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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 213

RIN 3206–AJ70

Excepted Service—Temporary Organizations

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final regulation amending the Governmentwide excepted service Schedule A authority for temporary organizations. This regulation revises the definition of the term ''temporary organization'' to comply with legislation. It also establishes criteria with which temporary organizations must comply if they wish to extend an employee's appointment.

DATES: Effective March 24, 2006.

FOR FURTHER INFORMATION CONTACT: Sharon K. Ginley at (202) 606–0960, FAX at (202) 606–2329, TDD at (202) 418–3134, or e-mail at *sharon.ginley@opm.gov.*

SUPPLEMENTARY INFORMATION: The Office of Personnel Management issued an interim regulation (68 FR 24605, May 8, 2003) to implement changes to the current Governmentwide excepted service Schedule A authority for temporary organizations. The interim regulation reflected the addition of a new subchapter IV to chapter 31 of title 5, United States Code. The new subchapter defined the term ''temporary organization''; permitted the head of a temporary organization to make excepted service appointments of up to 3 years to fill positions in these organizations; permitted appointment extensions for no more than 2 years; and gave return rights to those who transfer or convert (with agency head approval) to these appointments from career or career-conditional appointments if certain conditions are met.

We received comments from two agencies supporting the change. One agency suggested adding information to 5 CFR part 352, to include reemployment rights for those in temporary organizations. Although we appreciate the value of making our regulations as comprehensive as possible, we note that the statutory provision regarding return rights at 5 U.S.C. 3161(g) is specific and clear, and we encourage individuals with questions about this topic to consult this provision for guidance. We are adopting the interim regulation as final with no change.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because the regulations pertain only to Federal employees and agencies.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 213

Government employees, Reporting and recordkeeping requirements.

Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, OPM is adopting the interim regulations (68 FR 24605) amending 5 CFR part 213, published on May 8, 2003 as final with no change.

[FR Doc. 06–1607 Filed 2–21–06; 8:45 am]

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AK64

Prevailing Rate Systems; Environmental Differential Pay for Asbestos Exposure

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing a final rule to implement a statutory change that requires the use of the Occupational Safety and Health Administration permissible exposure limit standard for concentrations of airborne asbestos fibers for an environmental differential pay category that covers Federal prevailing rate (wage) employees.

DATES: The final rule is effective on February 22, 2006.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov;* or FAX: (202) 606–4264.

SUPPLEMENTARY INFORMATION: On April 27, 2005, the Office of Personnel Management (OPM) published an interim rule (70 FR 21613) to incorporate the Occupational Safety and Health Administration (OSHA) permissible exposure limit (PEL) standard for concentrations of airborne asbestos in the Federal Wage System (FWS) environmental differential pay (EDP) category for asbestos, as required by section 1122 of the National Defense Authorization Act for 2004 (Pub. L. 108–136, November 24, 2003). The interim rule revised the asbestos category in appendix A to subpart E of 5 CFR part 532 to implement section 1122 for prevailing rate employees and required Federal agencies to apply occupational safety and health standards consistent with the OSHA PEL standard for asbestos. The 60-day comment period ended on June 27, 2005. OPM received comments from an agency, a labor organization, and an institute dedicated to occupational and environmental health research.

The labor organization and the institute objected to the use of the OSHA PEL standard to determine an employee's pay entitlement under the FWS EDP asbestos category. The labor organization stated that it is a well-documented, scientific fact that no exposure to airborne asbestos fibers is safe. The institute asserted that there is a preponderance of data indicating that there is no threshold below which there is no risk of exposure to asbestos, and only the constraints of what OSHA considers feasible in terms of monitoring and abatement prevents OSHA from setting a lower PEL for asbestos exposure. The institute expressed the belief that exposure to asbestos at any level is hazardous.

OPM agrees that exposure to airborne concentrations of asbestos fibers is hazardous; consequently, OPM's paramount concern is the protection of employees from the hazards of exposure to airborne asbestos. Under OPM's Operating Manual for administering the FWS, Federal agencies must take positive action to eliminate danger and risks that contribute to or cause hazards for which EDP categories are established. The existence of EDP categories is not intended to condone work practices that circumvent Federal safety laws, rules, and regulations.

OSHA, the Federal agency responsible for establishing regulatory standards concerning hazards in the workplace, last reduced the PEL for airborne concentrations of asbestos fibers in 1994. The current OSHA PEL for asbestos is 0.1 fibers per cubic centimeter (0.1f/cc) of air, determined as an 8-hour time-weighted average. OPM's interim regulations amended the asbestos category in for EDP to comply with section 1122, which amended section 5 U.S.C. 5343(c)(4) by adding ''and for any hardship or hazard related to asbestos, such differentials shall be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970.''

OPM remains committed to protecting the health and safety of the Federal workforce. OPM's regulation is a tool for determining EDP entitlement only and does not relieve agencies of their responsibility to create and maintain safe and healthful workplaces. Employees whose assigned work is not directly connected with the risk of exposure, and who might be incidentally exposed to the hazard, should be removed from the area or circumstances presenting the hazard. Agencies must continue to aggressively eliminate asbestos and other potential health hazards from the workplace. Agencies must comply with the entire OSHA PEL standard for asbestos, not only because it provides an objective, measurable standard, but also because its purpose is the protection of employees from a significant risk of exposure to airborne concentrations of asbestos fibers. Based on the intent of the 2003 statute and the safeguards discussed above, we have not made any changes in the final regulations based on these two comments.

In the final comment, an agency requested that we delete the clause ''and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury'' at the end of the first sentence in the asbestos category in appendix A. The agency suggested that this phrase is no longer necessary because, pursuant to the 2003 statute, the second and third sentences in the asbestos category have now established a clearly defined standard for payment of EDP. We agree that the term ''practically eliminated'' is redundant, and we have made the suggested change in the final regulations. The OSHA standard provides very detailed training requirements, engineering controls, work practices, health monitoring and housekeeping procedures, etc. These additional requirements, when applied by employers together with the PEL, reduce health and safety risks for employees below the level that would occur if the PEL alone were applicable.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal agencies and employees.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, the interim rule amending 5 CFR part 532 which was published at 70 FR 21613 on April 27, 2005, is adopted as a final rule with the following change:

PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

■ 2. In appendix A to subpart E of part 532, category 16 in the table titled ''Part II—Payment on Basis of Hours in Pay Status'' is revised to read as follows:

Appendix A to Subpart E of Part 532—Schedule of Environmental Differentials Paid for Exposure to Various Degrees of Hazards, Physical Hardships, and Working Conditions of an Unusual Nature

PART II.—PAYMENT ON BASIS OF HOURS IN PAY STATUS

Differential rate (percent)	Category for which payable	Effective date
*	* * * * * *	*
8	16. *Asbestos.* Working in an area where airborne concentrations of asbestos fibers may expose employees to potential illness or injury. This differential will be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 as published in title 29, Code of Federal Regulations, §§ 1910.1001 or 1926.1101. Regulatory changes in §§ 1910.1001 or 1926.1101 are hereby incorporated in and made a part of this category, effective on the first day of the first pay period beginning on or after the effective date of the changes.	Nov. 24, 2003.
*	* * * * * *	*

[FR Doc. 06–1606 Filed 2–21–06; 8:45 am]
BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

RIN 0563–AC07

Common Crop Insurance Regulations, Basic Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Interim rule; reopening and extension of comment period.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) is reopening and extending the comment period for the interim rule that was published in the **Federal Register** on Wednesday, November 30, 2005 (70 FR 71749–71751). The interim rule amended the Common Crop Insurance Regulations, Basic Provisions to implement the requirements of section 780 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006 (2006 Appropriations Act) regarding written agreements and the use of similar agricultural commodities. This action will allow interested persons additional time to prepare and submit comments.

DATES: Written comments and opinions on this interim rule will be accepted until close of business March 24, 2006 and will be considered when the rule is to be made final.

ADDRESSES: Interested persons are invited to submit written comments to the Director, Product Development Division, Risk Management Agency, United States Department of Agriculture, 6501 Beacon Drive, Stop 0812, Room 421, Kansas City, MO 64133–4676. Comments titled ''Basic Provisions Interim Rule'' may also be sent via the Internet to *DirectorPDD@rma.usda.gov,* or the Federal eRulemaking Portal: *http://www.regulations.gov/.* Follow the online instructions for submitting comments. A copy of each response will be available for public inspection and copying from 7 a.m. to 4:30 p.m., c.s.t., Monday through Friday, except holidays, at the above address.

FOR FURTHER INFORMATION CONTACT: For further information contact Erin Reid, Risk Management Specialist, Research and Development, Product Development Division, Risk Management Agency, at the Kansas City, MO, address listed above, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Background

On Wednesday, November 30, 2005, FCIC published an interim rule with request for comments in the **Federal Register** proposing changes to the Common Crop Insurance Regulations, Basic Provisions to implement program changes mandated by the 2006 Appropriations Act.

Comments were required to be received on or before January 30, 2006. FCIC believes the email address listed on the interim rule and the Federal eRulemaking Portal address were not operational during that time period. Therefore, interested persons could not provide comment. Therefore, FCIC is reopening and extending the comment period until close of business March 24, 2006. This action will allow interested persons who were unable to submit comments additional time to submit comments.

Signed in Washington, DC on February 14, 2006.

Eldon Gould,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 06–1581 Filed 2–21–06; 8:45 am]
BILLING CODE 3410–08–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Docket No. FV06–989–1 IFR]

Raisins Produced From Grapes Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Raisin Administrative Committee (Committee) for the 2005–06 and subsequent crop years from $11.00 to $7.50 per ton of free tonnage raisins acquired by handlers, and reserve tonnage raisins released or sold to handlers for use in free tonnage outlets. The Committee locally administers the Federal marketing order which regulates the handling of raisins produced from grapes grown in California (order). Assessments upon raisin handlers are used by the Committee to fund reasonable and necessary expenses of the program. The crop year runs from August 1 through July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: February 23, 2006. Comments received by April 24, 2006 will be considered prior to issuance of a final rule.

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

FOR FURTHER INFORMATION CONTACT: Rose Aguayo, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938.

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 989 (7 CFR part 989), both as amended, regulating the handling of raisins produced from grapes grown in California, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

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

This rule has been reviewed under Executive Order 12988, Civil Justice

Reform. Under the marketing order now in effect, California raisin handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable raisins beginning August 1, 2005, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

This rule decreases the assessment rate established for the Committee for the 2005–06 and subsequent crop years from $11.00 to $7.50 per ton of free tonnage raisins acquired by handlers, and reserve tonnage raisins released or sold to handlers for use in free tonnage outlets. Assessments upon handlers are used by the Committee to fund reasonable and necessary expenses of the program. When volume regulation is in effect, an administrative budget funded with handler assessments is developed, and a reserve pool budget funded with reserve pool proceeds is developed. Volume regulation was not implemented for the 2004–05 crop, but is applicable this year. As a result, Committee costs are apportioned between the two for 2005–06 and will be funded appropriately. The $7.50 per ton assessment rate should generate enough revenue to cover the Committee's administrative expenses. This action was recommended by the Committee at a meeting on August 15, 2005.

Sections 989.79 and 989.80, respectively, of the order provide authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California raisins. They are familiar with the Committee's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

Section 989.79 also provides authority for the Committee to formulate an annual budget of expenses likely to be incurred during the crop year in connection with reserve raisins held for the account of the Committee. A certain percentage of each year's raisin crop may be held in a reserve pool during years when volume regulation is implemented to help stabilize raisin supplies and prices. The remaining ''free'' percentage may be sold by handlers to any market. Reserve raisins are disposed of through various programs authorized under the order. Reserve pool expenses are deducted from proceeds obtained from the sale of reserve raisins. Net proceeds are returned to the pool's equity holders, primarily producers.

When volume regulation is in effect, the Committee's operating costs (rent, salaries, etc.) are split between an administrative budget funded by handler assessments, and a reserve pool budget funded with proceeds of sales of reserve raisins. In years when the crop is short and no volume regulation is in effect, operating costs are funded by the administrative budget.

Volume regulation was not implemented for the 2004–05 season because the crop was short. Operating expenses were funded by the 2004–05 administrative budget and not apportioned between the administrative and reserve pool budgets. Thus, the Committee's assessment rate increased from $8.00 to $11.00 per ton to cover the higher 2004–05 administrative expenses.

The Committee meets each August to review the ensuing year's crop conditions and financial situation. When the Committee met on August 15, 2005, it recommended two budget scenarios for the 2005–06 crop year to accommodate both situations, because it was not known at that time if volume regulation would be implemented. At that time, it appeared the crop might be short, but the initial crop estimate would not be available until a later date.

Under the first budget scenario with volume regulation, the Committee recommended an administrative budget of $2,062,500, a reserve pool budget of $2,755,500, and a decreased assessment rate of $7.50 per ton for the 2005–06 season. Under the second scenario, with no volume regulation, the Committee recommended an administrative budget of $3,025,000, and a continuing assessment rate of $11.00 per ton.

The Committee met on October 4, 2005, and announced preliminary volume regulation percentages for 2005–06 crop raisins. Raisin deliveries to-date are at a level to warrant the use of volume regulation for the year. This, in turn, supports the Committee's August recommendation to decrease the assessment rate from $11.00 to $7.50 per ton. Handlers are expected to acquire 275,000 tons of raisins during the 2005–06 crop year, which should provide adequate revenue to fund the recommended administrative expenditures of $2,062,500. This compares to budgeted administrative expenses of $3,025,000 for the 2004–05 crop year when volume regulation was not in effect.

Because the 2004–05 administrative budget funded some of the costs typically allocated to a reserve budget, the Committee's 2004–05 expenses were higher than normal. A comparison of 2005–06 recommended administrative expenditures to 2004–05 administrative budget expenditures follows: 2005–06 salaries, $500,000 (2004–05 administrative budgeted expenditures for salaries was $1,000,000); $686,000 for export program activities, ($536,000); $250,000 for compliance activities, ($320,000); $65,000 for group health insurance, ($150,000); $58,000 for rent, ($110,000); $60,000 for Committee member and staff travel, ($120,000); and $30,000 for computer software and programming, ($110,000).

The recommended $7.50 per ton assessment rate was derived by dividing the $2,062,500 in anticipated expenses by an estimated 275,000 tons of assessable raisins. The Committee recommended decreasing its assessment rate because the projected administrative expenses for the 2005–06 crop year are $962,500 less than the 2004–05 administrative expenses. Thus, sufficient income should be generated at the lower assessment rate for the Committee to meet its anticipated expenses. Pursuant to § 989.81(a) of the order, any unexpended assessment funds from the crop year must be credited or refunded to the handlers from whom collected.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by the Secretary upon recommendation and other information submitted by the

Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2005–06 budget and those for subsequent crop years will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

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

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

There are approximately 20 handlers of California raisins who are subject to regulation under the order and approximately 4,500 raisin producers in the regulated area. Small agricultural firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $6,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. Eleven of the 20 handlers subject to regulation have annual sales estimated to be at least $6,000,000, and the remaining 9 handlers have sales less than $6,000,000. No more than 9 handlers, and a majority of producers, of California raisins may be classified as small entities.

This rule decreases the assessment rate established for the Committee for the 2005–06 and subsequent crop years from $11.00 to $7.50 per ton of free tonnage raisins acquired by handlers, and reserve tonnage raisins released or sold to handlers for use in free tonnage outlets. Assessments upon handlers are used by the Committee to fund reasonable and necessary expenses of the program.

When volume regulation is in effect, an administrative budget funded with handler assessments is developed, and a reserve pool budget funded with reserve pool proceeds is developed. Volume regulation was not implemented for the 2004–05 crop, but is applicable this year. As a result, Committee costs are apportioned between the two for 2005–06 and will be funded appropriately. The Committee recommended administrative expenses of $2,062,500. With anticipated assessable tonnage at 275,000 tons, sufficient income should be generated at the $7.50 per ton assessment rate to meet the Committee's administrative expenses. Pursuant to § 989.81(a) of the order, any unexpended assessment funds from the crop year must be credited or refunded to the handlers from whom collected.

Because the 2004–05 administrative budget funded some of the costs typically allocated to a reserve budget, the Committee's 2004–05 expenses were higher than normal. A comparison of 2005–06 recommended administrative budget expenditures to 2004–05 administrative budget expenditures follows: 2005–06 salaries, $500,000 (2004–05 administrative budgeted expenditures for salaries was $1,000,000); $686,000 for export program activities, ($536,000); $250,000 for compliance activities, ($320,000); $65,000 for group health insurance, ($150,000); $58,000 for rent, ($110,000); $60,000 for Committee member and staff travel, ($120,000); and $30,000 for computer software and programming, ($110,000).

The industry considered an alternative assessment rate and budget prior to arriving at the $7.50 per ton and $2,062,500 administrative budget recommendation. The Committee's Audit Subcommittee met on July 13, 2005, to review preliminary budget information. The subcommittee was aware that 2005–06 crop may be short and no volume regulation may be implemented. The subcommittee, thus, developed two budgets and assessment rates to accommodate a scenario with volume regulation and another scenario with no volume regulation. If volume regulation was not applicable, costs typically allocated to a reserve pool budget would be funded by the administrative budget, thus necessitating a continuation of the $11.00 per ton assessment rate. If volume regulation was applicable, costs would be allocated to an administrative budget and a reserve pool budget and the assessment rate would be reduced to $7.50 per ton. The Committee approved these budget and assessment recommendations on August 15, 2005. Ultimately, the Committee determined that volume regulation was applicable for the 2005–06 crop, and that the lower assessment rate of $7.50 per ton was appropriate.

A review of statistical data on the California raisin industry indicates that assessment revenue has consistently been less than one percent of grower revenue in recent years. A grower price of a minimum of $1,210 per ton for the 2005–06 raisin crop has been announced by the Raisin Bargaining Association. If this price is realized, assessment revenue would continue to be less than one percent of grower revenue in the 2005–06 crop year, even with the reduced assessment rate.

Regarding the impact of this action on affected entities, this action decreases the assessment rate imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers.

Additionally, the Audit Subcommittee's meeting on July 13, 2005, and the Committee's meeting on August 15, 2005, where this action was deliberated were public meetings widely publicized throughout the California raisin industry. All interested persons were invited to attend the meetings and participate in the Committee deliberations on all issues. Finally, all interested persons are invited to submit information on the regulatory and information impact of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large raisin handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2005–06 crop year began on August 1, 2005, and the order requires that the rate of assessment for each crop year apply to all assessable raisins acquired during the year; (2) this action decreases the assessment rate; (3) handlers are aware of this action which was recommended at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 989 is amended as followed:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 989 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 989.347 is revised to read as follows:

§ 989.347 Assessment rate.

On and after August 1, 2005, an assessment rate of $7.50 per ton is established for assessable raisins produced from grapes grown in California.

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 06–1582 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1427

RIN 0560–AH29

Cottonseed Payment Program; Correction

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Correcting amendment.

SUMMARY: This document corrects the final regulations published on January 26, 2006 to provide assistance to producers and first-handlers of the 2004 crop of cottonseed in counties declared a disaster by the President due to 2004 hurricanes and tropical storms. A correction is needed to change a reference from ''cotton'' to ''cottonseed.''

DATES: Effective February 22, 2006.

FOR FURTHER INFORMATION CONTACT: Chris Kyer, phone: (202) 720–7935; e-mail: *chris.kyer@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

This document corrects the final regulations published on January 26, 2006 (71 FR 4231–4234) to provide assistance to producers and first-handlers of the 2004 crop of cottonseed in counties declared a disaster by the President due to 2004 hurricanes and tropical storms. In the final rule, section 1427.1103(b) mistakenly refers to cotton, rather than cottonseed, in stating that ''Cotton must not have been destroyed or damaged by fire, flood, or other events such that its loss or damage was compensated by other local, State, or Federal government or private or public insurance or disaster relief payments'' in order to be eligible under the Cottonseed Payment Program. This correction changes the term ''cotton'' to ''cottonseed.''

List of Subjects in 7 CFR Part 1427

Agriculture, Cottonseed.

■ Accordingly, 7 CFR part 1427 is corrected as follows:

PART 1427—COTTON

■ 1. The authority citation for 7 CFR part 1427 continues to read as follows:

Authority: 7 U.S.C. 7231–7239; 15 U.S.C. 714b, 714c; Pub. L. 108–324, Pub. L. 108–447.

■ 2. Revise § 1427.1103(b) to read as follows:

§ 1427.1103 Eligible cottonseed and counties.

* * * * *

(b) Cottonseed must not have been destroyed or damaged by fire, flood, or other events such that its loss or damage was compensated by other local, State, or Federal government or private or public insurance or disaster relief payments.

Signed in Washington, DC, on February 15, 2006.

Michael W. Yost,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 06–1645 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–05–P

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2006–2]

Definition of Federal Election Activity

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission (''Commission'') is revising its rules defining ''Federal election activity'' (''FEA'') under the Federal Election Campaign Act of 1971, as amended (''FECA''). These final rules modify the definitions of ''get-out-the-vote activity'' and ''voter identification'' consistent with the ruling of the U.S. District Court for the District of Columbia in *Shays* v. *FEC.* The final rules retain the definition of ''voter registration activity'' that the Commission promulgated in 2002, and provide a fuller explanation of what this term encompasses in response to the district court's decision. The Commission is also revising the definition of ''in connection with an election in which a candidate for Federal office appears on the ballot'' for FEA purposes. Further information is provided in the supplementary information that follows.

DATES: *Effective Date:* These rules are effective on March 24, 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 (''BCRA''), Public Law No. 107–155, 116 Stat. 81 (2002), amended FECA by adding a new term, ''Federal election activity,'' to describe certain activities that State, district, and local party

committees must pay for with either Federal funds or a combination of Federal and Levin funds.[1] 2 U.S.C. 431(20) and 441i(b)(1). The FEA requirements apply to all State, district, and local party committees regardless of whether they are registered as political committees with the Commission. The term also affects fundraising on behalf of tax-exempt organizations. National, State, district, and local party committees are prohibited from soliciting or directing non-Federal funds to tax-exempt entities organized under 26 U.S.C. 501(c) that engage in FEA or make other disbursements or expenditures in connection with a Federal election. 2 U.S.C. 441i(d)(1). Also, Federal candidates and officeholders may make only limited solicitations for funds on behalf of tax-exempt entities organized under 26 U.S.C. 501(c) whose principal purpose is to conduct certain types of FEA. 2 U.S.C. 441i(e)(4).

BCRA identifies four types of FEA: Voter registration activity (Type I); voter identification, get-out-the-vote activity (''GOTV activity''), or generic campaign activity (Type II); public communications that refer to clearly identified Federal candidates and that promote, support, attack or oppose (''PASO'') a candidate for that office (Type III); and services provided by an employee of a State, district, or local political party committee who spends more than 25 percent of that individual's compensated time on activities in connection with a Federal election (Type IV). *See* 2 U.S.C. 431(20)(A)(i)–(iv). Only the first two types of FEA are implicated in this rulemaking. The Commission defined the different components of Types I and II FEA in 11 CFR 100.24. *Final Rules and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 FR 49064, 49066 (July 29, 2002) (''*Soft Money E&J*'').

In 2004, the Commission's rules defining ''voter registration activity,'' ''GOTV activity,'' and ''voter identification'' were reviewed by the U.S. District Court for the District of Columbia in *Shays* v. *FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (DC Cir. 2005) (''*Shays*''). The district court invalidated certain aspects of these regulations because they did not satisfy the first step of the test set out in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (''*Chevron*'').[2] *Shays*, 337 F. Supp. 2d at 98–100, 102–103. The district court held that other aspects of these regulations satisfied the *Chevron* step one analysis, but the 2002 NPRM did not fully notice the approach taken in the final rule, as required by the Administrative Procedure Act, 5 U.S.C. 553(b)(3) (''APA''). *Shays*, 337 F. Supp. 2d at 101, 105–107. The district court remanded the regulations to the Commission for further action consistent with the court's decision. *Id.* at 130. The Commission did not appeal the district court's ruling on these regulations.

In response to the district court's decision, the Commission published a Notice of Proposed Rulemaking on May 4, 2005. *See Notice of Proposed Rulemaking on the Definition of Federal Election Activity*, 70 FR 23068 (May 4, 2005) (''*2005 NPRM* or *NPRM*''). The NPRM proposed possible modifications to the definitions of ''voter registration activity,'' ''GOTV activity,'' and ''voter identification.'' The NPRM also proposed several changes to the definition of ''in connection with an election in which a candidate for Federal office appears on the ballot'' in 11 CFR 100.24(a)(1). The public comment period for the NPRM closed on June 3, 2005. The Commission received written comments from 14 commenters. The Commission held a public hearing on August 4, 2005, at which six witnesses testified. After the hearing, the Commission reopened the comment period until September 29, 2005 to allow interested parties to submit additional information or comments. *See Notice to Reopen Comment Period on the Definition of Federal Election Activity*, 70 FR 51302 (August 30, 2005). The Commission received two additional comments during this period. All comments and a transcript of the public hearing are available at *http://www.fec.gov/law/law_rulemakings.shtml* under ''Definition of Federal Election Activity.'' For purposes of this document, the terms ''comment'' and ''commenter'' apply to both written comments and oral testimony at the public hearing.

These final rules remove the exception to the definitions of ''get-out-the-vote activity'' and ''voter identification'' for associations or other similar groups of candidates for State and local office. These final rules also remove the reference to ''within 72 hours of an election'' from the definition of ''get-out-the-vote activity'' and amend the definition of ''voter identification'' so as to include ''acquiring information about potential voters, including, but not limited to, obtaining voter lists.'' The final rules retain the current definition of ''voter registration activity,'' and provide a fuller explanation of what this term encompasses. The Commission is also revising the definition of ''in connection with an election in which a candidate for Federal office appears on the ballot'' to remove restrictions on the rules for special elections to odd-numbered years.

Under the APA, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on February 10, 2006.

