosures must appear together and be preceded by the heading "IMPORTANT NOTICE," which must be in bold face font that is two point-type larger than the font size of the required disclosures; and

(ii) In communications disseminated orally or through audible means, wholly or in part, the audio component of the required disclosures must be preceded by the statement "Before using this service, consider the following information" and, in telephone communications, must be made at the beginning of the call.

(c) *Disclosures in All General Commercial Communications, Consumer-Specific Commercial Communications, and Other Communications*—In cases where the mortgage assistance relief service provider has represented, expressly or by implication, in connection with the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, that the consumer should temporarily or permanently discontinue payments, in whole or in part, on a dwelling loan, failing to disclose, clearly and prominently, and in close proximity to any such representation that "If you stop paying your mortgage, you could lose your home and damage your credit rating."

§ 322.5 Prohibition on collection of advance payments and related disclosures.

It is a violation of this rule for any mortgage assistance relief service provider to:

(a) Request or receive payment of any fee or other consideration until the consumer has executed a written agreement between the consumer and the consumer's dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer;

(b) Fail to disclose, at the time the mortgage assistance relief service provider furnishes the consumer with the written agreement specified in paragraph (a) of this section, the following information: "This is an offer of mortgage assistance we obtained from your lender [or servicer]. You may accept or reject the offer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [same amount as disclosed pursuant to § 322.4(b)(1)] for our services." The disclosure required by this paragraph must be made in a clear and prominent manner, on a separate written page, and preceded by the heading: "IMPORTANT NOTICE: Before buying this service, consider the following information." The heading must be in bold face font that is two point-type larger than the font size of the required disclosure; or

(c)(1) Fail to provide, at the time the mortgage assistance relief service provider furnishes the consumer with the written agreement specified in paragraph (a) of this section, a notice from the consumer's dwelling loan holder or servicer that describes all material differences between the terms, conditions, and limitations associated with the consumer's current mortgage loan and the terms, conditions, and limitations associated with the consumer's mortgage loan if he or she accepts the dwelling loan holder's or servicer's offer, including but not limited to differences in the loan's:

(i) Principal balance;

(ii) Contract interest rate, including the maximum rate and any adjustable rates, if applicable;

(iii) Amount and number of the consumer's scheduled periodic payments on the loan;

(iv) Monthly amounts owed for principal, interest, taxes, and any mortgage insurance on the loan;

(v) Amount of any delinquent payments owing or outstanding;

(vi) Assessed fees or penalties; and

(vii) Term

(2) The notice must be made in a clear and prominent manner, on a separate written page, and preceded by heading: "IMPORTANT INFORMATION FROM YOUR [name of lender or servicer] ABOUT THIS OFFER." The heading must be in bold face font that is two-point-type larger than the font size of the required disclosure.

(d) Fail to disclose in the notice specified in paragraph (c) of this section, in cases where the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer is a trial mortgage loan modification, the terms, conditions, and limitations of this offer, including but not limited to:

(1) The fact that the consumer may not qualify for a permanent mortgage loan modification; and

(2) The likely amount of the scheduled periodic payments and any arrears, payments, or fees that the consumer would owe in failing to qualify.

§ 322.6 Assisting and facilitating.

It is a violation of this rule for a person to provide substantial assistance or support to any mortgage assistance relief service provider when that person knows or consciously avoids knowing that the provider is engaged in any act or practice that violates this rule.

§ 322.7 Exemptions.

(a) An attorney is exempt from this part, with the exception of § 322.5, if the attorney:

(1) Provides mortgage assistance relief services as part of the practice of law;

(2) Is licensed to practice law in the state in which the consumer for whom the attorney is providing mortgage assistance relief services resides or in which the consumer's dwelling is located; and

(3) Complies with state laws and regulations that cover the same type of conduct the rule requires.

(b) An attorney who is exempt pursuant to paragraph (a) of this section is also exempt from § 322.5 if the attorney:

(1) Deposits any funds received from the consumer prior to performing legal services in a client trust account; and

(2) Complies with all state laws and regulations, including licensing regulations, applicable to client trust accounts.

§ 322.8 Waiver not permitted.

It is a violation of this rule for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this rule.

§ 322.9 Recordkeeping and compliance requirements.