Explanation and Justification

A. Definitions of ''Voter Registration Activity'' (11 CFR 100.24(a)(2)) and ''GOTV Activity'' (11 CFR 100.24(a)(3))

BCRA uses the terms ''voter registration activity'' and ''get-out-the-vote activity'' within the definition of FEA. Congress did not, however, define those terms. *See* 2 U.S.C. 431(20)(A)(i)–(ii).[3] In 2002, the Commission defined ''voter registration activity'' to mean ''contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. Voter registration activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms.'' 11 CFR 100.24(a)(2). Similarly, Commission regulations define ''GOTV activity'' to mean

[1] ''Federal funds'' are funds subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g). ''Levin funds'' are funds raised by State, district, and local party committees pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. *See* 11 CFR 300.2(i).

[2] The first step of the *Chevron* analysis, which courts use to review an agency's regulations, asks whether Congress has directly spoken to the precise questions at issue. The second step considers whether the agency's resolution of an issue not addressed in the statute is based on a permissible construction of the statute. *See Shays*, 337 F. Supp. 2d at 51–52 (citing *Chevron*, 467 U.S. at 842–43).

[3] The statute states that voter registration activity (Type I FEA) is FEA only when it is conducted 120 days or fewer before a regularly scheduled Federal election. *See* 2 U.S.C. 431(20)(A)(i). BCRA also specifies that GOTV activity (Type II FEA) is FEA only when it is conducted ''in connection with an election in which a candidate for Federal office appears on the ballot,'' *see* 2 U.S.C. 431(20)(A)(ii), which the Commission defined in 11 CFR 100.24(a)(1), as discussed below.

''contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting.'' 11 CFR 100.24(a)(3). This provision also includes a non-exhaustive list of examples of different types of GOTV activity. *See* 11 CFR 100.24(a)(3)(i)–(ii).

The *Shays* plaintiffs argued that the requirement that voter registration and GOTV activity ''assist'' in the registration of voters or the act of voting impermissibly narrowed the statutory definition of ''FEA'' by excluding activities that only ''encourage'' registration and voting. *See Shays*, 337 F. Supp. 2d at 98–99, 102–103. The district court did not invalidate these definitions on *Chevron* grounds. Instead, the district court found that the Commission's interpretation of section 431(20)(A) is permissible under the *Chevron* step one analysis because it does not conflict with expressed Congressional intent. *Shays*, 337 F. Supp. 2d at 99–100, 102–103. Specifically, the district court noted that ''it is possible to read the term 'voter registration activity' to encompass those activities that actually register persons to vote, as opposed to those that only encourage persons to do so without more. Moreover, the Court [did not] find based on the record presented that the 'common usage' of the term 'voter registration activity' necessarily includes the latter type of activities.'' *Shays*, 337 F. Supp. 2d at 99 (internal citation omitted); *see also Shays*, 337 F. Supp. 2d at 102–03 (GOTV activity). With respect to *Chevron* step two, the district court concluded that the ''exact parameters of the Commission's regulation[s] are subject to interpretation,'' and absent further guidance, the plaintiffs' challenges were not ripe. *Shays*, 337 F. Supp. 2d at 100 (voter registration activity); *see also Shays*, 337 F. Supp. 2d at 105 (GOTV activity). The district court concluded that if the parameters were sufficiently broad, it would alleviate any concerns that the regulations would ''unduly compromise[] the Act.'' *Shays*, 337 F. Supp. 2d at 100 and 105 (citing *Orloski* v. *FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986)).

The district court remanded these regulations to the Commission because the court found that the NPRM for 11 CFR 100.24 did not provide sufficient notice that the Commission might limit the definitions of ''voter registration'' and ''GOTV activity'' to activities that ''assist'' individuals to register to vote or to vote. *Shays*, 337 F. Supp. 2d at 101, 105–107; *see also Notice of Proposed Rulemaking on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money*, 67 FR 35654 (May 20, 2002) (''2002 NPRM''). The district court concluded that the final rules could not have been reasonably anticipated based on the 2002 NPRM proposals and therefore interested parties did not have an adequate opportunity to comment. *Shays*, 337 F. Supp. 2d at 101, 105–107.

The Commission's 2005 NPRM proposed retaining the ''assist'' requirement in these definitions. The purpose of retaining the ''assist'' requirement is to exclude ''mere encouragement'' from the scope of the rules. In proposing to retain the ''assist'' requirement, the Commission was concerned that regulations that included activities that merely encouraged people to register and vote may sweep too broadly. The proposed rule addresses the financing of the voter registration and GOTV activities that Congress sought to regulate. At the same time, the Commission reviewed the statutory language and the legislative history of the FEA provision and found no evidence that Congress intended to capture every State or local party event where an individual ends a speech with the exhortation, ''Don't forget to vote!'' Both Congress and the Commission are aware that such speech is ubiquitous and often spontaneous in an election year.

The 2005 NPRM sought public comment on how to address the district court's concerns that the scope of the 2002 rules might be too narrow. In addition, the Commission asked whether there were any particular activities that should be specifically included in, or excluded from, these provisions.

Several commenters supported the Commission's proposal to retain the current definitions of ''voter registration activity'' and ''GOTV activity.'' These commenters argued that the ''assist'' requirement effectuates BCRA and gives State, district, and local party committees a rule that is understandable. Some commenters asserted that including ''encouragement'' to register and/or to vote would broaden the reach of these provisions to cover nearly every activity of State, district, and local party committees. These commenters stated that local party committees would find it particularly difficult to comply with more expansive rules. According to these commenters, most local parties are small volunteer-centered organizations that operate largely autonomously from the State and national committees. Many local party committees do not have the resources to comply with the complexities of Federal law, and their response to BCRA has been to avoid voter registration and GOTV activities that might trigger Federal reporting and financing requirements. These commenters urged the Commission not to expand the FEA definitions because any further expansion of these definitions could preclude local parties at the grassroots level from answering simple voter inquiries about where to register or from referring voters to those who could legally assist them in registering.

Other commenters urged the Commission to amend the definitions of ''voter registration activity'' and ''GOTV activity'' to include ''encouragement'' to register and/or to vote, arguing that this approach would better reflect Congressional intent, and that the ''assist'' requirement improperly narrows the reach of these provisions. These commenters urged the Commission to adopt a standard such that a ''mere exhortation to register to vote,'' without any additional activity to assist the individual in doing so, would be covered by the FEA definitions and funding requirements. These commenters argued that any concerns about the FEA definition sweeping too broadly are alleviated by the fact that the rule applies only to State, district, or local party committees [4] and that the funding requirements on voter registration activity are limited to the period of 120 days before a Federal election.

The Commission has decided to retain the current definitions of ''voter registration activity'' and ''GOTV activity,'' which exclude mere encouragement of registration and/or voting from these definitions. *See* 11 CFR 100.24(a)(2) and (a)(3). The district court emphasized that ''it is possible to read the term 'voter registration activity' to encompass those activities that actually register persons to vote, as opposed to those that only encourage persons to do so without more. Moreover, the Court [did not] find based on the record presented that the 'common usage' of the term 'voter registration activity' necessarily includes the latter type of activities.'' *Shays*, 337 F. Supp. 2d at 99 (internal citation omitted); *see also Shays*, 337 F. Supp. 2d at 102–03 (GOTV activity).

The Commission's regulations are consistent with BCRA, which seeks to regulate the funds used to influence Federal elections. The final rules regulate actual voter registration activity

[4] However, as noted above, the FEA definition also affects the ability of national, State, district or local party committees and Federal candidates and officeholders to raise funds for tax-exempt entities organized under 26 U.S.C. 501(c).

without capturing incidental speech, such as responding to voter inquiries by providing publicly available information, such as the address on the FEC's website for the National Voter Registration Form or the 1–800 number of a State's Division of Elections. Should a State, district, or local party expend funds actually to register individuals to vote, such uses of funds are clearly covered by the Commission's regulations.

Moreover, in the Commission's extensive enforcement experience, general exhortations to register to vote and to vote are so common in political party communications that including encouragement to register to vote and to vote would be overly broad, is not necessary to effectively implement BCRA, and could have an adverse impact on grassroots political activities. As the Supreme Court has repeatedly stressed, where First Amendment rights are affected, ''[p]recision of regulation must be the touchstone.'' *Edenfield* v. *Fane*, 507 U.S. 761, 777 (1993). The Commission notes that these definitions will not lead to circumvention of FECA because the regulations prohibit the use of non-Federal funds for disbursements that State, district, and local parties make for those activities that actually register individuals to vote. Additionally, many programs for widespread encouragement of voter registration to influence Federal elections would be captured as public communications under Type III FEA.

Commenters who supported including ''encouragement'' in the definitions noted that these definitions do not exactly match the definition of ''voter registration and get-out-the-vote activities'' in 11 CFR 100.133. Section 100.133 exempts from the definition of ''expenditure'' the costs of non-partisan activity ''designed to encourage individuals to register to vote or to vote.'' However, the district court agreed with the Commission that these regulations are not in conflict. *Shays*, 337 F. Supp. 2d at 100. Indeed, these regulations are consistent because both provisions promote the public policy goal of encouraging civic participation through voter registration and voting. For reasons similar to the policy rationale that underlies the exception to the funding restrictions on expenditures in section 100.133, the Commission declines to impose FEA funding restrictions on State, district, and local party committees' mere ''encouragement'' of registering to vote or voting.

Therefore, the Commission is reaffirming its interpretation of the statutory FEA provision in its definitions at 11 CFR 100.24(a)(2) and (a)(3).

1. Examples of ''Voter Registration Activity''

As stated above, the district court concluded that the scope of the ''assist'' requirement was unclear. *Shays*, 337 F. Supp. 2d at 100. Commenters disagreed about whether particular State, district, or local party committee activities would meet the current definition of ''voter registration activity.'' The Commission has decided to include some additional examples in this Explanation and Justification to provide more guidance on which activities are, and are not, covered by this rule. These examples are illustrations only.[5]

The following are examples of activity that *are* Type I FEA voter registration activity:

1. At a county fair, a local political party committee sponsors a booth. The booth has banners reading, ''Don't forget to register to vote!'' Party staff at the booth provides voter registration forms and answers questions about completing and submitting the forms. They also accept completed forms and mail them to the appropriate governmental agency.

2. A State party committee conducts a phone bank contacting possible voters. The party staff making the calls encourages the individuals to register to vote, provides information about how to register to vote, and offers to mail registration forms with a prepaid postage envelope to the individuals.

Both of these examples illustrate activity where a State, district, or local party committee is providing potential voters with personal assistance in registering to vote. Both examples go beyond general statements encouraging voter registration. In example 1, providing registration forms and personal assistance in completing and submitting those forms are actions that actually assist individuals in registering to vote. In example 2, the State party committee is affirmatively contacting individual potential voters to provide them with registration information and offering to provide registration forms. Therefore, these examples would satisfy the definition of ''voter registration activity'' and are FEA if conducted within 120 days of a Federal election.

The following is an example of activity that is *not* Type I FEA voter registration activity:

3. A guest speaker at a local party committee rally for a mayoral candidate extols the virtues of the candidate and concludes his remarks by stating: ''Don't forget to register and vote!'

In contrast to examples 1 and 2 above, example 3 involves a State or local party committee speaker merely encouraging registration and voting without any additional concrete action that would be considered personal assistance to potential voters. General statements of encouragement alone are not enough to trigger the FEA definition. Congress did not express an intent in BCRA to require that Federal funds be used for an entire State or local party committee rally on behalf of non-Federal candidates on the basis of speeches that merely encourage the audience to register to vote. Additionally, this type of party event would not lead to actual or apparent corruption of Federal candidates or officeholders. Under BCRA, Congress continued to allow these organizations to use non-Federal funds for this type of State, district, or local activity generally, and there is no legislative history or administrative record that general encouragement to vote is similar to the other corrupting activity Congress was concerned with when it required certain activity to be funded with Federal dollars.

Congress, as a policy matter, has historically recognized the importance of encouraging voters to register to vote and to vote in a variety of laws. *See, e.g.*, FECA, 2 U.S.C. 431(9)(B)(ii) (exception to the definition of ''expenditure'' for non-partisan voter registration efforts and GOTV activity); Voting Rights Act of 1965, 42 U.S.C. 1973b(a)(1)(F)(iii) (a jurisdiction which wants to terminate ''Section 5'' coverage must show that it has ''engaged in * * * constructive efforts, such as expanded opportunity for convenient registration''); National Voter Registration Act of 1993, 42 U.S.C. 1973gg(b)(1) (purpose of the Act is to ''establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office''); Help America Vote Act of 2002, 42 U.S.C. 15483 (standards for computerized statewide voter registration lists and registering to vote by mail). The Commission believes that BCRA should be interpreted to be faithful to these purposes.

2. Examples of ''GOTV Activity''

The Commission's 2002 definition of ''GOTV activity'' included examples of activity that meet the ''assist'' requirement for GOTV activity in 11 CFR 100.24(a)(3)(i) and (ii). The first example is ''[p]roviding to individual voters, *within 72 hours of an election*, information such as the date of the election, the times when polling places

[5] All of these examples exclude public communications that PASO any Federal candidate and, therefore, would not raise the possibility of otherwise qualifying as Type III FEA. *See* 11 CFR 100.24(b)(3).

are open, and the location of particular polling places.'' 11 CFR 100.24(a)(3)(i) (emphasis added). The district court rejected the plaintiffs' challenge to the 72-hour provision in the first example at 11 CFR 100.24(a)(3)(i), noting that the general definition of ''GOTV activity'' in section 100.24(a)(3) makes clear that the list of examples is non-exhaustive. *Shays*, 337 F. Supp. 2d at 103. Similar to its *Chevron* step two analysis of the ''assist'' requirement discussed above, the district court held that the 72-hour provision was not ripe for review because it was unclear what activity the Commission would consider to be GOTV activity if conducted outside of this 72-hour window. *Shays*, 337 F. Supp. 2d at 105.

The NPRM sought public comment as to whether to revise the list of examples of GOTV activity in 11 CFR 100.24(a)(3)(i)–(ii) to address the district court's ruling on the 72-hour example. Most of the commenters urged the Commission to remove the 72-hour example, although for different reasons. Some commenters argued that GOTV activity occurs weeks and months before an election, and this example could suggest that no GOTV activity is covered until 72-hours before the election. Other commenters claimed that this example created confusion for State, district, and local party committees as to the timing, method, and content of communications that might be considered GOTV activity. Many commenters noted that it was unclear how the Commission would apply the 72-hour provision with regard to absentee balloting and early voting, which is now available in most states. One commenter argued that the Commission should include an exhaustive, yet narrow, list of covered activities in the definition of ''GOTV activity,'' while another commenter urged the Commission to eliminate all of the regulatory examples.

Activity conducted earlier than 72 hours before the election that meets the general definition of ''GOTV activity'' in 11 CFR 100.24(a)(3) is Type II FEA. As the Commission explained in the *Soft Money E&J*, the non-exhaustive list of examples in section 100.24(a)(3)(i)–(ii) is merely illustrative of the types of activity that would satisfy the definition of ''GOTV activity.'' *See Soft Money E&J*, 67 FR at 49067. For example, a State party committee could hire a consultant a month prior to the election to design a GOTV program for the State party committee and recruit volunteers to drive voters to the polls on election day. The consultant's work performed well before the 72-hour time period would be considered Type II FEA and must be paid for by the State party committee only with Federal funds or an allocated mix of Federal and Levin funds. Also, the definition of ''GOTV activity'' would apply equally to actions taken with regard to absentee balloting or early voting.

The 72-hour provision in the first example was included in the rule as an effort to provide an example of what activity would clearly be covered by the definition of ''GOTV activity,'' and was not intended to exclude activity in any other timeframe. The Commission based the example on its understanding that the execution of most GOTV activity tends to occur within 72 hours of an election. However, based on the comments received by the Commission, it appears that the 72-hour provision in the first example has given rise to uncertainty and potential confusion over whether GOTV activity conducted earlier in the election cycle would not be covered by the rule. No such time limitation exists, and the removal of the 72-hour reference will clarify that this has always been the case. Therefore, the Commission is removing the phrase ''within 72 hours of an election'' from the example in 11 CFR 100.24(a)(3)(i). The remainder of the example in section 100.24(a)(3)(i) gives proper guidance as to the type of activity covered by the rule, regardless of when it occurs inside the Type II FEA window.

B. Definition of ''Voter Identification'' (11 CFR 100.24(a)(4))

In 2002, the Commission's regulations defined ''voter identification'' to mean ''*creating or enhancing voter lists* by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates.'' *See* 11 CFR 100.24(a)(4) (2002) (emphasis added). This definition did not include the initial acquisition of a voter list because the Commission concluded that political party committees might acquire voter lists for a number of reasons other than for voter identification in connection with an election in which a Federal candidate appears on the ballot. Such reasons include fundraising and off-year party building activities. *See Soft Money E&J,* 67 FR at 49069. The district court in *Shays* held that the Commission's decision not to include acquisition of voter lists in the definition of ''voter identification'' failed *Chevron* step one. *Shays*, 337 F. Supp. 2d at 108.

To comport with this ruling, the NPRM proposed revising section 100.24(a)(4) to include the acquisition of voter lists in the definition of ''voter identification.'' Most of the commenters agreed that the Commission is required to include the acquisition of voter lists.

The NPRM also sought comment on whether the Commission should use the date a voter list is purchased or the date a voter list is used to determine whether the acquisition of a voter list occurs ''in connection with an election in which a candidate for Federal office appears on the ballot,'' as defined in 11 CFR 100.24(a)(1). A few commenters urged the Commission to adopt a ''use'' test to foreclose the possibility of State, district, and local party committees purchasing a list outside the FEA period and then using it inside the FEA period. Most commenters, however, supported the ''purchase'' test, noting the burdensome tracking that would be required of State, district, and local party committees under a ''use'' test. In addition, these commenters noted that a ''purchase'' test would not unfairly burden State, district, and local party committees that acquire lists in odd-numbered years for voter identification uses outside of the FEA windows. Some commenters also noted that a ''use'' test would effectively eliminate the FEA window for voter identification because any subsequent ''use'' of a voter list would reach back and retroactively convert a non-FEA acquisition into FEA.

The Commission has decided to amend the definition of ''voter identification'' to include ''acquiring information about potential voters, including, but not limited to, obtaining voter lists.'' *See* revised 11 CFR 100.24(a)(4). Under the new rule, the acquisition of a voter list is considered FEA if it occurs after the earliest filing deadline for the ballot in an even-numbered year and for those States that do not conduct primaries, on January 1 of an even-numbered year, and after the date is set for a special election in which a candidate for Federal office appears on the ballot. *See* 11 CFR 100.24(a)(1) and 100.24(b)(2). Under these revised rules, State, district, and local party committees should use the date the information was purchased, rather than the date the information was used, to determine whether the acquisition of a voter list falls within the FEA timeframes. The revised rule states that ''[t]he date a voter list is acquired shall govern whether a State, district, or local party committee has obtained a voter list.'' *See* revised 11 CFR 100.24(a)(4). Any acquisition of voter lists during the FEA period would come within this revised definition, and must be paid for with Federal funds or an allocated mix of Federal and Levin funds. The purchase of any voter list before the FEA period begins may be made with an allocated mixture of

Federal and non-Federal funds under 11 CFR 106.7(c). Any subsequent use of the voter list during the FEA period will not be considered a separate FEA cost unless the political party is also ''enhancing'' the voter list by verifying or adding information. *See* 11 CFR 100.24(a)(4).

This approach has a number of benefits. It provides a sensible, bright line rule. In addition, this interpretation is consistent with the Commission's reporting requirements, as political party committees are required to report disbursements for a voter list at the time of purchase. *See* 11 CFR 300.36. Finally, the Commission's rule allows for off-year party fundraising and party building activities not connected to Federal elections by using voter lists acquired outside of the FEA window without automatic imposition of the FEA rules.

The NPRM also sought public comment on a proposed exception to the definition of ''voter identification'' when a State party committee uses the voter list in connection with an election where no Federal candidates appear on the ballot. *See NPRM,* 70 FR at 23070. Most of the commenters who discussed this proposed exception opposed it as exceeding the Commission's statutory authority under BCRA. The Commission has decided not to adopt any new exceptions to the voter identification provision at this time. Additionally, this proposed exception would be challenging for State, district, and local party committees to apply and for the Commission to enforce because it is difficult to determine when a voter list is, or is not, ''used'' by a State party committee. Finally, any acquisitions of voter lists to be used in odd-numbered year, non-Federal elections would most likely occur outside the FEA timeframes, and would therefore not be considered FEA.

C. Exceptions for Non-Federal Candidate Associations in GOTV Activity (11 CFR 100.24(a)(3)) and Voter Identification (11 CFR 100.24(a)(4))

The 2002 regulatory definitions of ''GOTV activity'' and ''voter identification'' included exceptions for associations or similar groups of candidates for State or local office or of individuals holding State or local office (collectively ''non-Federal candidate associations''). *See* 11 CFR 100.24(a)(3) and (4). The Commission intended that these exceptions would keep State and local candidates' grassroots and local political activity a question of State, not Federal law. *See Soft Money E&J,* 67 FR at 49067. The Commission decided not to interpret BCRA in a way that would ''undertake * * * a vast federalization of State and local activity without greater direction from Congress.'' *See id.,* 67 FR at 49067.

The district court found that these exceptions ''run[] contrary to Congress's clearly expressed intent'' as enacted in BCRA and fail step one of *Chevron. See Shays*, 337 F. Supp. 2d at 104 and 107 n.83. The district court also observed that the Supreme Court rejected the federalism concerns underlying these exceptions in *McConnell* v. *FEC*, 540 U.S. 93 (2003). *See Shays*, 337 F. Supp. 2d at 104 (citing *McConnell*, 540 U.S. at 186).

To comply with the district court's opinion, the NPRM proposed removing from both definitions the exceptions for non-Federal candidate associations. *See NPRM,* 70 FR at 23072. The NPRM also sought comment on the impact of removing the exceptions, and whether other alternatives could address the Commission's concerns while still satisfying Congressional intent as determined by the *Shays* court. *See id.*, 70 FR at 23069 and 23070.

Several commenters agreed that BCRA or the district court's decision in *Shays* requires the removal of these exceptions from the definitions of ''GOTV activity'' and ''voter identification.'' One commenter urged the Commission to leave the definition of ''FEA'' undisturbed ''to the maximum extent permitted by the court's judgment in *Shays*.'' All of the commenters who addressed the issue believed that non-Federal candidate associations would be required to use Federal funds for FEA in the absence of these exceptions. No commenter provided any specific alternatives that would address the Commission's concerns that gave rise to these exceptions and satisfy Congressional intent as determined by the *Shays* court.

In light of these comments and the district court's reasoning, the Commission has decided to remove the exception for non-Federal candidate associations from the definitions of ''GOTV activity'' and ''voter identification.'' *See* revised 11 CFR 100.24(a)(3) and (4). These revisions require that non-Federal candidate associations use only Federal funds to pay for FEA. *See* 2 U.S.C. 441i(b)(1) and 11 CFR 300.32(a)(1).

D. Type II FEA Time Periods (11 CFR 100.24(a)(1))

BCRA provides that voter identification, GOTV activity, and generic campaign activity constitute FEA only when ''conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot).'' 2 U.S.C. 431(20)(A)(ii). In 2002, the Commission defined this period as beginning on the date of the earliest filing deadline for a primary election ballot for Federal candidates in each particular State and ending on the date of the general election, up to and including any runoff election date. *See* 11 CFR 100.24(a)(1)(i) (2002). For States that do not hold primary elections, the period begins January 1 of each even-numbered year. *Id.* For special elections in which Federal candidates are on the ballot, the period begins when the date of the special election is set and ends on the date of the special election. *See* 11 CFR 100.24(a)(1)(ii). By its terms, the 2002 rule for special elections applied in odd-numbered years only. *Id.*[6]

1. FEA Time Period for Special Elections During Odd-Numbered Years

In the NPRM, the Commission proposed eliminating the odd-numbered year limitation on the Type II FEA time period for special elections. *NPRM,* 70 FR at 23071 and 23072. All of the commenters who addressed this topic supported the proposed change. The Commission has decided to remove the limitation from former 11 CFR 100.24(a)(1)(ii) that made it applicable only to those special elections that take place in odd-numbered years. For any special elections that are scheduled in even-numbered years, the same Type II FEA time period should apply. Therefore, the phrase ''In an odd-numbered year,'' no longer appears in revised 11 CFR 100.24(a)(1)(ii).

2. Other Proposed Changes to Type II FEA Time Period.

The NPRM also sought comment on limited exceptions to the Type II FEA time period in 11 CFR 100.24(a)(1). *See NPRM,* 70 FR 23071 and 23072. The Commission received several comments on the issues raised in the NPRM. The Commission is promulgating an Interim Final Rule in a separate rulemaking to address these issues.

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

The Commission certifies that the attached final rule will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the organizations affected by this rule are State, district, and local party committees, which are not ''small

[6] None of these rules was challenged in *Shays.*

entities'' under 5 U.S.C. 601. These not-for-profit committees do not meet the definition of ''small organization,'' which requires that the enterprise be independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately. To the extent that any State party committees representing minor political parties might be considered ''small organizations,'' the number affected by this rule is not substantial.

List of Subjects in 11 CFR Part 100

Elections.

■ For the reasons set out in the preamble, Subchapter A of Chapter 1 of Title 11 of the *Code of Federal Regulations* is amended as follows:

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

■ 1. The authority citation for 11 CFR part 100 continues to read as follows:

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

■ 2. In section 100.24, paragraph (a) is revised to read as follows:

§ 100.24 Federal Election Activity (2 U.S.C. 431(20)).

(a) As used in this section, and in part 300 of this chapter,

(1) *In connection with an election in which a candidate for Federal office appears on the ballot* means:

(i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.

(ii) The period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

(2) *Voter registration activity* means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. Voter registration activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms.

(3) *Get-out-the-vote activity* means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting. Get-out-the-vote activity includes, but is not limited to:

(i) Providing to individual voters information such as the date of the election, the times when polling places are open, and the location of particular polling places; and

(ii) Offering to transport or actually transporting voters to the polls.

(4) *Voter identification* means acquiring information about potential voters, including, but not limited to, obtaining voter lists and creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. The date a voter list is acquired shall govern whether a State, district, or local party committee has obtained a voter list within the meaning of this section.

* * * * *

Dated: February 10, 2006.

Michael E. Toner,

Chairman, Federal Election Commission.

[FR Doc. 06–1679 Filed 2–21–06; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. 06–02]

RIN 1557–AC90

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulation H and Y; Docket No. R–1087]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AC46

Risk-Based Capital Guidelines; Market Risk Measure; Securities Borrowing Transactions

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; and Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the Agencies) are issuing a final rule that amends their market risk rules to revise the risk-based capital treatment for cash collateral that is posted in connection with securities borrowing transactions. This final rule will make permanent, and expand the scope of, an interim final rule issued in 2000 (the interim rule) that reduced the capital requirement for certain cash-collateralized securities borrowing transactions of banks and bank holding companies (banking organizations) that have adopted the market risk rule. This action more appropriately aligns the capital requirements for these transactions with the risk involved and provides a capital treatment for U.S. banking organizations that is more in line with the capital treatment to which their domestic and foreign competitors are subject.

DATES: *Effective:* February 22, 2006.

FOR FURTHER INFORMATION CONTACT: *OCC:* Margot Schwadron, Risk Expert, Capital Policy (202) 874–6022, or Carl Kaminski, Attorney, Legislative and Regulatory Activities Division (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Norah Barger, Associate Director, Division of Banking Supervision and Regulation, (202) 452–2402, David Adkins, Supervisory Financial Analyst, Division of Banking Supervision and Regulation, (202) 452–5259, Juan C. Climent, Supervisory Financial Analyst, Division of Banking Supervision and Regulation, (202) 872–7526, or Mark Van Der Weide, Senior Counsel, Legal Division, (202) 452–2263. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

FDIC: Jason Cave, Associate Director, Division of Supervision and Consumer Protection, (202) 898–3548, John Feid, Senior Capital Markets Specialist, Division of Supervision and Consumer Protection, (202) 898–8649, or Michael B. Phillips, Counsel, (202) 898–3581, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

Neither the July 1988 agreement entitled ''International Convergence of Capital Measurement and Capital Standards'' (Basel Accord) nor the risk-based capital guidelines adopted by the Agencies in 1989 (the 1989 rules) specifically address securities borrowing transactions.[1] At that time, the involvement of U.S. banking organizations in corporate debt and equity securities trading activities was limited. However, in recent years, U.S. banking organizations have been authorized to engage in, and have engaged in, trading activities to a significantly greater extent. Securities borrowing transactions serve an important function in the operation of securities markets. They are used in conjunction with short sales, securities fails (securities sold but not made available for delivery on the settlement date), and option and arbitrage positions. Securities are also borrowed in order to be pledged against public fund deposits. Securities borrowing enhances market efficiency and provides an important source of liquidity to the securities markets.

In a typical securities borrowing transaction, a party (for example, a banking organization) borrows securities from a securities lender and posts collateral in the form of cash or highly marketable securities with the securities lender (or an agent acting on behalf of the securities lender) in an amount that fully covers the value of the securities borrowed plus an additional margin, usually ranging from two to five percent. In accordance with U.S. generally accepted accounting principles (GAAP), cash collateral posted with the securities lender is treated as a receivable on the books of the securities borrower (that is, it is treated as a cash loan from the securities borrower to the securities lender). Under the 1989 rules, the securities borrower is required to hold capital against the full amount of this receivable—that is, the amount of the collateral posted. In contrast, under the 1989 rules, where a securities borrower posts collateral in the form of securities and those securities continue to be carried on the borrower's books, it does not incur a capital charge on the posting of the securities as collateral because under GAAP no receivable from the counterparty is booked on the balance sheet.

II. Interim Final Rule

In December 2000, the Agencies issued the interim rule with request for comment addressing the risk-based capital treatment of securities borrowing transactions where the borrower posts cash collateral.[2] In developing the interim rule, the Agencies recognized that securities borrowing is a long-established financial activity that historically has resulted in an exceedingly low level of losses. Accordingly, the application of a standard 100 percent risk weight to the full amount of the cash collateral posted to support such borrowings resulted in a capital charge that was excessively high, not only in light of the risk involved in the transactions, but also in comparison to the capital required by other U.S. and non-U.S. regulators of financial firms for the same transactions. The Agencies also noted that, under the 1989 rules, a banking organization incurred no capital charge when it borrowed securities and posted securities to collateralize the borrowing, even though the organization was at risk for the amount by which the collateral posted exceeded the value of the securities borrowed. As a result, securities borrowing transactions in which cash collateral was used were penalized relative to those where securities were used as collateral.

To address the case where securities borrowing transactions are collateralized by cash, the Agencies issued the interim rule with a request for comment that would better reflect the low risk of such transactions. The interim rule applied only to banking organizations that had adopted the market risk rule because only banking organizations with significant trading activity tend to engage in securities borrowing in any volume. Banking organizations that had not adopted the market risk rule continued to be subject to the risk-based capital treatment set forth in the 1989 rules for all their securities borrowing transactions.

Under the interim rule, banking organizations that have adopted the market risk rule for assessing capital adequacy for trading positions could exclude from risk-weighted assets receivables arising from the posting of cash collateral associated with securities borrowing transactions to the extent such receivables were collateralized by the market value of the securities borrowed, subject to all of the following conditions:

1. The transaction is based on securities includable in the trading book that are liquid and readily marketable;
2. The transaction is marked to market daily;
3. The transaction is subject to daily margin maintenance requirements; and
4. The transaction is a securities contract under section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231).

Under this treatment, the amount of the receivable created in connection with the posting of cash collateral in a securities borrowing transaction that is excluded from the securities borrower's adjusted risk-weighted assets is limited to the portion that is collateralized by the market value of the securities borrowed. The uncollateralized portion, which equals the difference between the amount of cash collateral that the securities borrower posts in support of the borrowing and the current market

[1] The Basel Accord was developed by the Basel Committee on Banking Supervision and endorsed by the central bank governors of the Group of Ten (G–10) countries. The Basel Accord provides a framework for assessing the capital adequacy of a depository institution by risk weighting its assets and off-balance sheet exposures primarily based on credit risk. The Basel Committee on Banking Supervision consists of representatives of the supervisory authorities and central banks from the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, United Kingdom, United States) and Luxembourg. See 54 FR 4168 (January 27, 1989) (OCC), 54 FR 4186 (January 27, 1989) (Board), 54 FR 11509 (March 21, 1989) (FDIC).

[2] See 65 FR 75856 (December 5, 2000), 12 CFR part 3, appendix B (OCC), 12 CFR part 208, appendix A, 12 CFR part 225, appendix A (Board), 12 CFR part 325, appendix C (FDIC).

value of the securities borrowed, is assigned to the risk weight appropriate to the securities lender.

The interim rule did not change the risk-based capital treatment for the posting of securities collateral, as opposed to cash collateral. However, the Agencies indicated that pending revisions to the Basel Accord could require a charge for such borrowing transactions and, accordingly, the U.S. risk-based capital treatment could change in the future.

Comments Received

The Agencies received comment letters from eight respondents. The commenters uniformly supported the interim rule. With regard to the issue of whether the interim rule should be limited to only those banking organizations that have implemented the market risk rules, the three commenters who addressed this issue expressed support for the extension of the interim rule to all banking organizations. On the issue of whether the interim rule should be amended to impose a capital charge on securities-collateralized borrowing transactions, the Agencies received five comments. Views on this issue were mixed as three commenters did not support a capital charge, while two expressed mild support. Another commenter suggested eliminating the requirement that the transaction be a securities contract under the Bankruptcy Code, a qualified financial contract under the Federal Deposit Insurance Act (FDIA), or a netting contract under the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) or the Board's Regulation EE. The commenter suggested that a banking organization should be permitted to exclude securities borrowing receivables for risk-based capital purposes as long as the pledge of the borrowed securities is legally enforceable in the event the counterparty failed.

On November 17, 2005, the Federal Reserve Board hosted a meeting for all institutions subject to the market risk rule to discuss finalizing the interim rule. The meeting, which representatives of the OCC and the FDIC also attended, allowed all parties subject to the interim rule to discuss their positions with respect to how to finalize the interim rule on securities borrowing. The Agencies made clear that they were not seeking a group opinion or consensus, but rather seeking advice from the participants on an individual basis to better understand some of the issues. Most meeting participants expressed the view that it was important to finalize the interim rule in a way that grants capital relief to securities borrowing transactions in line with the spirit of the interim rule.

At the meeting, various banking organizations noted that while the first three criteria of the interim rule were appropriate for securities borrowing transactions to qualify for the capital treatment under the interim rule, the fourth criterion presented challenges. Various banking organizations also indicated that a strict reading of the fourth criterion would prevent transactions with counterparties that are not subject to the U.S. Bankruptcy Code, the FDIA, or FDICIA from qualifying for that treatment. In particular, transactions with non-U.S. counterparties may not meet the interim rule's fourth criterion. Uncertainty also exists with regard to transactions with counterparties that are subject to state insolvency regimes or, like pension funds, that are not subject to a statutory insolvency regime.

Several participants stated that an important risk mitigant in securities borrowing transactions is that they typically are conducted on either an overnight or an open basis, which gives both counterparties the right to effectively close out at any time. This feature ensures that the banking organization has the ability to terminate the transactions early should the banking organization detect counterparty credit risk problems, effectively reducing counterparty credit risk to very low levels. Because an open or overnight transaction allows a banking organization to terminate promptly transactions with counterparties whose financial condition is deteriorating, events of default such as failure to post margin are very seldom encountered. Many institutions present at the meeting indicated that, in large part because of the ability to terminate transactions at will, defaults on securities borrowing transactions have been extremely rare, and defaults resulting in losses have been even rarer. Following this meeting, several banking organizations submitted detailed technical suggestions on how to amend the interim rule to deal with their concerns.

III. Final Rule

After consideration of the comments received, the Agencies are issuing a final rule (the final rule) identical to the interim rule with one exception. Specifically, the fourth criterion, which requires that a cash-collateralized securities borrowing transaction be a securities contract for purposes of the Bankruptcy Code, a qualified financial contract for purposes of the FDIA, or a netting contract for purposes of FDICIA or Regulation EE, will be replaced with the following:

4.(A) The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231); or

(B) If the transaction does not meet the criteria set forth in paragraph 4. (A) of this section, then either:

(i) The banking organization has conducted sufficient legal review to reach a well-founded conclusion that (1) the securities borrowing agreement executed in connection with the transaction provides the banking organization the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default, including in a bankruptcy, insolvency, or other similar proceeding of the counterparty and (2) under applicable law of the relevant jurisdiction, its rights under the agreement are legal, valid, binding, and enforceable and any exercise of rights under the agreement will not be stayed or avoided; or

(ii) The transaction is either overnight or unconditionally cancelable at any time by the banking organization, and the banking organization has conducted sufficient legal review to reach a well-founded conclusion that (1) the securities borrowing agreement executed in connection with the transaction provides the banking organization the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default and (2) under the law governing the agreement, its rights under the agreement are legal, valid, binding, and enforceable.

The fourth criterion has been revised to broaden the types of securities borrowing transactions that qualify for the interim rule. Subpart (A) preserves the existing method of qualification. It is the responsibility of the banking organization to determine if the transaction meets the criteria of subpart (A). If the transaction does not meet the criteria under subpart (A), or if there is uncertainty about it, the banking organization can rely on the criteria of

subpart (B) to apply the capital treatment set forth in this final rule. Subpart (B) extends the treatment set forth in the interim rule to transactions that are exempt from any automatic stay in bankruptcy, insolvency, or similar proceedings or that are conducted on a basis that is either overnight or that provides the banking organization the unconditional right to terminate that transaction at will. In this regard, the Agencies will not view a reasonably short notice period, typically no more than the standard settlement period associated with the securities borrowed, as detracting from the unconditionality of the banking organization's termination rights. With regard to overnight transactions, the counterparty generally should have no expectation, either explicit or implicit, that the banking organization will automatically roll over the transaction.

Under subpart (B), transactions may qualify only if the banking organization has conducted sufficient legal review to conclude that its rights under the agreement under which the transactions are executed is legal, valid, binding, and enforceable. No such review is required for transactions qualifying under subpart (A). For transactions executed under standard industry contracts, trade groups representing the financial services industry with established expertise often commission and maintain a library of current legal opinions with respect to the legal status, validity, binding effect, and enforceability of such contracts with various counterparties under the laws of a number of jurisdictions. While the Agencies do not discourage a banking organization from obtaining a specific legal opinion tailored to a particular transaction, a banking organization's review of the legal opinions described above to determine the legal status, validity, binding effect, and enforceability of a particular contract with a specific counterparty, for example, generally would meet the requirement for sufficient legal review under subpart (B).

The Agencies believe that the revisions to the fourth criterion set forth in the final rule resolve, in a manner that preserves safety and soundness, technical difficulties banking organizations may have had in meeting this criterion for a number of securities borrowing transactions.

At this time, the Agencies have decided not to extend the final rule beyond those banking organizations subject to the market risk rules. In general, securities borrowings are used to support trading activities and, thus, typically only banking organizations subject to the market risk rules could realize a more than de minimis benefit from the capital treatment set out in this final rule. With regard to the issue of assessing a capital charge on securities-collateralized securities borrowing transactions, the Agencies believe that while imposing such a charge would provide for a more consistent risk-based treatment of securities borrowing transactions in general, the enhanced consistency would impose additional burden on the affected banking organization with only a minimal increase in risk-based capital requirements. Accordingly, the Agencies will take no action on this issue at this time.

The Agencies note that the treatment set forth in the final rule for securities borrowing differs from, and could result in lower capital charges than, the treatment set forth in the Basel II framework. The U.S. implementation of that framework could result in a capital treatment that differs significantly from that set forth in the final rule.

Effective Date

This final rule is effective as of February 22, 2006. Pursuant to 5 U.S.C. 553, each of the Agencies may issue a rule without delaying its effectiveness if the agency finds good cause for the immediate effective date.

For the following reasons, the Agencies find good cause to issue this rule without a delayed effective date. First, in all respects, except one, the final rule is identical to the interim final rule that has been in effect since 2000. Thus, banking institutions are already subject to similar requirements. Second, the new provision in the final rule broadens the types of securities transactions that qualify for the risk-based capital treatment provided in the interim rule. The final rule thus relieves a restriction on U.S. banking organizations and fosters consistency among international institutions consistent with safety and soundness. Elimination of the costs and burdens associated with the restriction that is being removed warrants making this rule effective without a delayed effective date.

Subject to certain exceptions, 12 U.S.C. 4802(b)(1) provides that new regulations and amendments to regulations prescribed by a Federal banking agency that impose additional reporting, disclosure, or other new requirements on an insured depository institution must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form. Like the interim rule, the final rule imposes no additional reporting, disclosure, or other new requirements on insured depository institutions. Instead, it relieves a restriction. For this reason, section 4802(b)(1) does not apply to this rulemaking. Alternatively, section 4802(b)(1)(A) provides that the Agencies may, upon finding good cause to do so, determine that a regulation should become effective without a delayed effective date. As noted in the previous paragraph, the Agencies find good cause to issue this rule without a delayed effective date.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Agencies have determined that this final rule would not have a significant impact on a substantial number of small entities in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The final rule is only applicable to banking organizations subject to the market risk rules, which typically apply to large banking organizations with significant trading operations. Therefore, the Agencies do not believe this final rule will likely have a significant impact on a substantial number of small entities. Moreover, the overall impact of this final rule is to reduce regulatory burden. Accordingly, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The Agencies have determined that this final rule does not involve a collection of information pursuant to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

OCC Executive Order 12866

This rule will apply only to the small number of banks that are subject to the market risk rules. For those banks, the rule more accurately aligns the risk-based capital charge with the low risk of securities borrowing transactions, illustrated by a long-established history of exceedingly low levels of losses. Also, the rule will make the capital treatment comparable to that of other U.S. and non-U.S. regulators of financial firms for the same transactions. The OCC has determined that this joint final rule is not a significant regulatory action under Executive Order 12866.

OCC Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before

promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. As discussed in the preamble, this final rule is limited to banks subject to the market risk rules and to securities borrowing transactions collateralized with cash. The OCC, therefore, has determined that the final rule will not result in expenditures by State, local, or tribal governments, or by the private sector of $100 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

OCC Executive Order 13132

The OCC has determined that this rule does not have any Federalism implications, as required by Executive Order 13132, because it would 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.

List of Subjects

12 CFR Part 3

Administrative practice and procedure, Capital, National banks, Reporting and recordkeeping requirements, Risk.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Crime, Currency, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 325

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Capital adequacy, Reporting and recordkeeping requirements, Savings associations, State non-member banks.

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Chapter 1

Authority and Issuance

■ The interim final rule amending 12 CFR part 3 Appendices A and B, published at 65 FR 75856 (December 5, 2000), is adopted as final, with the following changes:

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

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

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907 and 3909.

■ 2. In appendix B to part 3, in section 3, revise paragraph (a)(1) to read as follows:

Appendix B to Part 3—Risk-Based Capital Guidelines; Market Risk Adjustment

Section 3. Adjustments to the Risk-Based Capital Ratio Calculations.

(a) * * *

(1) *Adjusted risk-weighted assets.* (i) *Covered positions.* Calculate adjusted risk-weighted assets, which equal risk-weighted assets (as determined in accordance with appendix A of this part), excluding the risk-weighted amount of all covered positions (except foreign exchange positions outside the trading account and over-the-counter derivatives positions).[7]

(ii) *Securities borrowing transactions.* In calculating adjusted risk-weighted assets, a bank also may exclude a receivable that results from the bank's posting of cash collateral in a securities borrowing transaction to the extent that the receivable is collateralized by the market value of the borrowed securities and subject to the following conditions:

(A) The borrowed securities must be includable in the trading account and must be liquid and readily marketable;

(B) The borrowed securities must be marked to market daily;

(C) The receivable must be subject to a daily margining requirement; and

(D) (*1*) The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231); or

(*2*) If the transaction does not meet the criteria set forth in paragraph (a)(1)(ii)(D)(*1*) of this section, then either:

(*i*) The bank has conducted sufficient legal review to reach a well-founded conclusion that:

(*A*) The securities borrowing agreement executed in connection with the transaction provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default, including in a bankruptcy, insolvency, or other similar proceeding of the counterparty; and

(*B*) Under applicable law of the relevant jurisdiction, its rights under the agreement are legal, valid, binding, and enforceable and any exercise of rights under the agreement will not be stayed or avoided; or

(*ii*) The transaction is either overnight or unconditionally cancelable at any time by the bank, and the bank has conducted sufficient legal review to reach a well-founded conclusion that:

(*A*) The securities borrowing agreement executed in connection with the transaction provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default; and

(*B*) Under the law governing the agreement, its rights under the agreement are legal, valid, binding, and enforceable.

* * * * *

Federal Reserve System

12 CFR Chapter II

Authority and Issuance

■ For the reasons set forth in the joint preamble, part 208 of chapter II of title 12 of the Code of Federal Regulations is amended as set forth below:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 12 U.S.C. 24, 36, 92a, 93a, 248(a), 248(c), 321–338a, 371d, 461, 481–486, 601, 611, 1814, 1816, 1818, 1820(d)(9), 1823(j), 1828(o), 1831, 1831o, 1831–1, 1831r–1, 1835a, 1882, 2901–2907, 3105, 3310, 3331–3351, and 3906–3909; 15 U.S.C. 78b, 78l(b), 78l(g), 78l(i), 78o–4(c)(5), 78q, 78q–1, and 78w, 6801, and 6805; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

■ 2. In appendix E to part 208, under section 3, paragraph (a)(1) is revised to read as follows:

Appendix E to Part 208—Capital Adequacy Guidelines for State Member Banks; Market Risk Measure

* * * * *

Section 3. Adjustments to the Risk-Based Capital Ratio Calculations

(a) * * *

[7] Foreign exchange position outside the trading account and all over-the-counter derivative positions, whether or not in the trading account, must be included in adjusted risk-weighted assets as determined in appendix A of this part 3.

(1) *Adjusted risk-weighted assets.* Calculate adjusted risk-weighted assets, which equals risk-weighted assets (as determined in accordance with appendix A of this part) excluding the risk-weighted amounts of all covered positions (except foreign-exchange positions outside the trading account and over-the-counter derivative positions)[7] and receivables arising from the posting of cash collateral that is associated with securities borrowing transactions to the extent the receivables are collateralized by the market value of the borrowed securities, provided that the following conditions are met:

(i) The transaction is based on securities includable in the trading book that are liquid and readily marketable,

(ii) The transaction is marked to market daily,

(iii) The transaction is subject to daily margin maintenance requirements, and

(iv)(A) The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231); or

(B) If the transaction does not meet the criteria set forth in paragraph (iv)(A) of this section, then either:

(*1*) The bank has conducted sufficient legal review to reach a well-founded conclusion that:

(*i*) The securities borrowing agreement executed in connection with the transaction provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default, including in a bankruptcy, insolvency, or other similar proceeding of the counterparty; and

(*ii*) Under applicable law of the relevant jurisdiction, its rights under the agreement are legal, valid, binding, and enforceable and any exercise of rights under the agreement will not be stayed or avoided; or

(*2*) The transaction is either overnight or unconditionally cancelable at any time by the bank, and the bank has conducted sufficient legal review to reach a well-founded conclusion that:

(*i*) The securities borrowing agreement executed in connection with the transaction provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default; and

(*ii*) Under the law governing the agreement, its rights under the agreement are legal, valid, binding, and enforceable.

* * * * *

[7] Foreign-exchange positions outside the trading account and all over-the-counter derivative positions, whether or not in the trading account, must be included in adjusted risk-weighted assets as determined in appendix A of this part.

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3907, and 3909; 15 U.S.C. 6801 and 6805.

■ 2. In appendix E to part 225, under section 3, paragraph (a)(1) is revised to read as follows:

Appendix E to Part 225—Capital Adequacy Guidelines for Bank Holding Companies; Market Risk Measure

* * * * *

Section 3. Adjustments to the Risk-Based Capital Ratio Calculations

(a) * * *

(1) *Adjusted risk-weighted assets.* Calculate adjusted risk-weighted assets, which equals risk-weighted assets (as determined in accordance with appendix A of this part) excluding the risk-weighted amounts of all covered positions (except foreign-exchange positions outside the trading account and over-the-counter derivative positions)[7] and receivables arising from the posting of cash collateral that is associated with securities borrowing transactions to the extent the receivables are collateralized by the market value of the borrowed securities, provided that the following conditions are met:

(i) The transaction is based on securities includable in the trading book that are liquid and readily marketable,

(ii) The transaction is marked to market daily,

(iii) The transaction is subject to daily margin maintenance requirements, and

(iv)(A) The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231); or

(B) If the transaction does not meet the criteria set forth in paragraph (iv)(A) of this section, then either:

(*1*) The banking organization has conducted sufficient legal review to reach a well-founded conclusion that:

(*i*) The securities borrowing agreement executed in connection with the transaction provides the banking organization the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default, including in a bankruptcy, insolvency, or other similar proceeding of the counterparty; and

(*ii*) Under applicable law of the relevant jurisdiction, its rights under the agreement are legal, valid, binding, and enforceable and any exercise of rights under the agreement will not be stayed or avoided; or

(*2*) The transaction is either overnight or unconditionally cancelable at any time by the banking organization, and the banking organization has conducted sufficient legal review to reach a well-founded conclusion that:

(*i*) The securities borrowing agreement executed in connection with the transaction provides the banking organization the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default; and

(*ii*) Under the law governing the agreement, its rights under the agreement are legal, valid, binding, and enforceable.

* * * * *

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

■ For the reasons set forth in the joint preamble, part 325 of chapter III of title 12 of the Code of Federal Regulations is amended as follows:

PART 325—CAPITAL MAINTENANCE

■ 1. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, 2386 (12 U.S.C. 1828 note).

■ 2. In appendix C to part 325, under section 3, paragraph (a)(1) is revised to read as follows:

Appendix C to Part 325—Risk-Based Capital for State Non-Member Banks: Market Risk

* * * * *

Section 3. Adjustments to the Risk-Based Capital Ratio Calculations

(a) * * *

(1) *Adjusted risk-weighted assets.* Calculate adjusted risk-weighted assets, which equals risk-weighted assets (as determined in accordance with appendix A of this part), excluding the risk-weighted amounts of all covered positions (except foreign exchange positions outside the trading account and over-the-counter derivative positions)[7] and receivables arising from the posting of cash collateral that is associated with securities borrowing transactions to the extent the receivables are collateralized by the market value of the borrowed securities, provided that the following conditions are met:

(i) The transaction is based on securities includable in the trading book that are liquid and readily marketable,

(ii) The transaction is marked to market daily,

(iii) The transaction is subject to daily margin maintenance requirements, and

(iv)(A) The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231); or

(B) If the transaction does not meet the criteria set forth in paragraph (iv)(A) of this section, then either:

(*1*) The bank has conducted sufficient legal review to reach a well-founded conclusion that:

(*i*) The securities borrowing agreement executed in connection with the transaction provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default, including in a bankruptcy, insolvency, or other similar proceeding of the counterparty; and

(*ii*) Under applicable law of the relevant jurisdiction, its rights under the agreement are legal, valid, binding, and enforceable and any exercise of rights under the agreement will not be stayed or avoided; or

(*2*) The transaction is either overnight or unconditionally cancelable at any time by the bank, and the bank has conducted sufficient legal review to reach a well-founded conclusion that:

(*i*) The securities borrowing agreement executed in connection with the transaction provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default; and

(*ii*) Under the law governing the agreement, its rights under the agreement are legal, valid, binding, and enforceable.

* * * * *

Dated: February 9, 2006.

John C. Dugan,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, February 8, 2006.