(a) Any mortgage assistance relief provider must keep, for a period of twenty-four (24) months from the date the record is created, the following records:

(1) All contracts or other agreements between the provider and any consumer for any mortgage assistance relief service;

(2) Copies of all written communications between the provider and any consumer occurring prior to the date on which the consumer entered into an agreement with the provider for any mortgage assistance relief service;

(3) Copies of all documents or telephone recordings created in connection with compliance with paragraph (b) of this section;

(4) All consumer files containing the names, phone numbers, dollar amounts paid, and descriptions of mortgage assistance relief services purchased, to the extent the mortgage assistance relief service provider keeps such information in the ordinary course of business;

(5) Copies of all materially different sales scripts, training materials, commercial communications, or other marketing materials, including websites and weblogs, for any mortgage assistance relief service; and

(6) Copies of the documentation provided to the consumer as specified in § 322.5 of this rule;

(b) A mortgage assistance relief service provider also must:

(1) Take reasonable steps sufficient to monitor and ensure that all employees and independent contractors comply with this rule. Such steps shall include the monitoring of communications directed at specific consumers, and shall also include, at a minimum, the following:

(i) If the mortgage assistance relief service provider is engaged in the telemarketing of mortgage assistance relief services, performing random, blind recording and testing of the oral representations made by individuals engaged in sales or other customer service functions;

(ii) Establishing a procedure for receiving and responding to all consumer complaints; and

(iii) Ascertaining the number and nature of consumer complaints regarding transactions in which all employees and independent contractors are involved;

(2) Investigate promptly and fully each consumer complaint received;

(3) Take corrective action with respect to any employee or contractor whom the mortgage assistance relief service provider determines is not complying with this rule, which may include training, disciplining, or terminating such individual; and

(4) Maintain any information and material necessary to demonstrate its compliance with paragraphs (b)(1) through (3) of this section.

(c) A mortgage assistance relief provider may keep the records required by § 322.10(a) through this section in any form, and in the same manner, format, or place as it keeps such records in the ordinary course of business.

(d) It is a violation of this rule for a mortgage assistance relief service provider not to comply with this section.

§ 322.10 Actions by states.

Any attorney general or other officer of a state authorized by the state to bring an action under this part may do so pursuant to Section 626(b) of the 2009 Omnibus Appropriations Act, Public Law 111–8, section 626, 123 Stat. 524 (Mar. 11, 2009), as amended by Public Law 111–24, section 511, 123 Stat. 1734 (May 22, 2009).

§ 322.11 Severability.

The provisions of this rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,

Secretary.

The following statement will not appear in the Code of Federal Regulations.

Statement of Commissioner J. Thomas Rosch

Mortgage Assistance Relief Services Rule, File No. R911003

I support the Commission's adoption today of the final Mortgage Relief Services Rule ("MARS Rule") and its accompanying Statement of Basis and Purpose. I write this separate statement to explain my decision to vote in favor of the MARS Rule in light of my dissenting vote against the issuance of the debt relief services amendments to the Telemarketing Sales Rule ("the TSR").[1]

Although I had concerns about certain aspects of the record in the TSR rulemaking proceeding relating to the need for an advance fee ban, I believe that the record in the MARS rulemaking proceeding supports a ban. In coming to this conclusion, I draw two distinctions. First, the business model for the provision of mortgage assistance relief services differs from debt relief services in that it does not require consumer participation in order to achieve a successful result. Rather, the likelihood of attaining a particular, promised result rests solely on the MARS provider's own efforts. Second, the length of time it takes to attain a mortgage assistance relief result (and hence the duration of the advance fee ban) is much shorter than the time it typically takes to obtain settlements of a consumer's debts.

[FR Doc. 2010–29694 Filed 11–30–10; 8:45 am]

BILLING CODE 6750–01–P

[1] My opinion as to the record in the debt relief services TSR rulemaking proceeding is limited to that rulemaking proceeding alone. Any individual case, alleging either violations of Section 5 or violations of the debt relief services amendments to the TSR, would have to be judged on the particular facts of that case.

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S. 3774/P.L. 111–285
To extend the deadline for Social Services Block Grant expenditures of supplemental funds appropriated following disasters occurring in 2008. (Nov. 24, 2010; 124 Stat. 3054)

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When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

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