Jennifer J. Johnson

Secretary of the Board

Dated at Washington, DC, this 10th day of February, 2006.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 06–1533 Filed 2–21–06; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 600, 602, 603, 604, and 606

RIN 3052–AB82

Organization and Functions; Releasing Information; Privacy Act Regulations; Farm Credit Administration Board Meetings; and Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Farm Credit Administration; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA) published a final rule under parts 600, 602, 603, 604, and 606 on November 17, 2005 (70 FR 69644). This final rule amends our regulations on the FCA's organization and functions to reflect the Agency's organization, update the statutory citation for the Farm Credit Act, and identify those FCA employees responsible for various functions named in parts 602, 603, 604, and 606 to conform to organizational changes. In accordance with 12 U.S.C. 2252, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulation is February 15, 2006.

DATES: *Effective Date:* The regulation amending 12 CFR parts 600, 602, 603, 604, and 606 published on November 17, 2005 (70 FR 69644) is effective February 15, 2006.

FOR FURTHER INFORMATION CONTACT: Mark L Johansen, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4479, TTY (703) 883–4434; or Jane Virga, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

(12 U.S.C. 2252(a)(9) and (10))

Dated: February 15, 2006.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. 06–1637 Filed 2–21–06; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–23374; Airspace Docket No. 05–ACE–34]

Establishment of Class E5 Airspace; David City, NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes a Class E surface area airspace area extending upward from 700 feet above the surface at David City, NE.

The effect of this rule is to provide appropriate controlled Class E airspace for aircraft departing from and executing instrument approach procedures to, David City Municipal Airport, NE and to segregate aircraft using instrument approach procedures in instrument conditions from aircraft operating in visual conditions.

DATES: *Effective:* 0901 UTC, April 13, 2006.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION:

History

On Thursday, January 5, 2006, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at David City, NE (71 FR 552). The proposal was to establish a Class E5 airspace area to bring David City, NE airspace into compliance with FAA directives. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

The Rule

This notice amends part 71 of the Federal Aviation Regulations (14 CFR part 71) by establishing a Class E airspace area extending upward from 700 feet above the surface at David City Municipal Airport, NE. The establishment of a Very High Frequency (VHF) Omni-directional Range (VOR)/Distance Measuring Equipment (DME) Instrument Approach Procedure (IAP) to Runway (RWY) 32 and Area Navigation (RNAV) Global Positioning System

(GPS) IAPs to RWYs 14 and 32 has made this action necessary. The intended effect of this action is to provide adequate controlled airspace for Instrument Flight Rules operations at David City Municipal Airport, NE. The area will be depicted on appropriate aeronautical charts.

Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in Paragraph 6005 of FAA Order 7400.9N, Airspace Designations and Reporting Points, dated September 1, 2005, and effective September 15, 2005, which is incorporated by reference in 14 CFR 71.1. of the same Order. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority since it contains aircraft executing instrument approach procedures to David City Municipal Airport.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, dated September 1, 2005, and effective September 15, 2005, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE NE #E5 David City, NE

David City Municipal Airport, NE
(Lat. 41°13′51″ N., long. 97°07′23″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of David City Municipal Airport.

* * * * *

Issued in Kansas City, MO, on February 7, 2006.

Elizabeth S. Wallis,

Acting Area Director, Western Flight Services Opeations.

[FR Doc. 06–1569 Filed 2–21–06; 8:45 am]

BILLING CODE 4910–13–M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AC25

Commodity Pool Operator Electronic Filing of Annual Reports

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is amending Commission rules to require that commodity pool annual financial reports submitted by commodity pool operators (''CPOs'') to the National Futures Association (''NFA'') be filed and affirmed electronically, in compliance with NFA's electronic filing procedures. NFA petitioned the Commission to adopt this amendment after its implementation of a pilot program for electronic filing of commodity pool annual reports in 2005.

The amendment necessarily eliminates the requirement that the commodity pool annual report filed with NFA be manually signed, and replaces it with a requirement that CPOs maintain for five years in their own business records a manually signed oath or affirmation with respect to each annual report along with documentation supporting the compilation of certain key financial balances required to be submitted to NFA.

In addition to mandating electronic filing, the Commission is also amending other provisions of its rules applicable to CPOs with respect to financial reporting to: (i) Explicitly state that commodity pool monthly and/or quarterly account statements distributed to participants must be prepared in accordance with generally accepted accounting principles; (ii) clarify that CPOs must file a notification of a change in a public accountant for a commodity pool with NFA; (iii) clarify that a reference to ''segregation'' with respect to a statement required to be made in an accountant's letter refers to the prohibition on commingling of funds of a commodity pool with the assets of any other person; and (iv) require that notifications concerning CPOs' election of fiscal years for commodity pools other than the calendar year or changes in fiscal year be filed solely with NFA and not the Commission.

These amendments with respect to commodity pool financial reporting do not impact the distribution of annual reports to pool participants, which may continue to be provided through hard-copy distribution via postal mail or electronically if the pool participant consents thereto. Also, these amendments do not change the requirements or process for CPOs to request that the Commission provide confidential treatment to commodity pool annual reports submitted to NFA, in response to requests from the public made under the Freedom of Information Act.

DATES: *Effective Date:* March 24, 2006.

FOR FURTHER INFORMATION CONTACT: Thomas J. Smith, Deputy Director and Chief Accountant, at (202) 418–5430 or Jennifer C.P. Bauer, Special Counsel, at (202) 418–5472, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Electronic mail: (*tsmith@cftc.gov*) or (*jbauer@cftc.gov*).

SUPPLEMENTARY INFORMATION:

I. Background

Rule 4.22(c) requires a CPO to file with NFA and to provide to each participant an annual financial report, certified by an independent public

accountant, for each commodity pool that it operates within 90 days of the end of the pool's fiscal year or the permanent cessation of trading.[1] Also, Rule 4.7(b)(3) requires a CPO that has claimed an exemption from certain regulatory requirements pursuant to Rule 4.7 to file with NFA and to distribute to commodity pool participants an unaudited annual financial report in lieu of an audited annual financial report.[2]

Beginning with reports filed for the year ended December 31, 2004, the NFA implemented a pilot program permitting CPOs to voluntarily elect to file commodity pool annual reports through the use of an electronic filing system, the ''EasyFile'' system, accessed from the NFA's Web site.[3] The NFA pilot program required that the complete annual report for commodity pools, including the public accountant's opinion contained in certified statements, be submitted to NFA in the Portable Document Format (''PDF'') file format. In addition to the electronic submission of the document in a PDF file format, participating CPOs were required to directly enter certain key financial statement balances or aggregated balances from the commodity pools' annual reports into the NFA's EasyFile system. The key financial statement balances filed electronically through the pilot program include all the data elements that NFA staff currently manually enter into the FACTS 2000 database from the information contained in hard copy annual reports, as well as several data elements that NFA staff added after consultation with members of the commodity pool industry, certified public accountants (''CPAs'') that serve the commodity pool industry, and Commission staff. NFA's FACTS 2000 database serves as the primary means by which NFA and Commission staff access commodity pool financial information.

NFA requested that the Commission provide CPOs participating in the pilot program with relief from the requirement of Rule 4.22(h) that the annual report filed with NFA include a manually signed oath or affirmation, as NFA implemented an electronic version of the oath or affirmation applicable to both the document submitted in PDF file format and the key financial statement balances directly entered into the EasyFile system. The Commission's Division of Clearing and Intermediary Oversight issued exemptive relief in January 2005 to CPOs participating in the pilot program from the requirement that their pools' annual reports submitted to NFA be manually signed under Rule 4.22(j).[4] On August 26, 2005, the NFA petitioned the Commission to formally amend Rules 4.22 and 4.7 to eliminate the requirement that CPOs file manually signed pool annual reports with NFA, and to further require CPOs to file such annual reports with NFA electronically using the EasyFile system implemented in the pilot program.

Mandatory electronic filing of commodity pool annual reports is anticipated to benefit both the Commission and NFA by increasing the quality of the financial data from commodity pool annual reports that will be collected in FACTS 2000 and be available to the Commission. Direct data entry by the CPO or its CPA, who are most familiar with the information being submitted, and system-enforced edit and validation checks,[5] which are part of the electronic filing system, should enhance the integrity and quality of data collected. Also, NFA's guidance for the classification of the key data elements in the pilot program should increase the uniformity of data available in FACTS 2000, when utilized by all CPOs with respect to applicable commodity pool annual report filings.

Pursuant to the effectiveness of these amendments, submission of annual reports in compliance with the NFA's electronic filing procedures, which require authentication through the use of user ids, passwords and specific permissions managed by designated Security Managers[6] of CPOs, will replace the requirement that a manually signed oath or affirmation be submitted to NFA with a commodity pool's annual report. The user interface and system security for NFA's CPO electronic filing system are patterned after NFA's existing EasyFile system for IBs' unaudited financial reports. Similar to EasyFile for IBs, the CPO's Security Manager can establish users and assign them abilities to enter data and/or submit the report and data in the NFA electronic filing system.

By these amendments CPOs will be required to maintain in their business records a manually signed oath or affirmation along with their commodity pool annual reports, and also sufficient documentation to support the compilation of the key balances from the annual report. Therefore, NFA may verify or corroborate the information submitted electronically if necessary.

II. Comments

NFA was the only entity to file a comment letter on the proposed amendments. NFA supported the proposed amendments and stated that ''mandatory participation [in electronic filing] should dramatically increase * * * efficiencies without imposing any undue hardships on our CPO Members.'' NFA also commented in support of the additional amendments proposed with respect to commodity pool financial reporting other than mandatory electronic filing, with one recommendation regarding the notification of changes in commodity pool certified public accountants. NFA commented that these required notifications to both the NFA and the Commission should only be submitted to NFA by CPOs, as they would be available to the Commission in the FACTS 2000 database. The Commission agrees with this comment and has changed the amendment to reflect that for CPOs, such notification must be made solely to NFA. NFA will alert the Commission whenever a notification indicates a disagreement with CPAs or other non-routine circumstances.

III. Amendments

Rule 4.22(c) requires that a registered CPO file with NFA an annual report for each pool that it operates within 90 days of the end of the pool's fiscal year or the permanent cessation of trading. The Commission is amending Rule 4.22(c) and Rule 4.7(b)(3) to specifically require that the commodity pool annual reports be submitted to NFA electronically through NFA's established electronic filing procedures. Further, the Commission is amending Rule 4.22(h), pursuant to which each such report, including those provided under Rule 4.7 and Rule 4.12(b), must contain an oath or affirmation that, to the best of the knowledge and belief of the person making the oath or affirmation, the information contained in the document

[1] The rules of the Commission cited in this release may be found at 17 CFR Ch. I (2005).

[2] CPOs operating pools offered solely to qualified eligible participants (''QEPs'') pursuant to Rule 4.7 may claim relief from the certification requirement of Rule 4.22(d) with respect to the exempt pools' financial statements. See Rule 4.7(b)(3).

[3] NFA initially adopted the EasyFile electronic filing system for financial reporting by introducing brokers (''IBs'') in 2004. The Commission approved NFA's rules adopting EasyFile for IBs on June 28, 2004.

[4] CFTC Letter No. 05–01 may be accessed at *http://www.cftc.gov/tm/letters/05letters/tm05–01.htm.*

[5] For example, the system will prompt the user for a correction if the components listed as assets do not total to the amount entered for total assets, or if certain types of trading assets and liabilities are reported in the balance sheet but there are no gains or losses reported in the income statement with respect to such assets.

[6] The Security Manager procedure is part of NFA's existing electronic system for registration processing. The Commission adopted rule amendments in 2002 to enable NFA to utilize an online system for registration functions. See 67 FR 38,869 (June 6, 2002).

is accurate and complete. The amendment shall require the oath or affirmation on annual reports filed with NFA to be made through the use of electronic filing procedures. The Commission is also deleting Rule 4.22(j) and adding a provision to Rule 4.23(a) requiring CPOs to maintain in their books and records a manually signed oath or affirmation for all annual reports and account statements, and to maintain records of the key financial balances submitted to NFA that clearly demonstrate how such balances were derived.

Rule 4.7(b)(2) requires that an account statement signed and affirmed by the CPO be prepared and distributed to pool participants no less frequently than quarterly within 30 calendar days after the end of the reporting period. The account statement must indicate: (1) The net asset value of the exempt pool as of the end of the reporting period; (2) the change in net asset value from the end of the previous reporting period; and (3) the net asset value per outstanding unit of participation in the exempt pool as of the end of the reporting period. The Commission is amending Rule 4.7(b)(2) to clarify that the account statement provided to participants must be presented and computed in accordance with generally accepted accounting principles as are other financial reports required in Part 4 of the Commission's Rules. By making this requirement explicit, the Commission is ensuring that established professional standards are the basis of such calculations.

Rule 4.22(d) requires that the certification of commodity pool annual reports by independent accountants be made in accordance with the certification requirements of Rule 1.16 that are applicable to the financial statements of FCMs and IBs, with specific exceptions. Rule 4.22(d) does not exempt CPOs from Rule 1.16(g), which requires written notification to be given to the NFA and to the Commission of changes in the entity's independent accountant. In order to make clear that this requirement applies to CPOs, the Commission is amending Rule 4.22(d) to specifically state that Rule 1.16(g) is also applicable to CPOs with respect to notifications of changes in the independent accountants engaged for the certification of commodity pool financial statements, except that such notification may be made solely to NFA. By clarifying this, the Commission will be assured that NFA receives proper notice of the circumstances of any changes of independent accountants, which NFA will report to the Commission if indicative of disagreements with auditors or similar circumstances of concern with respect to the commodity pool.

Rule 4.22(f)(1) provides a mechanism for CPOs that cannot distribute annual reports for pools within the required timeframe without substantial undue hardship to file applications of extensions of time with NFA. In the context of requesting such an extension, the application to NFA must be accompanied by a letter from the pool's independent public accountant. One of the items that must be addressed in the letter is whether the independent accountant has any indication from the audit work in process to indicate that the CPO is not meeting ''segregation'' requirements. In response to some perceived confusion by the use of the term ''segregation'', the Commission is amending Rule 4.22(f)(1)(ii)(B) to clarify that this does not refer to the segregation requirements of Rule 1.20 applicable to FCMs, but instead refers to the prohibition on commingling of funds of a commodity pool with the assets of any other person contained in Rule 4.20(c).[7]

Rules 4.22(g)(2) and (3) require notifications to be made to the Commission concerning CPOs' election of fiscal years for commodity pools other than the calendar year or subsequent changes in fiscal year-ends. The Commission is amending these Rules so that such notifications are solely required to be filed with NFA and not the Commission, consistent with other financial reporting filings that are now made to NFA directly as a result of functions the Commission has authorized NFA to perform.[8] NFA is hereby authorized to maintain and serve as official custodian of these notifications as well as the notifications of changes in certified public accountant for commodity pools.

[7] The language originally proposed was ''the segregation requirements of § 4.20(c)'' showing the intent of the reference to reflect Rule 4.20 and not FCM segregation requirements contained in Commission Rule 1.20. 45 FR 51,600 at 51,610 (August 4, 1980).

[8] By order dated December 11, 2002, the Commission authorized NFA to: (1) Receive and review annual financial reports required to be filed by CPOs pursuant to Rules 4.7(b)(3) and 4.22(c), including annual financial reports required to be filed by CPOs that have claimed relief pursuant to Rule 4.12(b) with respect to qualifying pools, and to review such reports for compliance with the Act and the Commission rules thereunder and to provide notice of deficiencies; (2) receive and grant or deny applications filed pursuant to Rule 4.22(f)(1) for extensions of time to distribute annual financial reports; and (3) process notices of claims of extension of time to distribute and file annual financial reports filed pursuant to Rule 4.22(f)(2). In addition, the Commission authorized NFA to maintain and to serve as the official custodian of such records. 67 FR 77,470 (December 18, 2002).

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et. seq.*, requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission previously has established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[9] The Commission has determined previously that registered CPOs are not small entities for the purpose of the RFA.[10] The proposed amendments to Rule 4.7 and Rule 4.22 would apply only to registered CPOs. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the action taken herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

This rulemaking alters the method of collection for a required collection of information under Part 4 of the Commissions Rules. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Commission submitted a copy of this section to the Office of Management and Budget (OMB) for its review. No comments were received in response to the Commission's invitation in the notice of proposed rulemaking to comment on any change in the potential paperwork burden associated with these rule amendments.

C. Cost-Benefit Analysis

Section 15(a) of the Act, as amended by Section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new Rule under the Act. By its terms, Section 15(a) as amended does not require the Commission to quantify the costs and benefits of a new Rule or to determine whether the benefits of the Rule outweigh its costs. Rather, Section 15(a) simply requires the Commission to ''consider the costs and benefits'' of its action.

Section 15(a) of the Act further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest

[9] 47 FR 18618 (April 30, 1982).

[10] 47 FR at 18619.

considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission's proposal contained an analysis of its consideration of these costs and benefits and solicited public comment thereon. 70 FR at 74244. No comments were received with respect to the analysis of the Commission's consideration. Therefore, pursuant to such consideration, the Commission has decided to adopt these amendments as discussed above.

List of Subjects in 17 CFR Part 4

Advertising, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 17 CFR Chapter I is amended as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

■ 1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

■ 2. Section 4.7 is amended by revising paragraphs (b)(2) and (b)(3) to read as follows:

§ 4.7 Exemption from certain Part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to advising qualified eligible persons.

* * * * *

(b) * * *

(2) *Periodic reporting relief.* Exemption from the specific requirements of §§ 4.22(a) and (b); *Provided,* That a statement signed and affirmed in accordance with § 4.22(h) is prepared and distributed to pool participants no less frequently than quarterly within 30 calendar days after the end of the reporting period. This statement must be presented and computed in accordance with generally accepted accounting principles and indicate:

(i) The net asset value of the exempt pool as of the end of the reporting period;

(ii) The change in net asset value from the end of the previous reporting period; and

(iii) The net asset value per outstanding unit of participation in the exempt pool as of the end of the reporting period.

(3) *Annual report relief.* (i) Exemption from the specific requirements of §§ 4.22(c) and (d); *Provided,* That within 90 calendar days after the end of the exempt pool's fiscal year, the commodity pool operator electronically files with the National Futures Association and distributes to each participant in lieu of the financial information and statements specified by those sections, an annual report for the exempt pool, affirmed in accordance with § 4.22(h) which contains, at a minimum:

* * * * *

■ 3. Section 4.22 is amended by:

■ a. Revising paragraph (c) introductory text;

■ b. Revising paragraph (d) introductory text;

■ c. Revising paragraph (f)(1)(ii)(B);

■ d. Revising paragraphs (g)(2) and (3);

■ e. Revising paragraph (h); and

■ f. Removing paragraph (j), to read as follows:

§ 4.22 Reporting to pool participants.

* * * * *

(c) Except as provided in paragraph (c)(6) of this section, each commodity pool operator registered or required to be registered under the Act must distribute an Annual Report to each participant in each pool that it operates, and must electronically submit a copy of the Report and key financial balances from the Report to the National Futures Association pursuant to the electronic filing procedures of the National Futures Association, within 90 calendar days after the end of the pool's fiscal year or the permanent cessation of trading, whichever is earlier, but in no event longer than 90 days after funds are returned to pool participants; *Provided, however,* That if during any calendar year the commodity pool operator did not operate a commodity pool, the pool operator must so notify the National Futures Association within 30 calendar days after the end of such calendar year. The Annual Report must be affirmed pursuant to paragraph (h) of this section and must contain the following:

* * * * *

(d) The financial statements in the Annual Report must be presented and computed in accordance with generally accepted accounting principles consistently applied and must be certified by an independent public accountant. The requirements of § 1.16(g) of this chapter shall apply with respect to the engagement of such independent public accountants, except that any related notifications to be made may be made solely to the National Futures Association, and the certification must be in accordance with § 1.16 of this chapter, except that the following requirements of that section shall not apply:

* * * * *

(f) * * *

(1) * * *

(ii) * * *

(B) Do you have any indication from the part of your audit completed to date that would lead you to believe that the commodity pool operator was or is not meeting the recordkeeping requirements of this part 4 or was or is not complying with the § 4.20(c) prohibition on commingling of property of any pool with the property of any other person?

* * * * *

(g)(1) * * *

(2) If a commodity pool operator elects a fiscal year other than the calendar year, it must give written notice of the election to all participants and must file the notice with the National Futures Association within 90 calendar days after the date of the pool's formation. If this notice is not given, the pool operator will be deemed to have elected the calendar year as the pool's fiscal year.

(3) The commodity pool operator must continue to use the elected fiscal year for the pool unless it provides written notice of any proposed change to all participants and files such notice with the National Futures Association at least 90 days before the change and the National Futures Association does not disapprove the change within 30 days after the filing of the notice.

(h)(1) Each Account Statement and Annual Report, including an Account Statement or Annual Report provided pursuant to § 4.7(b) or 4.12(b), must contain an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the document is accurate and complete; *Provided, however,* That it shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in the document is not accurate and complete.

(2) Each oath or affirmation must be made by a representative duly authorized to bind the pool operator, and

(i) for the copy of a commodity pool's Annual Report submitted to the National Futures Association, such representative shall satisfy the required oath or affirmation through compliance

with the National Futures Association's electronic filing procedures, and

(ii) for a commodity pool Account Statement or Annual Report distributed to participants, a facsimile of the manually signed oath or affirmation of such representative may be used so long as the manually signed original is retained in accordance with § 4.23.

(3) For each manually signed oath or affirmation, there must be typed beneath the signed oath or affirmation:

(i) The name of the individual signing the document;

(ii) The capacity in which he is signing;

(iii) The name of the commodity pool operator for whom he is signing; and

(iv) The name of the commodity pool for which the document is being distributed.

* * * * *

■ 4. Section 4.23 is amended by adding a new paragraph (a)(12) to read as follows:

§ 4.23 Recordkeeping.

* * * * *

(a) * * *

(12) A manually signed copy of each Account Statement and Annual Report provided pursuant to § 4.22, 4.7(b) or 4.12(b), and records of the key financial balances submitted to the National Futures Association for each commodity pool Annual Report, which records must clearly demonstrate how the key financial balances were compiled from the Annual Report.

* * * * *

Issued in Washington, DC, on February 16, 2006 by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 06–1615 Filed 2–21–06; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9251]

RIN 1545–BE71

Special Rules Regarding Certain Section 951 Pro Rata Share Allocations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 951(a) of the Internal Revenue Code (Code) regarding a United States shareholder's pro rata share of a controlled foreign corporation's (CFC's) subpart F income, previously excluded subpart F income withdrawn from investment in less developed countries, and previously excluded subpart F income withdrawn from foreign base country shipping operations. These regulations are intended to ensure that a CFC's earnings and profits for a taxable year attributable to a section 304 transaction will not be allocated in a manner that results in the avoidance of Federal income tax. These regulations are also intended to ensure that earnings and profits of a CFC are not allocated to certain preferred stock in a manner inconsistent with the economic interest that such stock represents.

DATES: *Effective Date:* These regulations are effective February 22, 2006.

Applicability Date: For dates of applicability, see § 1.951–1(e)(3)(v), (e)(4)(ii) and (e)(7).

FOR FURTHER INFORMATION CONTACT: Jefferson VanderWolk, (202) 622–3810 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On August 6, 2004, the IRS published in the **Federal Register** a notice of proposed rulemaking (REG–129771–04, 2004–36 I.R.B. 453) under section 951 of the Code. After consideration of comments received, the proposed regulations were modified and adopted as final with the publication of T.D. 9222 on August 25, 2005 (70 FR 49864). In response to comments, the IRS published at the same time in the **Federal Register** a notice of proposed rulemaking (REG–129782–05, 70 FR 49894) under section 951 of the Code. No written comments were received in response to that notice of proposed rulemaking. No public hearing was requested or held on the notice of proposed rulemaking. The proposed regulations are adopted as final regulations with the modifications discussed below.

Explanation of Changes

Section 1.951–1(e) defines pro rata share for purposes of section 951(a) of the Code. The general rule, set forth in § 1.951–1(e)(3)(i), provides for the allocation of current earnings and profits to different classes of stock on the basis of the respective amounts of such earnings and profits that would be distributed with respect to each class if such earnings and profits were distributed on the last day of the CFC's taxable year on which it is a CFC.

Section 1.951–1(e)(3)(v) provides a special rule that modifies the general rule regarding the allocation of a CFC's current earnings and profits to more than one class of stock. The special rule applies where a CFC has earnings and profits and subpart F income for its taxable year attributable to a transaction described in section 304 of the Code and that transaction is part of a plan a principal purpose of which is to avoid Federal income taxation by allocating the subpart F income resulting from the section 304 transaction disproportionately to a tax-indifferent party. Pursuant to the rule, such earnings and profits are allocated to each class of stock of the CFC in accordance with the value of such class relative to all other classes.

Several practitioners noted in oral comments that proposed § 1.951–1(e)(6), *Example 9*, which illustrates the application of proposed § 1.951–1(e)(3)(v), presented facts whose characterization under other Code sections could be unclear under the circumstances. In response to these comments, the IRS and Treasury Department have revised the example in order to limit the issues presented.

A comment on the rules originally proposed on August 6, 2004, requested guidance to eliminate inappropriate distortions between subpart F inclusions and economic realization that taxpayers may achieve if accumulated but unpaid dividends with respect to preferred stock are not discounted to present value for purposes of determining the hypothetical distribution. As a partial response to that comment, proposed § 1.951–1(e)(4)(ii) provided a special rule requiring accumulated but unpaid dividends with respect to mandatorily redeemable cumulative preferred stock be taken into account at present value for purposes of the hypothetical distribution. Comments were requested regarding the treatment of cumulative preferred stock that does not have a mandatory redemption date or that is subject to a shareholder-level agreement, such as a purchase option. In addition, the preamble stated that the IRS and the Treasury Department anticipated that any such rules would be effective for taxable years of a controlled foreign corporation beginning on or after January 1, 2006. No further comments were received beyond the original comment.

The IRS and Treasury Department agree with the commentator that accrued but unpaid dividends generally present possibilities for distortion between subpart F income inclusions and economic income realization. These distortions are similar to those that can arise from stock with discretionary

distribution rights. Accordingly, § 1.951–1(e)(4)(ii) adds a rule that generally treats cumulative preferred stock with accrued but unpaid dividends in the same manner as stock with discretionary distribution rights (as defined in § 1.951–1(e)(3)(ii)). Earnings and profits are allocated to such stock on the basis of the value of such stock relative to the value of other classes of stock outstanding.

There are two exceptions to this general rule. First, to the extent that dividends are paid with respect to such stock during the year, earnings and profits equal to the amount of such dividends are first allocated to that class of stock. Additional earnings and profits are allocated to that class of stock only in the amount (if any) by which the value-based allocation of earnings and profits to that class of stock exceeds the amount of such dividends. Second, the final regulations preserve the special present-value rule (with technical modifications) for certain mandatorily redeemable cumulative preferred stock.

Consistent with the comment received, and as provided in the preamble to the proposed regulations, these rules are effective for taxable years of a controlled foreign corporation beginning on or after January 1, 2006.

Special Analyses

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

Drafting Information

The principal author of these regulations is Jefferson VanderWolk of the Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.951–1 is amended by revising paragraphs (e)(3)(v), (e)(4)(ii), and the first sentence of paragraph (e)(7), and paragraph (e)(6) *Example 9* is added.

The revisions and addition read as follows:

§ 1.951–1 Amounts included in gross income of United States shareholders.

* * * * *

(e) * * *

(3) * * *

(v) *Earnings and profits attributable to certain section 304 transactions.* For taxable years of a controlled foreign corporation beginning on or after January 1, 2006, if a controlled foreign corporation has more than one class of stock outstanding and the corporation has earnings and profits and subpart F income for a taxable year attributable to a transaction described in section 304, and such transaction is part of a plan a principal purpose of which is the avoidance of Federal income taxation, the amount of such earnings and profits allocated to any one class of stock shall be that amount which bears the same ratio to the remainder of such earnings and profits as the value of all shares of such class of stock, determined on the hypothetical distribution date, bears to the total value of all shares of all classes of stock of the corporation, determined on the hypothetical distribution date.

(4) * * *

(i) * * *

(ii) *Certain cumulative preferred stock.* For taxable years of a controlled foreign corporation beginning on or after January 1, 2006, if a controlled foreign corporation has one or more classes of preferred stock with cumulative dividend rights, such stock shall be considered for the purposes of this section as stock with discretionary distribution rights. As a result, the provisions of paragraph (e)(3)(ii) of this section shall apply for purposes of allocating earnings and profits to such stock, except that earnings and profits shall first be allocated to the stock under paragraph (e)(3)(i) of this section to the extent of any dividends paid with respect to the stock during the taxable year. Additional earnings and profits will be allocated to the stock only in an amount equal to the excess (if any) of the amount of earnings and profits allocated to the stock under paragraph (e)(3)(ii) of this section over the amount of such dividends. Notwithstanding the foregoing, if a class of redeemable preferred stock with cumulative dividend rights has a mandatory redemption date, and all dividend arrearages with respect to such stock compound at least annually at a rate that is not lower than the applicable Federal rate (as defined in section 1274(d)(1)) (AFR) that applies on the date the stock is issued for the term from such issue date to the mandatory redemption date, based on a comparable compounding assumption, such stock shall not be considered for purposes of this section as stock with discretionary distribution rights.

* * * * *

(6) * * *

Example 9. (i) *Facts.* In 2006, FC10, a controlled foreign corporation within the meaning of section 957(a), has outstanding 100 shares of common stock and 100 shares of 6-percent, voting, preferred stock with a par value of $10x per share. All of the common stock is held by Corp H, a foreign corporation, which invested $1000x in FC10 in exchange for the common stock. All of the preferred stock is held by Corp J, a domestic corporation, which invested $5000x in FC10 in exchange for the preferred stock. Corp H is unrelated to Corp J. In 2006, FC10 borrows $3000x from a bank and invests $5000x in preferred stock issued by FC11, a foreign corporation the common stock of which is owned by Corp J. Corp J's adjusted basis in its FC 11 common stock is $5000x. FC11, which has no current or accumulated earnings and profits, distributes the $5000x to Corp J. Subsequently, in 2007, FC10 sells the FC11 preferred stock to FC12, a wholly-owned foreign subsidiary of FC11 that has $5000x of accumulated earnings and profits, for $5000x in a transaction described in section 304. FC10 repays the bank loan in full. For 2007, FC10 has $5000x of earnings and profits, all of which is subpart F income attributable to a section 304 dividend arising from FC10's sale of the FC11 preferred stock to FC12. At all relevant times, the value of the common stock of FC10 is $1000x and the value of the preferred stock of FC10 is $5000x.

(ii) *Analysis.* The acquisition and sale of the FC11 preferred stock by FC10 was part of a plan a principal purpose of which was the avoidance of Federal income tax by depleting the earnings and profits of FC12 and allowing FC11 to make a distribution to Corp J that it characterizes entirely as a return of basis. FC10 has $5000x of earnings and profits for 2007 attributable to a dividend from a section 304 transaction which was part of such plan. Under paragraph (e)(3)(v) of this section, these earnings and profits are allocated to the common and preferred stock of FC10 in accordance with the relative value of each class of stock ($1000x and $5000x,

respectively). Thus, for taxable year 2007, $833x (⅙ × $5000x = $833x) of these earnings and profits is allocated to FC10's common stock and $4167x (⅚ × $5000x = $4167x) is allocated to its preferred stock.

(7) *Effective dates.* Except as provided in paragraphs (e)(3)(v) and (e)(4)(ii) of this section, this paragraph (e) applies for taxable years of a controlled foreign corporation beginning on or after January 1, 2005. * * *

* * * * *

Approved: February 8, 2006.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 06–1532 Filed 2–21–06; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9245]

RIN 1545–BE15

Disclosure of Return Information to the Department of Agriculture

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that incorporate and clarify the phrase ''return information reflected on returns'' in conformance with the terms of section 6103(j)(5) of the Internal Revenue Code (Code), which provides for limited disclosures of returns and return information in connection with the census of agriculture. These final regulations also remove certain items of return information that the Department of Agriculture no longer needs for conducting the census of agriculture.

DATES: *Effective Date:* These regulations are effective on February 22, 2006.

FOR FURTHER INFORMATION CONTACT: Deborah Lambert-Dean at (202) 622–4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 301 under section 6103(j) of the Code. On June 6, 2003, the **Federal Register** published a temporary regulation (TD 9060) regarding disclosure of return information to the Department of Agriculture (68 FR 33857) and a notice of proposed rulemaking (NPRM) (REG–103809–03) cross-referencing the temporary regulations (68 FR 33887). There were no comments submitted in response to the NPRM. There was no request for a public hearing, and none took place. The proposed regulations are adopted and the corresponding temporary regulations are removed.

Special Analyses

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

Drafting Information

The principal author of these regulations is Deborah Lambert-Dean, Office of the Associate Chief Counsel, Procedure & Administration (Disclosure & Privacy Law Division).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 is amended by removing the entry for ''Section 301.6103(j)(5)–1T and adding an entry in numerical order to read in part as follows:

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

Section 301.6103(j)(5)–1 also issued under 26 U.S.C. 6103(j)(5). * * *

301.6103(j)(5)–1T [Removed]

■ **Par. 2.** Section 301.6103(j)(5)–1T is removed.

■ **Par. 3.** Section 301.6103(j)(5)–1 is added to read as follows:

§ 301.6103(j)(5)–1 Disclosures of return information reflected on returns to officers and employees of the Department of Agriculture for conducting the census of agriculture.

(a) *General rule.* Pursuant to the provisions of section 6103(j)(5) of the Internal Revenue Code and subject to the requirements of paragraph (c) of this section, officers or employees of the Internal Revenue Service will disclose return information reflected on returns to officers and employees of the Department of Agriculture to the extent, and for such purposes, as may be provided by paragraph (b) of this section. ''Return information reflected on returns'' includes, but is not limited to, information on returns, information derived from processing such returns, and information derived from other sources for the purposes of establishing and maintaining taxpayer information relating to returns.

(b) *Disclosure of return information reflected on returns to officers and employees of the Department of Agriculture.* (1) Officers or employees of the Internal Revenue Service will disclose the following return information reflected on returns described in this paragraph (b) for individuals, partnerships and corporations with agricultural activity, as determined generally by industry code classification or the filing of returns for such activity, to officers and employees of the Department of Agriculture for purposes of, but only to the extent necessary in, structuring, preparing, and conducting, as authorized by chapter 55 of title 7, United States Code, the census of agriculture.

(2) From Form 1040 ''U.S. Individual Income Tax Return'', Form 1041 ''U.S. Income Tax Return for Estates and Trusts'', Form 1065 ''U.S. Return of Partnership Income'' and Form 1065–B ''U.S. Return of Income for Electing Large Partnerships'' (Schedule F)—

(i) Taxpayer identity information (as defined in section 6103(b)(6) of the Internal Revenue Code);

(ii) Spouse's Social Security Number;

(iii) Annual accounting period;

(iv) Principal Business Activity (PBA) code;

(v) Taxable cooperative distributions;

(vi) Income from custom hire and machine work;

(vii) Gross income;

(viii) Master File Tax (MFT) code;

(ix) Document Locator Number (DLN);

(x) Cycle posted;

(xi) Final return indicator;

(xii) Part year return indicator; and

(xiii) Taxpayer telephone number.

(3) From Form 943, ''Employer's Annual Tax Return for Agricultural Employees''—

(i) Taxpayer identity information;

(ii) Annual accounting period;

(iii) Total wages subject to Medicare taxes;

(iv) MFT code;

(v) DLN;

(vi) Cycle posted;

(vii) Final return indicator; and

(viii) Part year return indicator.

(4) From Form 1120 series, ''U.S. Corporation Income Tax Return''—

(i) Taxpayer identity information;

(ii) Annual accounting period;

(iii) Gross receipts less returns and allowances;

(iv) PBA code;

(v) MFT Code;

(vi) DLN;

(vii) Cycle posted;

(viii) Final return indicator;

(ix) Part year return indicator; and

(x) Consolidated return indicator.

(5) From Form 1065 series, ''U.S. Return of Partnership Income''—

(i) Taxpayer identity information;

(ii) Annual accounting period;

(iii) PBA code;

(iv) Gross receipts less returns and allowances;

(v) Net farm profit (loss);

(vi) MFT code;

(vii) DLN;

(viii) Cycle posted;

(ix) Final return indicator; and

(x) Part year return indicator.

(c) *Procedures and Restrictions.* (1) Disclosure of return information reflected on returns by officers or employees of the Internal Revenue Service as provided by paragraph (b) of this section will be made only upon written request designating, by name and title, the officers and employees of the Department of Agriculture to whom such disclosure is authorized, to the Commissioner of Internal Revenue by the Secretary of Agriculture and describing—

(i) The particular return information reflected on returns for disclosure;

(ii) The taxable period or date to which such return information reflected on returns relates; and

(iii) The particular purpose for the requested return information reflected on returns.

(2)(i) No such officer or employee to whom the Internal Revenue Service discloses return information reflected on returns pursuant to the provisions of paragraph (b) of this section shall disclose such information to any person, other than the taxpayer to whom such return information reflected on returns relates or other officers or employees of the Department of Agriculture whose duties or responsibilities require such disclosure for a purpose described in paragraph (b)(1) of this section, except in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(ii) If the Internal Revenue Service determines that the Department of Agriculture, or any officer or employee thereof, has failed to, or does not, satisfy the requirements of section 6103(p)(4) of the Internal Revenue Code or regulations or published procedures, the Internal Revenue Service may take such actions as are deemed necessary to ensure that such requirements are or will be satisfied, including suspension of disclosures of return information reflected on returns otherwise authorized by section 6103(j)(5) and paragraph (b) of this section, until the Internal Revenue Service determines that such requirements have been or will be satisfied.

(d) *Effective date.* This section is applicable on February 22, 2006.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: February 11, 2006.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 06–1531 Filed 2–21–06; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 153

[0790–AH73]

Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Service Members, and Former Service Members

AGENCY: Department of Defense, General Counsel of the Department of Defense.

ACTION: Final rule.

SUMMARY: Chapter 212 of title 18, United States Code (Military Extraterritorial Jurisdiction Act of 2000 (MEJA)) establishes Federal criminal jurisdiction over whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year (i.e., a felony offense) while employed by or accompanying the Armed Forces outside the United States, certain members of the Armed Forces subject to the Uniform Code of Military Justice (Chapter 47 of title 10, United States Code), and former members of the Armed Forces. This rule is established to correspond with the Department of Defense Instruction 5525.11, ''Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members,'' that the Deputy Secretary of Defense approved on March 3, 2005.

DATES: *Effective:* March 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Reed, 703–695–1055.

SUPPLEMENTARY INFORMATION: On February 2, 2004 (69 FR 4890) the Department of Defense published a proposed rule. Several comments were received, reviewed, and accepted to better clarify the provisions of the proposed rule and to add appropriate definitions of terms used. Other comments addressed concerns raised and considered during the legislative process and were not adopted as additional modifications for the Final Rule.

Pursuant to the comment opportunity afforded the public by the **Federal Register** publication of the proposed rule on February 2, 2004, public comments recommended that international agreements involving extradition procedures be considered, ensure that potential conflict with the Posse Comitatus Act and double jeopardy be eliminated, that military defense counsel be clearly designated to serve as qualified defense counsel for limited representation purposes, and that juveniles be include in the discussions of persons subject to the Military Extraterritorial Jurisdiction Act (''the Act''). Each of these concerns were specifically considered and addressed when the Act was legislatively developed and further changes to the Proposed Rule were considered unnecessary. A recommendation that the term ''Designated Commanding Officer (DCO)'' be defined was approved and added to the definitions in the Final Rule. Another recommendation was approved to clarify the discussion of the amenability of the Act to Reserve component personnel and proper use of ''reservists,'' as well as clarify that annual reports due in February were to encompass information for the immediately preceding calendar year. A recommendation was approved to clarify that ''command sponsorship'' was not to be used to consider whether a person was a dependent for purposes of the Act. It was determined that the Proposed Rules' discussion of union representation was sufficient and a recommendation to expand the discussion of a union's statutory right to

bargain over any provision was not approved. However, the provision was modified to reflect collective bargaining unit representation under Chapter 71 of title 5, United States Code. A recommendation was adopted to clarify that it was not required under the Act that an individual's misconduct violate both the host nation law and that of the United States under the Act. Illustrative examples contained in the Proposed Rule were deleted from the Final Rule as being misleading and potentially causing confusion. A recommendation that the regulations specify that a Combatant Commander's delegation authority extends to specific subordinates was not adopted, but is left to the best judgment and discretion of the Combatant Commander.

Executive Order 12866, ''Regulatory Planning and Review''

This rule regulatory action is a significant regulatory action, as defined by Executive Order 12866 and has been reviewed by OMB and approved for publication.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This regulatory action will not have a significant adverse impact on a substantial number of small entities.

Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104–4)

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of $100 million or more in any 1 year. This rule making will not significantly or uniquely affect small governments.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Federalism (Executive Order 13132)

This regulatory action does not have Federalism implications, as set forth in Executive Order 13132. 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.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule establishes procedures for coordinating criminal jurisdiction matters between the Department of Defense, Justice, and State that involve crimes committed by civilians employed by or accompanying the Armed Forces overseas.

List of Subjects in 32 CFR Part 153

Courts, Intergovernmental relations, Military personnel.

■ Accordingly, 32 CFR part 153 is revised to read as follows:

PART 153—CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS

Sec.
153.1 Purpose.
153.2 Applicability and scope.
153.3 Definitions.
153.4 Responsibilities.
153.5 Procedures.

Authority: 10 U.S.C. 301.

§ 153.1 Purpose.

This part:

(a) Implements policies and procedures, and assigns responsibilities under the Military Extraterritorial Jurisdiction Act of 2000, as amended by section 1088 of the ''Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005,'' October 28, 2004 (hereinafter referred to as ''the Act'') for exercising extraterritorial criminal jurisdiction over certain military personnel, former service members of the United States Armed Forces, and over civilians employed by or accompanying the Armed Forces outside the United States (U.S.).

(b) Implements section 3266 of the Act.

§ 153.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard by agreement with the Department of Homeland Security when it is not operating as a Service of the Department of the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as ''the DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

(b) *Coast Guard.* The Coast Guard ordinarily operates as a separate branch of the Armed Forces in the Department of Homeland Security (DHS). However, upon Presidential Directive, the Coast Guard operates as a Service within the Department of the Navy and becomes part of the Department of Defense. By agreement with the Secretary of the Department of Homeland Security, when the Coast Guard is operating as a separate Service within the DHS, this part shall apply to the Coast Guard to the extent permitted by the Act. Whether a provision of this Instruction applies to a Coast Guard case is determined by whether the Coast Guard is operating as a Service in the DHS or as a Service within the Department of the Navy.

(c) While some Federal criminal statutes are expressly or implicitly extraterritorial, many acts described therein are criminal only if they are committed within ''the special maritime and territorial jurisdiction of the United States'' or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation's borders. State criminal jurisdiction, likewise, normally ends at the boundaries of each State. Because of these limitations, acts committed by military personnel, former service members, and civilians employed by or accompanying the Armed Forces in foreign countries, which would be crimes if committed in the U.S., often do not violate either Federal or State criminal law. Similarly, civilians are generally not subject to prosecution under the Uniform Code of Military Justice (UCMJ), unless Congress had declared a ''time of war'' when the acts were committed. As a result, these acts are crimes, and therefore criminally punishable, only under the law of the foreign country in which they occurred. See section 2 of Report Accompanying the Act (Report to Accompany H.R. 3380, House of Representatives Report 106–778, July 20, 2000 hereafter referred to as ''the Report Accompanying the Act''). While the U.S. could impose administrative discipline for such actions, the Act and this part are intended to address the jurisdictional gap with respect to criminal sanctions.

(d) Nothing in this part may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by court-martial, military commission, provost court, or other military tribunal (Section 3261(c) of title

18). In some cases, conduct that violates section 3261(a) of the Act may also violate the UCMJ, or the law of war generally. Therefore, for military personnel, military authorities would have concurrent jurisdiction with a U.S. District Court to try the offense. The Act was not intended to divest the military of jurisdiction and recognizes the predominant interest of the military in disciplining its service members, while still allowing for the prosecution of members of the Armed Forces with non-military co-defendants in a U.S. District Court under section 3261(d) of the Act.

(e) This part, including its enclosures, is intended exclusively for the guidance of military personnel and civilian employees of the Department of Defense, and of the United States Coast Guard by agreement with the Department of Homeland Security. Nothing contained herein creates or extends any right, privilege, or benefit to any person or entity. See *United States* v. *Caceres,* 440 U.S. 741 (1979).

§ 153.3 Definitions

Accompanying the Armed Forces Outside the United States. As defined in section 3267 of the Act, the dependent of:

(1) A member of the Armed Forces; or

(2) A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department); or

(3) A DoD contractor (including a subcontractor at any tier); or

(4) An employee of a DoD contractor (including a subcontractor at any tier); and

(5) Residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

(6) Not a national of or ordinarily resident in the host nation.

Active Duty. Full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the Military Department concerned. See section 101(d)(1) of title 10, United States Code.

Armed Forces. The Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard. See section 101(a)(4) of title 10, United States Code.

Arrest. To be taken into physical custody by law enforcement officials.

Charged. As used in the Act and this part, this term is defined as an indictment or the filing of information against a person under the Federal Rules of Criminal Procedure. See the analysis to Section 3264 of the Report Accompanying the Act.

Civilian Component. A person or persons employed by the Armed Forces outside the United States, as defined in this section and section 3267(a)(1), as amended, of the Act. A term used in Status of Forces Agreements.

Dependent. A person for whom a member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier) has legal responsibility while that person is residing outside the United States with or accompanying that member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier), and while that responsible person is so assigned, employed or obligated to perform a contractual obligation to the Department of Defense. For purposes of this part, a person's ''command sponsorship'' status while outside the United States is not to be considered in determining whether the person is a dependent within the meaning of this part, except that there shall be a rebuttable presumption that a command-sponsored individual is a dependent.

Designated Commanding Officer (DCO). A single military commander in each foreign country where U.S. Forces are stationed and as contemplated by DoD Directive 5525.1, Status of Forces Policy and Information.

Detention. To be taken into custody by law enforcement officials and placed under physical restraint.

District. A District Court of the United States.

Employed by the Armed Forces Outside the United States. Any person employed as:

(1) A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department); or

(2) A civilian employee of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or

(3) A contractor (including a subcontractor at any tier) of the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense); or

(4) A contractor (including a subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or

(5) An employee of a contractor (including a subcontractor at any tier) of the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense); or

(6) An employee of a contractor (including a subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; and, when the person:

(i) Is present or resides outside the United States in connection with such employment; and

(ii) Is not a national of or ordinarily resident in the host nation.

Federal Magistrate Judge. As used in the Act and this part, this term includes both Judges of the United States and U.S. Magistrate Judges, titles that, in general, should be given their respective meanings found in the Federal Rules of Criminal Procedure. (See footnote 32 of the Report Accompanying the Act) The term does not include Military Magistrates or Military Judges, as prescribed by the UCMJ, or regulations of the Military Departments or the Department of Defense.

Felony Offense. Conduct that is an offense punishable by imprisonment for more than one year if the conduct had been engaged in the special maritime and territorial jurisdiction of the United States. See sections 3261 of the Act and 18 U.S.C. 7. Although the Act, uses the conditional phrase ''if committed within the special maritime and territorial jurisdiction of the United States,'' acts that would be a Federal crime regardless of where they are committed in the U.S., such as drug crimes contained in chapter 13 of title 21, United States Code, also fall within the scope of section 3261(a) of the Act. See the analysis to section 3261 of the Report Accompanying the Act.

Host Country National. A person who is not a citizen of the United States, but who is a citizen of the foreign country in which that person is located.

Inactive Duty Training. Duty prescribed for Reservists by the Secretary of the Military Department concerned under section 206 of title 37, United States Code, or any other provision of law; and special additional duties authorized for Reservists by an authority designated by the Secretary of the Military Department concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. Inactive Duty Training includes those duties performed by Reservists in their status as members of the National Guard while in Federal service. See section 101(d)(7) of title 10, United States Code.

Juvenile. A person who has not attained his or her eighteenth birthday,

as defined in section 5031 of title 18, United States Code.

Military Department. The Department of the Army, the Department of the Navy, and the Department of the Air Force. See section 101(a)(8) of title 10, United States Code.

National of the United States. As defined in section 1101(a)(22), of title 8, United States Code.

Outside the United States. Those places that are not within the definition of ''United States'' below and, with the exception of subparagraph 7(9), those geographical areas and locations that are not within the special maritime and territorial jurisdiction of the United States, as defined in sections 7 of title 18, United States Code. The locations defined in subparagraph 7(9) of title 18, United States Code are to be considered ''Outside the United States'' for the purposes of this part. See 3261–3267 of title 18, United States Code.

Qualified Military Counsel. Judge advocates assigned to or employed by the Military Services and designated by the respective Judge Advocate General, or a designee, to be professionally qualified and trained to perform defense counsel responsibilities under the Act.

Staff Judge Advocate. A judge advocate so designated in the Army, the Air Force, the Marine Corps, or the Coast Guard; the principal legal advisor of a command in the Navy who is a judge advocate, regardless of job title. See Rule for Courts-Martial 103(17), Manual for Courts-Martial, United States (2002 Edition).

Third Country National. A person whose citizenship is that of a country other than the U.S. and the foreign country in which the person is located.

United States. As defined in section 5 of title 18, United States Code, this term, as used in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except for the Panama Canal Zone.

§ 153.4 Responsibilities.

(a) The *General Counsel of the Department of Defense* shall provide initial coordination and liaison with the Departments of Justice and State, on behalf of the Military Departments, regarding a case for which investigation and/or Federal criminal prosecution under the Act is contemplated. This responsibility may be delegated entirely, or delegated for categories of cases, or delegated for individual cases. The General Counsel, or designee, shall advise the Domestic Security Section of the Criminal Division, Department of Justice (DSS/DOJ), as soon as practicable, when DoD officials intend to recommend that the DOJ consider the prosecution of a person subject to the Act for offenses committed outside the United States. The Assistant Attorney General, Criminal Division, Department of Justice, has designated the Domestic Security Section (DSS/DOJ) as the Section responsible for the Act.

(b) The *Inspector General of the Department of Defense* shall:

(1) Pursuant to Section 4(d) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3), ''report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.'' This statutory responsibility is generally satisfied once an official/special agent of the Office of the Inspector General of the Department of Defense notifies either the cognizant Department of Justice representative or the Assistant Attorney General (Criminal Division) of the ''reasonable grounds.''

(2) Pursuant to Section 8(c)(5) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3), and 10 U.S.C. 141(b), ensure the responsibilities described in DoD Directive 5525.7, ''Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes,'' January 22, 1985,[1] to ''implement the investigative policies [,m]onitor compliance by DoD criminal investigative organizations [, and p]rovide specific guidance regarding investigative matters, as appropriate'' are satisfied relative to violations of the Military Extraterritorial Jurisdiction Act of 2000.

(c) The *Heads of Military Law Enforcement Organizations and Military Criminal Investigative Organizations, or their Designees,* shall:

(1) Advise the Commander and Staff Judge Advocate (or Legal Advisor) of the Combatant Command concerned, or designees, of an investigation of an alleged violation of the Act. Such notice shall be provided as soon as practicable. In turn, the General Counsel of the Department of Defense, or designee, shall be advised so as to ensure notification of and consultation with the Departments of Justice and State regarding information about the potential case, including the host nation's position regarding the case. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate. Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Departments of Defense, Justice, and State.

(2) Provide briefings to, and coordinate with, appropriate local law enforcement authorities in advance or, if not possible, as soon thereafter as is practicable, of investigations or arrests in specific cases brought under the Act. If not previously provided to local law enforcement authorities, such briefings about the case shall, at a minimum, describe the Host Nation's position regarding the exercise of jurisdiction under the Act that followed from any briefings conducted pursuant to appendix A of this part.

(d) The *Domestic Security Section, Criminal Division, Department of Justice (DSS/DOJ)* has agreed to:

(1) Provide preliminary liaison with the Department of Defense, coordinate initial notifications with other entities of the Department of Justice and Federal law enforcement organizations; make preliminary decisions regarding proper venue; designate the appropriate U.S. Attorney's Office; and coordinate the further assignment of DOJ responsibilities.

(2) Coordinate with the designated U.S. Attorney's office arrangements for a Federal Magistrate Judge to preside over the initial proceedings required by the Act. Although the assignment of a particular Federal Magistrate Judge shall ordinarily be governed by the jurisdiction where a prosecution is likely to occur, such an assignment does not determine the ultimate venue of any prosecution that may be undertaken. Appropriate venue is determined in accordance with the requirements of section 3238 of title 18, United States Code.

(3) Coordinate the assistance to be provided the Department of Defense with the U.S. Attorney's office in the district where venue for the case shall presumptively lie.

(4) Continue to serve as the primary point of contact for DoD personnel regarding all investigations that may lead to criminal prosecutions and all associated pretrial matters, until such time as DSS/DOJ advises that the case has become the responsibility of a specific U.S. Attorney's Office.

(e) The *Commanders of the Combatant Commands* shall:

(1) Assist the DSS/DOJ on specific cases occurring within the

[1] Available from Internet site *http://www.dtic.mil/whs/directives.*

Commander's area of responsibility. These responsibilities include providing available information and other support essential to an appropriate and successful prosecution under the Act with the assistance of the Commanders' respective Staff Judge Advocates (or Legal Advisors), or their designees, to the maximum extent allowed and practicable.

(2) Ensure command representatives are made available, as necessary, to participate in briefings of appropriate host nation authorities concerning the operation of this Act and the implementing provisions of this part.

(3) Determine when military necessity in the overseas theater requires a waiver of the limitations on removal in section 3264(a) of the Act and when the person arrested or charged with a violation of the Act shall be moved to the nearest U.S. military installation outside the United States that is adequate to detain the person and facilitate the initial proceedings prescribed in section 3265(a) of the Act and this part. Among the factors to be considered are the nature and scope of military operations in the area, the nature of any hostilities or presence of hostile forces, and the limitations of logistical support, available resources, appropriate personnel, or the communications infrastructure necessary to comply with the requirements of section 3265 of the Act governing initial proceedings.

(4) Annually report to the General Counsel of the Department of Defense, by the last day of February for the immediately preceding calendar year, all cases involving the arrest of persons for violations of the Act; persons placed in temporary detention for violations of the Act; the number of requests for Federal prosecution under the Act, and the decisions made regarding such requests.

(5) Determine the suitability of the locations and conditions for the temporary detention of juveniles who commit violations of the Act within the Commander's area of responsibility. The conditions of such detention must, at a minimum, meet the following requirements: Juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment.

(6) As appropriate, promulgate regulations consistent with and implementing this part. The Combatant Commander's duties and responsibilities pursuant to this part may be delegated.

(f) The *Secretaries of the Military Departments* shall:

(1) Consistent with the provisions of paragraph (c) of this section, make provision for defense counsel representation at initial proceedings conducted outside the United States pursuant to the Act for those persons arrested or charged with violations of section 3261(a) of the Act.

(2) Issue regulations establishing procedures that, to the maximum extent practicable, provide notice to all persons covered by the Act who are not nationals of the United States but who are employed by or accompanying the Armed Forces outside the United States, with the exception of individuals who are nationals of or ordinarily resident in the host nation, that they are potentially subject to the criminal jurisdiction of the United States under the Act. At a minimum, such regulations shall require that employees and persons accompanying the Armed Forces outside the United States, who are not nationals of the United States, be informed of the jurisdiction of the Act at the time that they are hired for overseas employment, or upon sponsorship into the overseas command, whichever event is earlier applicable. Such notice shall also be provided during employee training and any initial briefings required for these persons when they first arrive in the foreign country. For employees and persons accompanying the Armed Forces outside the United States who are not nationals of the United States, but who have already been hired or are present in the overseas command at the time this part becomes effective, such notice shall be provided within 60 days of the effective date of this part.

(3) Ensure orientation training, as described in paragraph (f)(2) of this section, is also provided for all U.S. nationals who are, or who are scheduled to be, employed by or accompanying the Armed Forces outside the United States, including their dependents, and include information that such persons are potentially subject to the criminal jurisdiction of the United States under the Act.

(i) For members of the Armed Forces, civilian employees of the Department of Defense and civilians accompanying the Armed Forces overseas, notice and briefings on the applicability of the Act shall, at a minimum, be provided to them and their dependents when travel orders are issued and, again, upon their arrival at command military installations or place of duty outside the United States.

(ii) For civilian employees, contractors (including subcontractors at any tier), and employees of contractors (including subcontractors at any tier) of any other Federal agency, or any provisional authority, permit such persons to attend the above-referenced briefings on a voluntary basis. In addition, to the maximum extent practicable, make available to representatives of such other Federal agencies or provisional authorities such notice and briefing materials as is provided to civilian employees, contractors, and contractor employees of the Department of Defense overseas.

(4) Failure to provide notice or orientation training pursuant to paragraphs (f)(2) and (f)(3) of this section shall not create any rights or privileges in the persons referenced and shall not operate to defeat the jurisdiction of a court of the United States or provide a defense or other remedy in any proceeding arising under the Act or this part.

(5) Provide training to personnel who are authorized under the Act and designated pursuant to this part to make arrests outside the United States of persons who allegedly committed a violation of section 3261(a) of the Act. The training, at a minimum, shall include the rights of individuals subject to arrest.

§ 153.5 Procedures.

(a) *Applicability.* (1) *Offenses and Punishments.* Section 3261(a) of the Act establishes a separate Federal offense under 18 U.S.C. for an act committed outside the United States that would be a felony crime as if such act had been committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of 18 U.S.C. Charged as a violation of section 3261(a) of the Act, the elements of the offense and maximum punishment are the same as the crime committed within the geographical limits of section 7 of 18 U.S.C., but without the requirement that the conduct be committed within such geographical limits. See section 1 of the Section-By-Section Analysis and Discussion to section 3261 in the Report Accompanying the Act.

(2) *Persons subject to this part.* This part applies to certain military personnel, former military service members, and persons employed by or accompanying the Armed Forces outside the United States, and their

dependents, as those terms are defined in section 153.3 of this part, alleged to have committed an offense under the Act while outside the United States. For purposes of the Act and this part, persons employed by or accompanying the Armed Forces outside the U.S. are subject to the ''military law'' of the U.S., but only to the extent to which this term has been used and its meaning and scope have been understood within the context of a SOFA or any other similar form of international agreement.

(3) *Military Service Members.* Military service members subject to the Act's jurisdiction are:

(i) Only those active duty service members who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ. See section 3261(d)(2) of the Act.

(ii) Members of a Reserve component with respect to an offense committed while the member was not on active duty or inactive duty for training (in the case of members of the Army National Guard of the United States or the Air National Guard of the United States, only when in Federal service), are not subject to UCMJ jurisdiction for that offense and, as such, are amenable to the Act's jurisdiction without regard to the limitation of section 3261(d)(2) of the Act.

(4) *Former Military Service Members.* Former military service members subject to the Act's jurisdiction are:

(i) Former service members who were subject to the UCMJ at the time the alleged offenses were committed, but are no longer subject to the UCMJ with respect to the offense due to their release or separation from active duty.

(ii) Former service members, having been released or separated from active duty, who thereafter allegedly commit an offense while in another qualifying status, such as while a civilian employed by or accompanying the Armed Forces outside the United States, or while the dependent of either or of a person subject to the UCMJ.

(5) *Civilians Employed by the Armed Forces.* Civilian employees employed by the U.S. Armed Forces outside the United States (as defined in section 153.3), who commit an offense under the Act while present or residing outside the U.S. in connection with such employment, are subject to the Act and the provisions of this part. Such civilian employees include:

(i) Persons employed by the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense).

(ii) Persons employed as a DoD contractor (including a subcontractor at any tier).

(iii) Employees of a DoD contractor (including a subcontractor at any tier).

(iv) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (or subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.

(6) *Civilians Accompanying the Armed Forces.* Subject to the requirements of paragraph (a)(6)(ii) of this section, the following persons are civilians accompanying the Armed Forces outside the United States who are covered by the Act and the provisions of this part:

(i) Dependents of:

(A) An active duty service member.

(B) A member of the reserve component while the member was on active duty or inactive duty for training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States, only when in Federal service.

(C) A former service member who is employed by or is accompanying the Armed Forces outside the United States.

(D) A civilian employee of the Department of Defense (including non-appropriated fund instrumentalities of the Department of Defense).

(E) A contractor (including a subcontractor at any tier) of the Department of Defense.

(F) An employee of a contractor (including a subcontractor at any tier) of the Department of Defense.

(ii) In addition to the person being the dependent of a person who is listed in paragraph (a)(6)(i) of this section, jurisdiction under the Act requires that the dependent also:

(A) Reside with one of the persons listed in paragraph (a)(6)(i) of this section.

(B) Allegedly commit the offense while outside the United States; and

(C) Not be a national of, or ordinarily resident in, the host nation where the offense is committed.

(iii) Command sponsorship of the dependent is not required for the Act and this part to apply.

(iv) If the dependent is a juvenile, as defined in section 153.3, who engaged in conduct that is subject to prosecution under section 3261(a) of the Act, then the provisions of chapter 403 of title 18, United States Code would apply to U.S. District Court prosecutions.

(7) *Persons NOT Subject to the Act or the Procedures of this part.* (i) Persons who are the nationals of, or ordinarily resident in, the host nation where the offense is committed, regardless of their employment or dependent status.

(ii) Persons, including citizens of the United States, whose presence outside the United States at the time the offense is committed, is not then as a member of the Armed Forces, a civilian employed by the Armed Forces outside the United States, or accompanying the Armed Forces outside the United States.

(A) Persons (including members of a Reserve component) whose presence outside the United States at the time the offense is committed, is solely that of a tourist, a student, or a civilian employee or civilian accompanying any other non-federal agency, organization, business, or entity (and thereby can not be said to be employed by or accompanying the Armed Forces within the definitions of those terms as established by the Act, as modified) are not subject to the Act. Civilian employees of an agency, organization, business, or entity accompanying the Armed Forces outside the U.S. may, by virtue of the agency, organization, business, or entity relationship with the Armed Forces, be subject to the Act and this part.

(B) Persons who are subject to the Act and this part remain so while present, on official business or otherwise (e.g., performing temporary duty or while in leave status), in a foreign country other than the foreign country to which the person is regularly assigned, employed, or accompanying the Armed Forces outside the United States.

(iii) Persons who have recognized dual citizenship with the United States and who are the nationals of, or ordinarily resident in, the host nation where the alleged conduct took place are not persons ''accompanying the Armed Forces outside the United States'' within the meaning of the Act and this part.

(iv) Juveniles whose ages are below the minimum ages authorized for the prosecution of juveniles in U.S. District Court under the provisions of chapter 403 of title 18, United States Code.

(v) Persons subject to the UCMJ (See sections 802 and 803 of title 10, United States Code) are not subject to prosecution under the Act unless, pursuant to section 3261(d) of the Act, the member ceases to be subject to the UCMJ or an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ. A member of a Reserve component who is subject to the UCMJ at the time the UCMJ offense was committed is not relieved from amenability to UCMJ jurisdiction for

that offense. Such reserve component members are not subject to the Act unless section 3261(d)(2) of the Act applies. Retired members of a regular component who are entitled to pay remain subject to the UCMJ after retiring from active duty. Such retired members are not subject to prosecution under the Act unless section 3261(d)(2) of the Act applies.

(vi) Whether Coast Guard members and civilians employed by or accompanying the Coast Guard outside the United States, and their dependents, are subject to the Act and this part depends on whether at the time of the offense the Coast Guard was operating as a separate Service in the Department of Homeland Security or as a Service in the Department of the Navy.

(8) *Persons Having a Tenuous Nexus to the United States.* Third Country Nationals who are not ordinarily resident in the host nation, and who meet the definition of ''a person accompanying the Armed Forces outside the United States,'' may have a nexus to the United States that is so tenuous that it places into question whether the Act's jurisdiction should be applied and whether such persons should be subject to arrest, detention, and prosecution by U.S. authorities. Depending on the facts and circumstances involved, and the relationship or connection of the foreign national with the U.S. Armed Forces, it may be advisable to consult first with the DSS/DOJ before taking action with a view toward prosecution. In addition, to facilitate consultation with the government of the nation of which the Third Country National is a citizen, the State Department should be notified of any potential investigation or arrest of a Third Country National.

(b) *Investigation, Arrest, Detention, And Delivery Of Persons To Host Nation Authorities.* (1) *Investigation.* (i) Investigations of conduct reasonably believed to constitute a violation of the Act committed outside the United States must respect the sovereignty of the foreign nation in which the investigation is conducted. Such investigations shall be conducted in accordance with recognized practices with host nation authorities and applicable international law, SOFA and other international agreements. After general coordination with appropriate host nation authorities, as referenced in Appendix A of this part, specific investigations shall, to the extent practicable, be coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

(ii) When a Military Criminal Investigative Organization is the lead investigative organization, the criminal investigator, in order to assist DSS/DOJ and the designated U.S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the Office of the Staff Judge Advocate of the Designated Commanding Officer (DCO) at the location where the offense was committed for review and transmittal, through the Combatant Commander, to the DSS/DOJ and the designated U.S. Attorney representative. The Office of the Staff Judge Advocate shall also furnish the DSS/DOJ and the designated U.S. Attorney representative an affidavit or declaration from the criminal investigator or other appropriate law enforcement official that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation.

(iii) When the Defense Criminal Investigative Service (DCIS) is the lead investigative organization, the criminal investigator, in order to assist the DSS/DOJ and the designated U.S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the DSS/DOJ and the designated U.S. Attorney representative. The criminal investigator shall also furnish the DSS/DOJ and the designated U.S. Attorney representative, an affidavit or declaration that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation. Within the parameters of 10 U.S.C. Chapter 47, the Inspector General may also notify the General Counsel of the Department of Defense and the DCO's Office of the Staff Judge Advocate at the location where the offense was committed, as appropriate.

(2) *Residence Information.* To the extent that it can be determined from an individual's personnel records, travel orders into the overseas theater, passport, or other records, or by questioning upon arrest or detention, as part of the routine ''booking'' information obtained, an individual's last known residence in the United States shall be determined and forwarded promptly to the DSS/DOJ and the designated U.S. Attorney representative. See *Pennsylvania* v. *Muniz,* 496 U.S. 582, at 601 (1990) and *United States* v. *D'Anjou,* 16 F. 3d 604 (4th Cir. 1993). The information is necessary to assist in determining what law enforcement authorities and providers of pretrial services, including those who issue probation reports, shall ultimately have responsibility for any case that may develop. Determination of the individual's ''last known address'' in the United States is also important in determining what Federal district would be responsible for any possible future criminal proceedings.

(i) Due to the venue provisions of section 3238 of 18 U.S.C. Chapter 212, Sections 3261–3267, the DSS/DOJ and the designated U.S. Attorney representative shall be consulted prior to removal of persons arrested or charged with a violation of the Act by U.S. law enforcement officials. The venue for Federal criminal jurisdiction over offenses committed on the high seas or elsewhere beyond the jurisdiction of a particular State or District (as would be required under the Act), is in the Federal district in which the offender is arrested or first brought. However, if the individual is not so arrested in or brought into any Federal district in the United States (i.e., is to be indicted, or information obtained, prior to the individual's return to the United States), then an indictment or information may be sought in the district of the person's last known residence. If no such residence is known, the indictment or information may be filed in the District of Columbia.

(ii) ''First brought'' connotes the location within the U.S. to which the person is returned in a custodial status.

(iii) ''Last known residence'' refers to that U.S. location where the person lived or resided. It is not necessarily the same as the person's legal domicile or home of record.

(iv) Prompt transmittal of venue information to the DSS/DOJ and the designated U.S. Attorney representative in the United States may prove helpful in determining whether a particular case may be prosecuted, and may ultimately be a pivotal factor in determining whether the host nation or the U.S. shall exercise its jurisdiction over the matter.

(v) The Investigative Report, and any affidavit or declaration, as well as all other documents associated with a case shall be transmitted promptly by the command Staff Judge Advocate to the DSS/DOJ and the designated U.S. Attorney representative. This may be accomplished through the use of facsimile or other means of electronic communication.

(3) *Notice of Complaint or Indictment.* Upon receipt of information from command authorities or Defense

Criminal Investigation Organizations (the Defense Criminal Investigation Service, the Army's Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations) that a person subject to jurisdiction under this Act has violated section 3261(a), the U.S. Attorney for the District in which there would be venue for a prosecution may, if satisfied that probable cause exists to believe that a crime has been committed and that the person identified has committed this crime, file a complaint under Federal Rule of Criminal Procedure 3. As an alternative, the U.S. Attorney may seek the indictment of the person identified. In either case, a copy of the complaint or indictment shall be provided to the Office of the Staff Judge Advocate of the overseas command that reported the offense. The DSS/DOJ and the designated U.S. Attorney representative will ordinarily be the source from which the command's Staff Judge Advocate is able to obtain a copy of any complaint or indictment against a person outside the United States who is subject to the jurisdiction under the Act. This may be accomplished through the use of facsimile or other means of electronic communication.

(4) *Arrest.* (i) Federal Rule of Criminal Procedure 4 takes the jurisdiction of the Act into consideration in stating where arrest warrants may be executed: ''Location. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.'' The Advisory Committee Note explains that the new language reflects the enactment of the Military Extraterritorial Jurisdiction Act permitting arrests of certain military and Department of Defense personnel overseas.

(ii) The Act specifically authorizes persons in DoD law enforcement positions, as designated by the Secretary of Defense, to make arrests outside the United States, upon probable cause and in accordance with recognized practices with host nation authorities and applicable international agreements, those persons subject to the Act who violate section 3261(a) of the Act. Section 3262(a) of the Act constitutes authorization by law to conduct such functions pursuant to 10 U.S.C. 801–946 and therefore avoids possible restrictions of the Posse Comitatus Act regarding military personnel supporting civilian law enforcement agencies.

(iii) When the host nation has interposed no objections after becoming aware of the Act, arrests in specific cases shall, to the extent practicable, be first coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

(iv) Military and civilian special agents assigned to the Defense Criminal Investigative Organizations are hereby authorized by the Secretary of Defense to make an arrest, outside the United States, of a person who has committed an offense under section 3261(a) of the Act. Civilian special agents assigned to Defense Criminal Investigative Organizations while performing duties outside the U.S. shall make arrests consistent with the standardized guidelines established for such agents, as approved in accordance with sections 1585a, 4027, 7480, and 9027 of title 10, United States Code.

(v) Military personnel and DoD civilian employees (including local nationals, either direct hire or indirect hire) assigned to security forces, military police, shore patrol, or provost offices at military installations and other facilities located outside the United States are also authorized to make an arrest, outside the United States, of a person who has committed an offense under section 3261(a) of the Act. This authority includes similarly-assigned members of the Coast Guard law enforcement community, but only when the Coast Guard is operating at such locations as a Service of the Department of the Navy.

(vi) Law enforcement personnel thus designated and authorized by the Secretary of Defense in this part may arrest a person, outside the United States, who is suspected of committing a felony offense in violation of section 3261(a) of the Act, when the arrest is based on probable cause to believe that such person violated section 3261(a) of the Act, and when made in accordance with applicable international agreements. Because the location of the offense and offender is outside the United States, it is not normally expected that the arrest would be based on a previously-issued Federal arrest warrant. Law enforcement personnel authorized to make arrests shall follow the Secretaries of the Military Departments' guidelines for making arrests without a warrant, as prescribed by 10 U.S.C. 1585a, 4027, 7480, and 9027. Authorizations issued by military magistrates under the UCMJ may not be used as a substitute for Federal arrest warrant requirements.

(vii) The foregoing authorization to DoD law enforcement personnel to arrest persons subject to Chapter 212 of title 18, United States Code, for violations of the Act is not intended as a limitation upon the authority of other Federal law enforcement officers to effect arrests when authorized to do so. (E.g., see 18 U.S.C. 3052 authorizing agents of the Federal Bureau of Investigation to make arrests ''for any felony cognizable under the laws of the United States, 21 U.S.C. 878(a)(3) for the same authority for Drug Enforcement Administration agents, and 18 U.S.C. 3053 for the same authority for U.S. Marshals and their deputies.)

(5) *Temporary Detention.* (i) The Commander of a Combatant Command, or designee, may order the temporary detention of a person, within the Commander's area of responsibility outside the United States, who is arrested or charged with a violation of the Act. The Commander of the Combatant Command, or designee, may determine that a person arrested need not be held in custody pending the commencement of the initial proceedings required by section 3265 of the Act and paragraph (d) of this section. The Commander of the Combatant Command may designate those component commanders or DCO commanders who are also authorized to order the temporary detention of a person, within the commanding officer's area of responsibility outside the United States, who is arrested or charged with a violation of the Act.

(ii) A person arrested may be temporarily detained in military detention facilities for a reasonable period, in accordance with regulations of the Military Departments and subject to the following:

(A) Temporary detention should be ordered only when a serious risk is believed to exist that the person shall flee and not appear, as required, for any pretrial investigation, pretrial hearing or trial proceedings, or the person may engage in serious criminal misconduct (e.g., the intimidation of witnesses or other obstructions of justice, causing injury to others, or committing other offenses that pose a threat to the safety of the community or to the national security of the United States). The decision as to whether temporary detention is appropriate shall be made on a case-by-case basis. Section 3142 of title 18, United States Code provides additional guidance regarding conditions on release and factors to be considered.

(B) A person arrested or charged with a violation of the Act who is to be detained temporarily shall, to the extent practicable, be detained in areas that separate them from sentenced military prisoners and members of the Armed Forces who are in pretrial confinement pending trial by courts-martial.

(C) Separate temporary detention areas shall be used for male and female detainees.

(D) Generally, juveniles should not be ordered into temporary detention. However, should circumstances warrant temporary detention, the conditions of such temporary detention must, at a minimum, meet the following requirements: juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment. Appointment of a guardian ad litem may be required under 18 U.S.C. 5034 to represent the interests of the juvenile when the juvenile's parents are not present or when the parents' interests may be adverse to that of the juvenile.

(iii) Persons arrested or charged with a violation of the Act, upon being ordered into temporary detention and processed into the detention facility, shall, as part of the processing procedures, be required to provide the location address of their last U.S. residence as part of the routine booking questions securing ''biographical data necessary to complete booking or pretrial services.'' See *United States* v. *D'Anjou,* 16 F. 3d 604 (4th Cir.1993). This information shall be recorded in the detention documents and made available to the DCO's Office of the Staff Judge Advocate. This information shall be forwarded with other case file information, including affidavits in support of probable cause supporting the arrest and detention, to the DSS/DOJ. The information is provided so that the DSS/DOJ may make appropriate preliminary decisions about venue. See paragraph (b)(2) of this section.

(A) Notice of the temporary detention of any person for a violation of the Act shall be forwarded through command channels, without unnecessary delay, to the Combatant Commander, who shall advise the General Counsel of the Department of Defense, as the representative of the Secretary of Defense, of all such detentions. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

(B) Such notice shall include a summary of the charges, facts and circumstances surrounding the offenses, information regarding any applicable SOFA or other international agreements affecting jurisdiction in the case, and the reasons warranting temporary detention.

(iv) If military command authorities at the military installation outside the United States intend to request a person's detention by order of the Federal Magistrate Judge, the military representative assigned to the case shall gather the necessary information setting forth the reasons in support of a motion to be brought by the attorney representing the government at the initial proceeding conducted pursuant to section 3265 of the Act.

(v) This part is not intended to eliminate or reduce existing obligations or authorities to detain persons in foreign countries as required or permitted by agreements with host countries. See generally, *United States* v. *Murphy,* 18 M.J. 220 (CMA 1984).

(6) *Custody and Transport of Persons While in Temporary Detention.* (i) The Department of Defense may only take custody of and transport the person as specifically set forth in the Act. This is limited to delivery as soon as practicable to the custody of U.S. civilian law enforcement authorities for removal to the United States for judicial proceedings; delivery to appropriate authorities of the foreign country in which the person is alleged to have committed the violation of section 3261(a) of the Act in accordance with section 3263; or, upon a determination by the Secretary of Defense, or the Secretary's designee, that military necessity requires it, removal to the nearest U.S. military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in 3265(a) of the Act.

(ii) Responsibility for a detained person's local transportation, escort, and custody requirements remains with the command that placed the person in temporary detention for a violation of section 3261(a) of the Act. This responsibility includes:

(A) Attendance at official proceedings and other required health and welfare appointments (e.g., appointments with counsel, medical and dental appointments, etc.).

(B) Delivery to host nation officials under section 3263 of the Act.

(C) Attendance at Initial Proceedings conducted under section 3265 of the Act.

(D) Delivery under the Act to the custody of U.S. civilian law enforcement authorities for removal to the United States.

(iii) A person who requires the continued exercise of custody and transportation to appointments and locations away from the detention facility, including delivery of the person to host nation officials under section 3263 of the Act, may be transferred under the custody of command authorities or those law enforcement officers authorized to make arrests in paragraphs (b)(4)(iv) and (b)(4)(v) of this section. Transportation of a detainee outside an installation shall be coordinated with the host nation's local law enforcement, as appropriate and in accordance with recognized practices.

(iv) Military authorities retain responsibility for the custody and transportation of a person arrested or charged with a violation of the Act who is to be removed from one military installation outside the United States to another military installation outside the United States, including when the person is transferred under the provisions of section 3264(b)(5) of the Act. Unless otherwise agreed to between the sending and receiving commands, it shall be the responsibility of the sending command to make arrangements for the person's transportation and custody during the transport or transfer to the receiving command.

(v) In coordination with appropriate host nation authorities, U.S. civilian law enforcement authorities shall be responsible for taking custody of a person arrested or charged with a violation of the Act and for the removal of that person to the United States for any pretrial or trial proceedings. DoD officials shall consult with the DSS/DOJ to determine which civilian law enforcement authority (i.e., U.S. Marshals Service, Federal Bureau of Investigations, Drug Enforcement Agency, or other Federal agency) shall dispatch an officer to the overseas' detention facility to assume custody of the person for removal to the United States. Until custody of the person is delivered to such U.S. civilian law enforcement authorities, military authorities retain responsibility for the custody and transportation of the person arrested or charged with a violation of the Act, to include transportation within the host nation to help facilitate the removal of the person to the United States under the Act.

(7) *Release From Temporary Detention.* When a person subject to the Act has been placed in temporary detention, in the absence of a Criminal Complaint or Indictment pursuant to the

Federal Rules of Criminal Procedure, only the Commander who initially ordered detention, or a superior Commander, or a Federal Magistrate Judge, may order the release of the detained person. If a Criminal Complaint or Indictment exists, or if a Federal Magistrate Judge orders the person detained, only a Federal Magistrate Judge may order the release of the person detained. If a Federal Magistrate Judge orders the person temporarily detained to be released from detention, the Commander who ordered detention, or a superior Commander, shall cause the person to be released. When a person is released from detention under this provision, the Commander shall implement, to the extent practicable within the commander's authority, any conditions on liberty directed in the Federal Magistrate Judge's order. When the commander who independently ordered the person's temporary detention without reliance on a Federal Magistrate Judge's order, or a superior commander, orders a person's release before a Federal Magistrate Judge is assigned to review the matter, the commander may, within the commander's authority, place reasonable conditions upon the person's release from detention.

(i) A person's failure to obey the conditions placed on his or her release from detention, in addition to subjecting that person to the commander's, or Federal Magistrate Judge's order to be returned to detention, may consistent with the commander's authority and applicable policy, laws, and regulations, subject the person to potential criminal sanctions, or to administrative procedures leading to a loss of command sponsorship to the foreign country, as well as the possibility of additional disciplinary or adverse action.

(ii) A copy of all orders issued by a Federal Magistrate Judge concerning initial proceedings, detention, conditions on liberty, and removal to the United States shall promptly be provided to the Commander of the Combatant Command concerned and the Commander of the detention facility at which the person is being held in temporary detention.

(8) *Delivery of Persons to Host Nation Authorities.* (i) Persons arrested may be delivered to the appropriate authorities of the foreign country in which the person is alleged to have violated section 3261(a) of the Act, when:

(A) Authorities of a foreign country request that the person be delivered for trial because the conduct is also a violation of that foreign country's laws, and

(B) Delivery of the person is authorized or required by treaty or another international agreement to which the United States is a party.

(ii) Coast Guard personnel authorized to make arrests pursuant to paragraph (b)(4)(v) of this section are also authorized to deliver persons to foreign country authorities, as provided in section 3263 of the Act.

(iii) Section 3263(b) of the Act calls upon the Secretary of Defense, in consultation with the Secretary of State, to determine which officials of a foreign country constitute appropriate authorities to which persons subject to the Act may be delivered. For purposes of the Act, those authorities are the same foreign country law enforcement authorities as are customarily involved in matters involving foreign criminal jurisdiction under an applicable SOFA or other international agreement or arrangement between the United States and the foreign country.

(iv) No action may be taken under this part with a view toward the prosecution of a person for a violation of the Act if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense(s), except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity). See section 3261(b) of the Act. Requests for an exception shall be written and forwarded to the Combatant Commander. The Combatant Commander shall forward the request to the General Counsel of the Department of Defense, as representative for the Secretary of Defense, for review and transmittal to the Attorney General of the United States. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and the Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

(v) Except for persons to be delivered to a foreign country, and subject to the limitations of section 3264 of the Act and paragraph (e)(5) of this section, persons arrested for conduct in violation of the Act shall, upon the issuance of a removal order by a Federal Magistrate Judge under section 3264(b) of the Act, be delivered, as soon as practicable, to the custody of U.S. civilian law enforcement authorities. See paragraph (b)(6)(iv) of this section.

(c) *Representation.* (1) *Civilian Defense Counsel.* (i) Civilian defense counsel representation shall not be at the expense of the Department of Defense or the Military Departments.

(ii) The Act contemplates that a person arrested or charged with a violation of the Act shall be represented by a civilian attorney licensed to practice law in the United States. However, it is also recognized that in several host nations where there has been a long-standing military presence, qualified civilian attorneys (including lawyers who are U.S. citizens) have established law practices in these host nations to assist assigned U.S. personnel and to represent service members in courts-martial, or before host nation courts. With the consent of the person arrested or charged with a violation of the Act who wishes to remain in the foreign country, these lawyers can provide adequate representation for the limited purpose of any initial proceedings required by the Act. When the person entitled to an attorney or requests counsel, staff judge advocates at such locations should assemble a list of local civilian attorneys for the person's consideration. The list shall contain a disclaimer stating that no endorsement by the United States government or the command is expressed or implied by the presence of an attorney's name on the list.

(A) To the extent practicable, military authorities shall establish procedures by which persons arrested or charged with a violation of the Act may seek the assistance of civilian defense counsel by telephone. Consultation with such civilian counsel shall be in private and protected by the attorney-client privilege.

(B) Civilian defense counsel, at no expense to the Department of Defense, shall be afforded the opportunity to participate personally in any initial proceedings required by the Act that are conducted outside the United States. When civilian defense counsel cannot reasonably arrange to be personally present for such representation, alternative arrangements shall be made for counsel's participation by telephone or by such other means that enables voice communication among the participants.

(C) When at least one participant cannot arrange to meet at the location outside the United States where initial proceedings required by the Act are to be conducted, whenever possible arrangements should be made to conduct the proceedings by video teleconference or similar means. Command video teleconference communication systems should be used for this purpose, if resources permit, and if such systems are not otherwise unavailable due to military mission

requirements. When these capabilities are not reasonably available, the proceedings shall be conducted by telephone or such other means that enables voice communication among the participants. See section 3265 of the Act.

(D) The above provisions regarding the use of teleconference communication systems apply to any detention proceedings that are conducted outside the United States under section 3265(b) of the Act.

(E) Civilian defense counsel practicing in host nations do not gain Department of Defense sponsorship, nor any diplomatic status, as a result of their role as defense counsel. To the extent practicable, notice to this effect shall be provided to the civilian defense counsel when the civilian defense counsel's identity is made known to appropriate military authorities.

(2) *Qualified Military Counsel.* (i) Counsel representation also includes qualified military counsel that the Judge Advocate General of the Military Department concerned determines is reasonably available for the purpose of providing limited representation at initial proceedings required by the Act and conducted outside the United States. By agreement with the Department of Homeland Security, Coast Guard commands and activities located outside the United States shall seek to establish local agreements with military commands for qualified military counsel from the Military Departments to provide similar limited representation in cases arising within the Coast Guard. The Secretaries of the Military Departments shall establish regulations governing representation by qualified military counsel. These regulations, at a minimum, shall require that the command's Staff Judge Advocate:

(ii) Prepare, update as necessary, and make available to a Federal Magistrate Judge upon request, a list of qualified military counsel who are determined to be available for the purpose of providing limited representation at initial proceedings.

(iii) Ensure that the person arrested or charged under the Act is informed that any qualified military counsel shall be made available only for the limited purpose of representing that person in any initial proceedings that are to be conducted outside the United States, and that such representation does not extend to further legal proceedings that may occur either in a foreign country or the United States. The person arrested or charged shall also be required, in writing, to acknowledge the limited scope of qualified military counsel's representation and therein waive that military counsel's further representation in any subsequent legal proceedings conducted within a foreign country or the United States. The ''Acknowledgement of Limited Representation,'' at appendix B of this part, may be used for this purpose. A copy of the ''Acknowledgement of Limited Representation'' shall be provided to the person arrested or charged under the Act, as well as to the qualified military counsel. The original acknowledgment shall be kept on file in the DCO's Office of the Staff Judge Advocate.

(iv) Provide available information that would assist the Federal Magistrate Judge make a determination that qualified civilian counsel are unavailable, and that the person arrested or charged under the Act is unable financially to retain civilian defense counsel, before a qualified military counsel who has been made available is assigned to provide limited representation. See Analysis and Discussion of Section 3265 (c), Report Accompanying the Act.

(3) *Union Representation.* Agency law enforcement officials shall comply with applicable Federal civilian employee rights and entitlements, if any, regarding collective bargaining unit representation under Chapter 71 of title 5, United States Code, during pretrial questioning and temporary detention procedures under this part.

(4) *Military Representative.* (i) To assist law enforcement officers and the U.S. Attorney's representative assigned to a case, a judge advocate, legal officer, or civilian attorney-advisor may be appointed as a military representative to represent the interests of the United States. As appropriate, the military representative may be appointed as a Special Assistant U.S. Attorney. The military representative shall be responsible for assisting the command, law enforcement, and U.S. Attorney representatives during pretrial matters, initial proceedings, and other procedures required by the Act and this part. These responsibilities include assisting the U.S. Attorney representative determine whether continued detention is warranted, and to provide information to the presiding Federal Magistrate Judge considering the following:

(ii) If there is probable cause to believe that a violation of the Act has been committed and that the person arrested or charged has committed it,

(iii) If the person being temporarily detained should be kept in detention or released from detention, and, if released, whether any conditions practicable and reasonable under the circumstances, should be imposed.

(d) *Initial Proceedings.* (1) A person arrested for or charged with a violation of the Act may be entitled to an initial appearance before a judge and/or a detention hearing (collectively, the ''initial proceedings''). The initial proceedings are intended to meet the requirements of the Federal Rules of Criminal Procedure. The initial proceedings are not required when the person under investigation for violating the Act has not been arrested or temporarily detained by U.S. military authorities, or the person's arrest or temporary detention by U.S. law enforcement authorities occurs after the person ceases to accompany or be employed by the Armed Forces outside the United States, or the arrest or detention takes place within the United States.

(2) The initial proceedings to be conducted pursuant to the Act and this part shall not be initiated for a person delivered to foreign country authorities and against whom the foreign country is prosecuting or has prosecuted the person for the conduct constituting such offense, except when the Attorney General or Deputy Attorney General (or a person acting in either such capacity) has approved an exception that would allow for prosecution in the United States may initial proceedings under the Act be conducted, under these circumstances. Requests for approval of such an exception shall be forwarded through the Commander of the Combatant Command to the General Counsel of the Department of Defense, in accordance with paragraph (b)(8)(iv) of this section.

(3) Initial proceedings required by the Act and this part shall be conducted, without unnecessary delay. In accordance with the U.S. Supreme Court decision in *County of Riverside* v. *McLaughlin,* 500 U.S. 44 (1991), the initial appearance shall be conducted within 48 hours of the arrest. The initial proceedings required by the Act shall be conducted when:

(i) The person arrested has not been delivered to foreign country authorities under the provisions of section 3263 of the Act; or

(ii) The foreign country authorities having custody of the person delivers the person to U.S. military authorities without first prosecuting the person for such conduct as an offense under the laws of that foreign country.

(4) A Federal Magistrate Judge shall preside over the initial proceedings that are required by the Act and this part. The proceedings should be conducted from the United States using video

teleconference methods, if practicable, and with all parties to the proceedings participating. In the event that there is no video teleconference capability, or the video teleconference capability is unavailable due to military requirements or operations, the parties to the proceeding shall, at a minimum, be placed in contact by telephone.

(5) Initial proceedings conducted pursuant to the Act and this part shall include the requirement for the person's initial appearance under the Federal Rules of Criminal Procedure. The Federal Magistrate Judge shall determine whether probable cause exists to believe that an offense under section 3261(a) of the Act has been committed and that the identified person committed it. This determination is intended to meet the due process requirements to which the person is entitled, as determined by the U.S. Supreme Court in *Gerstein* v. *Pugh,* 420 U.S. 103 (1975).

(6) Initial proceedings shall also include a detention hearing where required under 18 U.S.C. 3142 and the Federal Rules of Criminal Procedure. A detention hearing may be required when:

(i) The person arrested or charged with a violation of the Act has been placed in temporary detention and the intent is to request continued detention; or

(ii) The United States seeks to detain a person arrested or charged with a violation of the Act who has not previously been detained.

(7) A detention hearing shall be conducted by a Federal Magistrate Judge. When the person arrested or charged requests, the detention hearing be conducted while the person remains outside the United States, detention hearing shall be conducted by the same Federal Magistrate Judge presiding over the initial proceeding and shall be conducted by telephone or other means that allow for voice communication among the participants, including the person's defense counsel. If the person does not so request, or if the Federal Magistrate Judge so orders, the detention hearing shall be held in the United States after the removal of the person to the United States.

(8) In the event that the Federal Magistrate Judge orders the person's release prior to trial, and further directs the person's presence in the district in which the trial is to take place, the U.S. Attorney Office's representative responsible for prosecuting the case shall inform the military representative and the DCO's Office of the Staff Judge Advocate.

(9) Under circumstances where the person suspected of committing an offense in violation of the Act has never been detained or an initial proceeding conducted, the presumption is that a trial date shall be established at which the defendant would be ordered to appear. Such an order would constitute an order under section 3264(b)(4) of the Act that ''otherwise orders the person to be removed.'' The person's failure to appear as ordered shall be addressed by the Court as with any other failure to comply with a valid court order.

(10) The DCO's Office of the Staff Judge Advocate shall assist in arranging for the conduct of initial proceedings required by the Act and this part, and shall provide a military representative to assist the U.S. Attorney's Office representative in presenting the information for the Federal Magistrate Judge's review. The military representative shall also provide any administrative assistance the Federal Magistrate Judge requires at the location outside the United States where the proceedings shall be conducted.

(e) *Removal Of Persons To The United States Or Other Countries.* (1) In accordance with the limitation established by section 3264 of the Act, military authorities shall not remove, to the United States or any other foreign country, a person suspected of violating section 3261(a) of the Act, except when:

(i) The person's removal is to another foreign country in which the person is believed to have committed a violation of section 3261(a) of the Act; or

(ii) The person is to be delivered, upon request, to authorities of a foreign country under section 3263 of the Act and paragraph (b)(8) of this section; or

(iii) The person is arrested or charged with a violation of the Act and the person is entitled to, and does not waive, a preliminary examination under Federal Rule of Criminal Procedure 5.1, in which case the person shall be removed to the U.S. for such examination; or

(iv) The person's removal is ordered by a Federal Magistrate Judge. See paragraph (e)(2) of this section; or

(v) The Secretary of Defense, or the Secretary's designee, directs the person be removed, as provided in section 3264(b)(5) of the Act and paragraph (e)(3) of this section.

(2) *Removal By Order Of A Federal Magistrate Judge.* Military authorities may remove a person suspected of violating section 3261(a) of the Act to the United States, when:

(i) A Federal Magistrate Judge orders that the person be removed to the United States to be present at a detention hearing; or

(ii) A Federal Magistrate Judge orders the detention of the person prior to trial (See 18 U.S.C. 3142(e)) in which case the person shall be promptly removed to the United States for such detention; or

(iii) A Federal Magistrate Judge otherwise orders the person be removed to the United States.

(3) *Removal By Direction of the Secretary of Defense or Designee.* The Secretary of Defense, or designee, may order a person's removal from a foreign country within the Combatant Command's geographic area of responsibility when, in his sole discretion, such removal is required by military necessity. See section 3264(b)(5) of the Act. Removal based on military necessity may be authorized in order to take into account any limiting factors that may result from military operations, as well as the capabilities and conditions associated with a specific location.

(i) When the Secretary of Defense, or designee, determines that a person arrested or charged with a violation of the Act should be removed from a foreign country, the person shall be removed to the nearest U.S. military installation outside the United States where the limiting conditions requiring such a removal no longer apply, and where there are available facilities and adequate resources to temporarily detain the person and conduct the initial proceedings required by the Act and this part.

(ii) The relocation of a person under this paragraph does not authorize the further removal of the person to the United States, unless that further removal is authorized by an order issued by a Federal Magistrate Judge under paragraph (e)(2) of this section.

(iii) *Delegation.* The Commander of a Combatant Command, and the Commander's principal assistant, are delegated authority to make the determination, based on the criteria stated in paragraph (e)(3) of this section, that a person arrested or charged with a violation of the Act shall be removed from a foreign country under section 3264(b)(5) of the Act and this part. Further delegation is authorized, but the delegation of authority is limited to a subordinate commander within the command who is designated as a general court-martial convening authority under the UCMJ.

(4) A person who is removed to the United States under the provisions of the Act and this part and who is thereafter released from detention, and otherwise at liberty to return to the location outside the United States from which he or she was were removed, shall be subject to any requirements

imposed by a Federal District Court of competent jurisdiction.

(5) Where a person has been removed to the United States for a detention hearing or other judicial proceeding and a Federal Magistrate Judge orders the person's release and permits the person to return to the overseas location, the Department of Defense (including the Military Department originally sponsoring the person to be employed or to accompany the Armed Forces outside the United States) shall not be responsible for the expenses associated with the return of the person to the overseas location, or the person's subsequent return travel to the United States for further court proceedings that may be required.

Appendix A to Part 153—Guidelines

(a) Civilians employed by the Armed Forces outside the United States who commit felony offenses while outside the U.S. are subject to U.S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(b) Civilians accompanying the Armed Forces outside the United States who commit felony offenses while outside the U.S. are subject to U.S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(c) Former members of the Armed Forces who commit felony offenses while serving as a member of the Armed Forces outside the U.S., but who ceased to be subject to UCMJ court-martial jurisdiction without having been tried by court-martial for such offenses, are subject to U.S. criminal jurisdiction under the Act and shall be held accountable for their actions, as appropriate.

(d) The procedures of this part and DoD actions to implement the Act shall comply with applicable Status of Forces Agreements, and other international agreements affecting relationships and activities between the respective host nation countries and the U.S. Armed Forces. These procedures may be employed outside the United States only if the foreign country concerned has been briefed or is otherwise aware of the Act and has not interposed an objection to the application of these procedures. Such awareness may come in various forms, including but not limited to Status of Forces Agreements containing relevant language, Diplomatic Notes or other acknowledgements of briefings, or case-by-case arrangements, agreements, or understandings with appropriate host nation officials.

(e) Consistent with the long-standing policy of maximizing U.S. jurisdiction over its citizens, the Act and this part provide a mechanism for furthering this objective by closing a jurisdictional gap in U.S. law and thereby permitting the criminal prosecution of covered persons for offenses committed outside the United States. In so doing, the Act and this part provide, in appropriate cases, an alternative to a host nation's exercise of its criminal jurisdiction should the conduct that violates U.S. law also violate the law of the host nation, as well as a means of prosecuting covered persons for crimes committed in areas in which there is no effective host nation criminal justice system.

(f) In addition to the limitations imposed upon prosecutions by section 3261(b) of the Act, the Act and these procedures should be reserved generally for serious misconduct for which administrative or disciplinary remedies are determined to be inadequate or inappropriate. Because of the practical constraints and limitations on the resources available to bring these cases to successful prosecution in the United States, initiation of action under this part would not generally be warranted unless serious misconduct were involved.

(g) The procedures set out in the Act and this part do not apply to cases in which the return of fugitive offenders is sought through extradition and similar proceedings, nor are extradition procedures applicable to cases under the Act.

Appendix B to Part 153—Acknowledgment of Limited Legal Representation (Sample)

1. I, _____, have been named as a suspect or defendant in a matter to which I have been advised is subject to the jurisdiction of the Military Extraterritorial Jurisdiction Act of 2000 (section 3261, *et seq.,* of title 18, United States Code.); hereinafter referred to as ''the Act''). I have also been informed that certain initial proceedings under 18 U.S.C. 3265 may be required under this Act, for which I am entitled to be represented by legal counsel.

2. I acknowledge and understand that the appointment of military counsel for the limited purpose of legal representation in proceedings conducted pursuant to the Act is dependent upon my being unable to retain civilian defense counsel representation for such proceedings, due to my indigent status, and that qualified military defense counsel has been made available.

3. Pursuant to the Act, _____, a Federal Magistrate Judge, has issued the attached Order and has directed that that military counsel be made available:

____ For the limited purpose of representing me at an initial proceeding to be conducted outside the United States pursuant to 18 U.S.C. 3265,

____ For the limited purpose of representing me in an initial detention hearing to be conducted outside the United States pursuant to 18 U.S.C. 3265(b),

4. _____, military counsel, has been made available in accordance with Department of Defense Instruction 5525.bb, and as directed by the attached Order of a Federal Magistrate Judge.

5. I (do) (do not) wish to be represented by _____, military counsel ____ (initials).

6. I understand that the legal representation of _____, military counsel, is limited to:

a. Representation at the initial proceedings conducted outside the United States pursuant to 18 U.S.C. 3265.

____ (Initials)

b. The initial detention hearing to be conducted outside the United States pursuant to the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3261, *et seq.*).

____ (Initials)

c. Other proceedings (Specify):

_____. ____ (Initials)

_____

Signature of Person To Be Represented By Military Counsel

_____

Signature of Witness*

Attachment:

Federal Magistrate Judge Order

(***Note:** The witness must be a person other than the defense counsel to be made available for this limited legal representation.)

Dated: February 15, 2006.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, DoD

[FR Doc. 06–1605 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2005–CO–0004; FRL–8029–7]

Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Affirmative Defense Provisions for Startup and Shutdown; Common Provisions Regulation and Regulation No. 1

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is partially approving and partially disapproving a State Implementation Plan (SIP) revision submitted by the State of Colorado. The revision establishes affirmative defense provisions for source owners and operators for excess emissions during periods of startup and shutdown. The affirmative defense provisions are contained in the State of Colorado's Common Provisions regulation. The intended effect of this action is to approve those portions of the rule that are approvable and to disapprove those portions of the rule that are inconsistent with the Clean Air Act. This action is being taken under section 110 of the Clean Air Act. In addition, EPA is announcing that it no longer considers the State of Colorado's May 27, 1998 submittal of revisions to Regulation No. 1 to be an active SIP submittal. Those revisions, which we proposed to disapprove on September 2, 1999 and October 7, 1999, would have provided

exemptions from existing limitations on opacity and sulfur dioxide (SO_2) emissions for coal-fired electric utility boilers during periods of startup, shutdown, and upset. Since our proposed disapproval, the State of Colorado has removed or replaced the provisions in Regulation No. 1 that we proposed to disapprove, and has instead pursued adoption of the affirmative defense provisions in the State of Colorado's Common Provisions regulation that we are approving today.

DATES: This final rule is effective March 24, 2006.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2005–CO–0004. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laurie Ostrand, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 200, Denver, Colorado 80202–2466, (303) 312–6437, *ostrand.laurie@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background of State Submittal
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III. Final Action
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Definitions

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

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

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

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

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

I. Background of State Submittal

On July 31, 2002, the State of Colorado submitted a SIP revision that added affirmative defense provisions for excess emissions during startup and shutdown. These affirmative defense provisions are contained in the Common Provisions Regulation at section II.J and were adopted by the Colorado Air Quality Control Commission (AQCC) on August 16, 2001.

On December 7, 2005 (70 FR 72741), we proposed to approve sections II.J.1 through II.J.4 of the Common Provisions regulation and proposed to disapprove section II.J.5 of the Common Provisions regulation. No comments were received on the December 7, 2005 proposal. See the December 7, 2005 notice of proposed rulemaking for additional information.

On December 7, 2005 (70 FR 72741) we also announced that we no longer consider Colorado's May 27, 1998 submittal of revisions to Regulation No. 1 to be an active submittal, and that we do not intend to finalize our proposed disapprovals. The May 1998 Regulation No. 1 submittal would have provided exemptions from the existing limitations on opacity and sulfur dioxide (SO_2) emissions for coal-fired electric utility boilers during periods of startup, shutdown, and upset. We proposed to disapprove the May 1998 Regulation No. 1 submittal on September 2, 1999 (64 FR 48127) and October 7, 1999 (64 FR 54601).

II. EPA Analysis of State Submittal

EPA's interpretations of the Act regarding excess emissions during malfunctions, startup and shutdown are contained in, among other documents, a September 20, 1999 memorandum titled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation.[1] That memorandum indicates that because excess emissions might aggravate air quality so as to prevent attainment and maintenance of the national ambient air quality standards (NAAQS) or jeopardize the prevention of significant deterioration (PSD) increments, all periods of excess emissions are considered violations of the applicable emission limitation. However, the memorandum recognizes that in certain circumstances states and EPA have enforcement discretion to refrain from taking enforcement action for excess emissions. In addition, the memorandum also indicates that states can include in their SIPs provisions that would, in the context of an enforcement action for excess emissions, excuse a source from penalties (but not injunctive relief) if the source can demonstrate that it meets certain objective criteria (an ''affirmative defense'').[2] Finally, the memorandum indicates that EPA does not intend to approve SIP revisions that would recognize a state director's decision to bar EPA's or citizens' ability to enforce applicable requirements.

We have evaluated Colorado's affirmative defense provisions for startup and shutdown and find that, except for one paragraph, they are consistent with our interpretations under the Act regarding the types of affirmative defense provisions we can approve in SIPs. The Affirmative Defense provisions in the Common Provisions Regulation, sections II.J.1 through II.J.4 are consistent with the provisions for startup and shutdown we suggested in our September 20, 1999 memorandum. Thus, these provisions will provide sources with appropriate incentives to comply with their emissions limitations and help ensure protection of the NAAQS and increments and compliance with other Act requirements.

However, we cannot approve the provisions in section II.J.5 of the Common Provisions regulation. Section II.J.5 reads as follows:

II.J.5. Affirmative Defense Determination: In making any determination whether a source established an affirmative defense, the Division shall consider the information within the notification required in paragraph 2 of this section and any other information the division deems necessary, which may

[1] Earlier expressions of EPA's interpretations regarding excess emissions during malfunctions, startup, and shutdown are contained in two memoranda, one dated September 28, 1982, the other February 15, 1983, both titled ''Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions'' and signed by Kathleen M. Bennett. However, the September 1999 memorandum directly addresses the creation of affirmative defenses in SIPs and, therefore, is most relevant to this action.

[2] EPA's September 20, 1999 memorandum indicates that the term *affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. See footnote 4 of the attachment to the memorandum.

include, but is not limited to, physical inspection of the facility and review of documentation pertaining to the maintenance and operation of process and air pollution control equipment.

Under this language, the Division could make a determination outside the context of an enforcement action, or at any time during an enforcement action, that a source has established the affirmative defense. If we were to approve section II.J.5, a court might conclude that we had ceded the authority to the Division to make this determination, not just for the State, but on behalf of EPA and citizens as well. Consequently, a court might also view the Division's determination that a source had established the affirmative defense as barring an EPA or citizen action for penalties.

As we stated in the September 1999 memoranda, we do not intend to approve SIP language that would allow a state's decision to constrain our or citizens' enforcement discretion. To do so would be inconsistent with the regulatory scheme established in Title I of the Act, which allows independent EPA and citizen enforcement of violations, regardless of a state's decisions regarding those violations and any potential defenses.[3]

Section 110(l) of the Clean Air Act states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment of the NAAQS or any other applicable requirements of the Act. The Colorado SIP revision that is the subject of this document does not interfere with the maintenance of the NAAQS or any other applicable requirement of the Act. The July 31, 2002 submittal merely adopts affirmative defense provisions for source owners and operators for excess emissions during periods of startup and shutdown. These provisions provide, that in the context of an enforcement action for excess emissions, a source can be excused from penalties (but not injunctive relief) if the source can demonstrate that it meets certain objective criteria. Therefore, section 110(l) requirements are satisfied.

[3] Section II.J.5 may be confusing the concept of affirmative defense with the concept of enforcement discretion. By definition, an affirmative defense is a defense that may be raised in the context of an enforcement proceeding before an independent trier of fact. Before pursuing an enforcement action, the state might evaluate the likelihood that an owner/operator could prove the elements of the affirmative defense, but this would go to the state's exercise of enforcement discretion. While the state might decide not to pursue an enforcement action based on such an evaluation, if EPA or citizens were to pursue enforcement action, an independent trier of fact might reach a conclusion different from the state's, *i.e.*, that the owner/operator had not proved the elements of the affirmative defense.

III. Final Action

We are approving sections II.J.1 through II.J.4 of the Common Provisions Regulation submitted on July 31, 2002 for the reasons expressed above. We are disapproving section II.J.5 of the Common Provisions Regulation submitted on July 31, 2002 because this section is inconsistent with the Clean Air Act.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., OMB must approve all ''collections of information'' by EPA. The Act defines ''collection of information'' as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *'' 44 U.S.C. 3502(3)(A). Because this final rule does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions.

This final rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the State is already imposing. Therefore, because the Federal SIP approval/disapproval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that this final action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action partially approves and partially disapproves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, *Federalism* (64 FR 43255, August 10, 1999), revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal

government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely partially approves and partially disapproves state rules implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 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 final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Protection of Children From Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2). This rule will be effective March 24, 2006.

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 24, 2006. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2) of the Clean Air Act.)

List of Subjects in 40 CFR Part 52

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

Dated: January 30, 2006.

Robert E. Roberts,

Regional Administrator, Region 8.

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

PART 52—[AMENDED]

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

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

Subpart G—Colorado

■ 2. Section 52.320 is amended by adding paragraph (c)(109) to read as follows:

§ 52.320 Identification of plan.

* * * * *

(c) * * *

(109) A revision to the State Implementation Plan was submitted by the State of Colorado on July 31, 2002. The submittal revises the Common Provisions regulation by adding affirmative defense provisions for source owners and operators for excess emissions during periods of startup and shutdown.

(i) Incorporation by reference.

(A) Common Provisions Regulation, 5 CCR 1001–2, sections II.J.1 through II.J.4, adopted August 16, 2001, effective September 30, 2001.

■ 3. Section 52.329 is amended by adding paragraph (c) to read as follows:

§ 52.329 Rules and regulations.

* * * * *

(c) A revision to the State Implementation Plan was submitted by the State of Colorado on July 31, 2002. The submittal revises the Common Provisions regulation by adding

affirmative defense provisions for source owners and operators for excess emissions during periods of startup and shutdown. The affirmative defense provisions are contained in section II.J. As indicated in 40 CFR 52.320(c)(109), EPA approved the affirmative defense provisions contained in sections II.J.1 through II.J.4 of the Common Provisions regulation, adopted August 16, 2001 and effective September 30, 2001. Section II.J.5 of the Common Provisions regulation, adopted August 16, 2001 and effective September 30, 2001, is disapproved.

[FR Doc. 06–1567 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2005–TX–0003; FRL–8034–7]

Approval and Promulgation of State Implementation Plans; Texas; Revision to the Rate of Progress Plan for the Beaumont/Port Arthur Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving revisions to the Texas State Implementation Plan (SIP) Post-1996 Rate of Progress (ROP) Plan, the 1990 Base Year Inventory, and the Motor Vehicle Emissions Budgets (MVEB) established by the ROP Plan, for the Beaumont/Port Arthur (BPA) ozone nonattainment area submitted November 16, 2004. The intended effect of this action is to approve revisions submitted by the State of Texas to satisfy the reasonable further progress requirements for 1-hour ozone nonattainment areas classified as serious and demonstrate further progress in reducing ozone precursors. We are approving these revisions in accordance with the requirements of the Federal Clean Air Act (CAA).

DATES: This rule is effective on April 24, 2006 without further notice, unless EPA receives relevant adverse comment by March 24, 2006. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2005–TX–0003, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- EPA Region 6 ''Contact Us'' Web site: *http://epa.gov/region6/r6coment.htm.* Please click on ''6PD'' (Multimedia) and select ''Air'' before submitting comments.
- E-mail: Mr. Thomas Diggs at *diggs.thomas@epa.gov.* Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- Fax: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.
- Mail: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- Hand or Courier Delivery: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2005–TX–0003. 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 information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov index.* Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30am and 4:30pm weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Carl Young, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone 214–665–6645, *young.carl@epa.gov.*

SUPPLEMENTARY INFORMATION:

What Action Are We Taking?

We are approving revisions to the BPA area post-1996 ROP Plan for the 1997–1999, 2000–2002 and 2003–2005 time periods submitted in a letter dated November 16, 2004. The post-1996 ROP plan is designed to achieve an additional 9 percent reduction in emissions between 1996 and 1999, a further 9 percent reduction between 1999 and 2002, and another 9 percent reduction between 2002 and 2005. We are also approving revisions to the 1990 base year inventory and the ROP Plan's associated Motor Vehicle Emissions Budgets (MVEB) for 1999, 2002, and 2005.

Why Are These Revisions Necessary?

On March 30, 2004, EPA issued a final action in the **Federal Register** reclassifying BPA from moderate one-hour ozone nonattainment to serious (69 FR 16483). With this new classification came several requirements including a requirement to provide a revision to the SIP showing the CAA section 182(c)(2) rate of progress requirements would be met for 1999, 2002, and 2005.

We released a new MOBILE6 model on January 29, 2002. (See 67 FR at 4254). Using MOBILE6 to calculate the 1999, 2002, and 2005 ROP target levels requires a revision to the 1990 base year inventory, which is the planning base line from which the ROP targets are calculated. Texas updated the 1990 base year inventory for the BPA area to reflect the use of MOBILE6. This affected the base year on-road mobile source inventory as well as the projected emission reductions from mobile source control programs. Texas also made a number of other changes as a result of updated information.

What Are the Clean Air Act's Rate of Progress Requirements?

Section 182(c)(2) of the CAA requires each State to submit for each serious and above ozone nonattainment area a SIP revision, which describes how the area will achieve an actual volatile organic compound (VOC) emission reduction from the baseline emissions of at least 3 percent of baseline emissions per year averaged over each consecutive 3-year period beginning 6 years after enactment (*i.e.*, November 15, 1996) until the area's attainment date. The CAA does not allow States to take credit for emission reductions due to Federal Motor Vehicle Controls adopted prior to 1990 or corrections to reasonably available control technology or vehicle inspection and maintenance programs. Section 182(c)(2)(C) explains the conditions under which reductions of oxides of nitrogen (NO_X) may be substituted for reductions in VOC emissions for post 1996 ROP plans.

Why Control Volatile Organic Compounds and Oxides of Nitrogen?

VOCs participate in chemical reactions with oxides of nitrogen (NO_X) and oxygen in the atmosphere in the presence of sunlight to form ozone, a key component of urban smog. Inhaling even low levels of ozone can trigger a variety of health problems including chest pains, coughing, nausea, throat irritation, and congestion. It can also worsen bronchitis, asthma and reduce lung capacity.

EPA has established National Ambient Air Quality Standards (NAAQS) for ozone. The previously adopted standard of 0.12 ppm averaged over a 1 hour period has been phased out and replaced with a new standard of 0.08 ppm averaged over a 8 hour period. The 1-hour standard was revoked on June 15, 2005.

Areas that do not meet a NAAQS are subject to nonattainment requirements of the CAA. Air quality in BPA does not meet either the 1-hour or the 8-hour NAAQS for ozone. As such, the area is subject to the ROP requirements of section 182 of the CAA. The revised ROP plan approved today was developed in response to a 1-hour ozone requirement. Under the anti-backsliding provisions of the Phase I ozone implementation rule, published on April 30, 2004 (69 FR 69 FR 23951), these rate of progress requirements must remain in effect.

How Has Texas Demonstrated Compliance With Rate of Progress Requirements?

Table 1 and Table 2 show the target levels and the projected controlled VOC and NO_X emissions for each of the milestone years in the SIP.

The target levels are calculated by subtracting the needed percentage reductions for each ROP milestone year and any non-creditable reductions from the 1990 base year levels. Projected future-year emissions for 2005 were developed by projecting from the State's 2002 Emission Inventory—actual emission inventory estimates reported for 2002. Emissions for 1999 and 2002 are based on the actual reported inventory for those years. The projections for 2005 were determined based on growth estimates using EPA approved methodologies and imposition of Federal and SIP-approved state enforceable controls. The two tables demonstrate that estimated emissions in 1999 and 2002 and projected emissions for 2005 are well below the target levels for each of the milestone years. In other words, the Texas Commission on Environmental Quality (TCEQ) has shown that there will be more emission reductions than are required to meet each milestone's target level. For a complete discussion of EPA's evaluation of TCEQ's calculation of target levels and emission projections, see the technical support document for this action.

TABLE 1.—ACTUAL AND PROJECTED NO_X EMISSIONS

[Tons/day]

Category/year	1990	1999	2002	2005
Projected Emissions	313.13	225.21	193.65	177.1
Target Level	NA	303.37	270.02	234.82

The reductions in projected emissions shown in Table 1 result from a variety of measures including post-1990 federal motor vehicle control programs, NO_X reasonably available control technology, and controls on lean burn engines and additional NO_X controls shown to be needed to achieve attainment.

It is worth noting that the 2005 projections above do not include all of the emission reductions expected in the BPA area including reductions from the Texas Emission Reduction Program and some of the industrial controls required to be implemented after 2002.

TABLE 2.—ACTUAL AND PROJECTED VOC INVENTORIES

[Tons/day]

Category/year	1990	1999	2002	2005
Total	320.56	150.02	126.22	119.55
Target	NA	230.40	228.57	227.02

As can be seen in Table 2, the VOC emission reductions were largely realized between 1990 and 1999. These VOC reductions result from post-1990 federal motor vehicle emission control programs and a variety of point source measures implemented as part of the area's ROP plan for the 1990–1996 time period which was approved February 10, 1998 (63 FR 6659). In addition, the State has quantified the reductions from the institution of Maximum Available Control Technology (MACT) standards under 40 CFR Part 63 such as the Hazardous Organic National Emission Standard for Hazardous Air Pollutants.

What Are the Revisions to the 1990 Base Year Inventory?

Table 3 summarizes the changes to the approved 1990 base year inventory. For a full discussion of EPA's evaluation, see the technical support document for this action.

TABLE 3.—1990 RATE-OF-PROGRESS BASE YEAR EMISSIONS INVENTORY

[Tons/day]

Base year inventory				
Source type	VOC		NO_X	
	Old	New	Old	New
Point	245.35	245.54	221.01	221.01
Area	30.63	24.56	1.44	16.73
On-road Mobile	19.11	36.99	41.09	54.94
Non-road Mobile	18.44	13.47	60.72	20.63
Total	313.53	320.56	324.26	313.31

The columns denoted as old were the 1990 base year emission inventories approved February 10, 1998 (63 FR 6659). The changes to the inventory result from the use of the more recent version of EPA's model for estimating on-road mobile source emissions, MOBILE6, the more recent emissions model for emissions from off-road mobile sources, NONROAD, and several area-specific studies of activity levels. Appendix 7 in the submitted Plan includes various studies of off-road emissions categories. In particular, TCEQ has included area-specific studies of aircraft, locomotive, ship and construction emissions.

What Are the Motor Vehicle Emissions Budgets Established in the Plan?

Table 4 documents the motor vehicle emissions budgets that have been established by this post-1996 ROP Plan revision. A motor vehicle emission budget is that portion of the total allowable emissions defined in the SIP revision allocated to on-road mobile sources for a certain date for meeting the purpose of the SIP, in this case reasonable further progress towards attainment of the NAAQS. EPA's conformity rule (40 CFR part 51, subpart T and part 93, subpart A) requires that transportation plans, programs and projects in nonattainment or maintenance areas conform to the SIP. The motor vehicle emissions budget is one mechanism EPA has identified for demonstrating conformity. Upon the effective date of this SIP approval, all future transportation improvement programs and long range transportation plans for the Beaumont/Port Arthur area will have to show conformity to the budgets in this plan; previous budgets approved or found adequate will no longer be applicable.

TABLE 4.—SIP ROP MOTOR VEHICLE EMISSIONS BUDGETS

[Tons per day]

Year	NO_X	VOC
1999	57.17	20.52
2002	49.56	17.21
2005	33.97	12.59

Final Action

The EPA is approving the aforementioned changes to the Texas SIP because the revisions are consistent with the CAA and EPA regulatory requirements. The EPA is publishing this rule without prior proposal because the EPA views this as a non-controversial 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 April 24, 2006 without further notice, unless EPA receives relevant adverse comment by March 24, 2006.

If the 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. The 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 April 24, 2006, and no further action will be taken on the proposed rule.

Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes,

as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 *note*) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. section 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 April 24, 2006. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 6, 2006.

Richard E. Greene,

Regional Administrator, Region 6.

■ 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 SS—Texas

■ 2. The second table in § 52.2270(e) entitled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' is amended by adding two new entries to the end of the table for ''Post 1996 Rate of Progress Plan'' and for ''Revisions to the 1990 Base Year Inventory'', both for the Beaumont/Port Arthur, TX area. The additions read as follows: § 52.2270 Identification of plan

* * * * *

(e) * * *

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or non-attainment area	State submittal/effective date	EPA approval date	Comments
*	*	*	*	*
Post 1996 Rate of Progress Plan.	Beaumont/Port Arthur, TX	11/16/04	February 22, 2006.	
Revisions to the 1990 Base Year Inventory.	Beaumont/Port Arthur, TX	11/16/04	February 22, 2006.	

[FR Doc. 06–1565 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2005–0170; FRL–8035–2]

Regulation of Fuels and Fuel Additives: Removal of Reformulated Gasoline Oxygen Content Requirement for California Gasoline and Revision of Commingling Prohibition To Address Non-Oxygenated Reformulated Gasoline in California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: In the Energy Policy Act of 2005 (Energy Act), Congress removed the oxygen content requirement for reformulated gasoline (RFG) in Section 211(k) of the Clean Air Act (CAA). The Energy Act specified that this change was to be immediately effective in California, and that it would be effective 270 days after enactment for the rest of the country. This direct final rule amends the fuels regulations to remove the oxygen content requirement for RFG for gasoline produced and sold for use in California, thereby making the fuels

regulations consistent with amended Section 211(k). In addition, for gasoline produced and sold for use in California, this rule extends the current prohibition against combining VOC-controlled RFG blended with ethanol with VOC-controlled RFG blended with any other type of oxygenate from January 1 through September 15, to also prohibit combining VOC-controlled RFG blended with ethanol with non-oxygenated VOC-controlled RFG during that time period, except in limited circumstances authorized by the Act.

The removal of the RFG oxygen content requirement and revision of the commingling prohibition for gasoline produced and sold for use in all areas of the country is being published in a separate direct final rule that will have a later effective date than this California specific rulemaking.

DATES: This rule is effective on April 24, 2006, without further notice unless we receive adverse comment by March 24, 2006. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the portion of the final rule on which adverse comment was received will not take effect. Those portions of the rule on which adverse comment was not received will go into effect on the effective date noted above.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2005–0170 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. E-mail: Group *A-AND-R-DOCKET@epa.gov*. Attention Docket ID No. OAR–2005–0170.

4. Mail: Air and Radiation Docket, Environmental Protection Agency, Mailcode: 6406J, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.

5. Hand Delivery: EPA Docket Center, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B102, Mail Code 6102T, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2005–0170. 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 information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM 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.*

We are only taking comment on issues related to the removal of the oxygen requirement for RFG produced and sold for use in California, and the provisions regarding the combining of ethanol blended California RFG with non-oxygenated California RFG and provisions for retailers regarding the combining of ethanol blended California RFG with non-ethanol blended California RFG. Comments on any other issues or provisions in the RFG regulations are beyond the scope of this rulemaking.

Docket: All documents in the docket are listed in the *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, 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 Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Marilyn Bennett, Transportation and Regional Programs Division, Office of Transportation and Air Quality (6406J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343–9624; fax number: (202) 343–2803; e-mail address: *mbennett@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA is publishing this rule without prior proposal because we view this action to be noncontroversial and anticipate no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register** publication, we are publishing a separate document that will serve as the proposal to adopt the provisions in this Direct Final Rule if adverse comments are filed. This rule will be effective on April 24, 2006 without further notice except to the extent that we receive adverse comment by March 24, 2006. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the portion of the rule on which adverse comment was received will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Any distinct amendment, paragraph, or section of today's rule for which we do not receive adverse comment will become effective on the date set out above, notwithstanding any adverse comment on any other distinct amendment, paragraph, or section of today's rule.

I. General Information

A. Does This Action Apply To Me?

Entities potentially affected by this action include those involved with the production and importation of conventional gasoline motor fuel. Regulated categories and entities affected by this action include:

Category	NAICS codes [a]	SIC codes [b]	Examples of potentially regulated parties
Industry	324110	2911	Petroleum Refiners, Importers.
Industry	422710	5171	Gasoline Marketers and Distributors.
	422720	5172	
Industry	484220	4212	Gasoline Carriers.
	484230	4213	

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of Part 80, subparts D, E and F of title 40 of the Code of Federal Regulations. If you have any question regarding applicability of this action to a particular entity, consult the person in the preceding **FOR FURTHER INFORMATION CONTACT** section above.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.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:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. 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.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR Part 2.

C. Outline of This Preamble

I. General Information
II. Removal of the RFG Oxygen Content Requirement for California Gasoline
III. Combining Ethanol Blended California RFG With Non-Ethanol Blended California RFG
IV. Environmental Effects of This Action
V. Statutory and Executive Order Reviews
VI. Statutory Provisions and Legal Authority

II. Removal of the RFG Oxygen Content Requirement for California Gasoline

Section 211(k) of the 1990 Amendments to the CAA required reformulated gasoline (RFG) to contain oxygen in an amount that equals or exceeds 2.0 weight percent. CAA Section 211(k)(2)(B). Accordingly, EPA's current regulations require RFG refiners, importers and oxygenate blenders to meet a 2.0 or greater weight percent oxygen content standard. 40 CFR 80.41. Recently, Congress passed legislation which amended Section 211(k) of the CAA to remove the RFG oxygen requirement.[1] The Energy Act specified that this change was to be immediately effective in California, and that it would be effective 270 days after enactment for the rest of the country. To make the fuels rules consistent with the current Section 211(k), today's rule modifies the RFG regulations to remove the oxygen standard in § 80.41 for gasoline produced and sold for use in California.[2] (Modifications to the RFG regulations to remove the oxygen standard for gasoline produced and sold for use in all areas of the country are being published in a separate rulemaking.)

Today's rule also modifies other provisions of the RFG regulations which relate to the removal of the oxygen content requirement for gasoline produced and sold for use in California. The modifications to the affected sections are listed in the following table:

§§ 80.41(e) and (f)	Removes the per-gallon and averaged oxygen standards for Phase II Complex Model RFG for gasoline produced and sold for use in California.[3]
§ 80.41(o)	Adds a provision which specifies that the requirements in § 80.41(o) do not apply to California gasoline.

[1] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1504(a), 119 STAT 594, 1076–1077(2005).

[2] The RFG regulations were promulgated under authority of CAA Section 211(c) as well as CAA Section 211(k). The regulations were adopted under section 211(c) primarily for the purpose of applying the preemption provisions in Section 211(c)(4). See 59 FR 7809 (February 16, 1994.)

[3] The regulations also include oxygen minimum standards for simple model RFG and Phase I complex Model RFG, and an oxygen maximum standard for simple model RFG. See §§ 80.41(a) through (d), and (g). These standards are no longer in effect and today's rule does not modify the regulations to remove these standards or compliance requirements relating to these standards, except where such requirements are included in provisions requiring other changes in today's rule.

§ 80.78(a)	Removes the prohibition against producing and marketing California RFG that does not meet the oxygen minimum standard since the oxygen standard has been removed. Also removes requirements for California gasoline to meet the oxygen minimum standard during transition from RBOB to RFG in a storage tank. (Today's rule also removes the provision in § 80.78(a)(1) regarding compliance with the maximum oxygen standard in § 80.41 for simple model RFG. See footnote 3.)
§ 80.79	Removes quality assurance requirement to test California gasoline for compliance with the oxygen standard.
§ 80.81(d)	Removes requirement for oxygenate blenders to exclude California gasoline from compliance calculations since oxygenate blenders are no longer required to demonstrate compliance with a standard.
§ 80.81(e)	Removes § 80.81(e)(2) which required refiners, importers and oxygenate blenders to provide written notification to EPA to produce or import gasoline certified under Title 13 of the California Code of Regulations, sections 2265 or 2266, or to comply with an oxygen content compliance survey option, since these requirements related to ensuring compliance with the federal RFG oxygen content standard. Also removes reference to oxygenate blenders in § 80.81(e)(3) regarding withdrawal of California gasoline exemptions for parties who have violated California or federal RFG regulations.
§ 80.81(h)	Removes provisions for oxygenate blenders to use California test methods for purposes of compliance testing, since oxygenate blenders are no longer required to conduct testing for compliance with the oxygen standard.

III. Combining Ethanol Blended California RFG With Non-Ethanol Blended California RFG

As discussed above, Section 211(k) required RFG to contain a minimum of 2.0 weight percent oxygen, and the current fuels regulations reflect this requirement. Refiners, importers and oxygenate blenders have used different oxygenates to meet this requirement. RFG that contains ethanol must be specially blended to account for the RVP ''boost'' that ethanol provides, and the consequent possibility of increased VOC emissions. EPA's existing regulations prohibit the commingling of ethanol-blended RFG with RFG containing other oxygenates because the non-ethanol RFG is typically not able to be mixed with ethanol and still comply with the VOC performance standards. Since all RFG is currently required to contain oxygen, the regulations do not now contain a prohibition against combining ethanol-blended RFG with non-oxygenated RFG. With the removal of the oxygen content requirement for RFG, EPA expects that refiners and importers will be producing some RFG without oxygen and some with ethanol or other oxygenates. Mixing ethanol-blended RFG with non-oxygenated RFG has the same potential to create an RVP ''boost'' for the non-oxygenated gasoline as mixing ethanol blended RFG with RFG blended with other oxygenates. This is of particular concern regarding RFG because most refiners and importers comply with the RFG VOC emissions performance standard on an annual average basis calculated at the point of production or importation. All downstream parties are prohibited from marketing RFG which does not comply with a less stringent downstream VOC standard. However, even though the combined gasoline may meet the downstream VOC standard, combining ethanol-blended RFG with non-oxygenated RFG may cause some gasoline to have VOC emissions which are higher on average than the gasoline as produced or imported. Thus, with regard to gasoline produced and sold for use in California, today's rule extends the commingling prohibition currently in the fuels regulations to include a prohibition against combining VOC-controlled ethanol blended RFG with VOC-controlled non-oxygenated RFG during the period January 1 through September 15, with one exception, described below.

The Energy Act contains a provision which specifically addresses the combining of ethanol-blended RFG with non-ethanol-blended RFG.[4] Under this new provision, retail outlets are allowed to sell non-ethanol-blended RFG which has been combined with ethanol-blended RFG under certain conditions. First, each batch of gasoline to be blended must have been ''individually certified as in compliance with subsections (h) and (k) prior to being blended.'' Second, the retailer must notify EPA prior to combining the gasolines and identify the exact location of the retail outlet and specific tank in which the gasoline is to be combined. Third, the retailer must retain, and, upon request by EPA, make available for inspection certifications accounting for all gasoline at the retail outlet. Fourth, retailers are prohibited from combining VOC-controlled gasoline with non-VOC-controlled gasoline between June 1 and September 15. Retailers are also limited with regard to the frequency in which batches of non-ethanol-blended RFG may be combined with ethanol-blended RFG. Retailers may combine such batches of RFG a maximum of two periods between May 1 and September 15. Each period may be no more than ten consecutive calendar days. This direct final rule implements this provision of the Energy Act for California gasoline. A separate direct final rule will implement this provision for the rest of the country, with a later effective date coinciding with the removal of the RFG oxygen content requirement for such areas.

This new provision will typically be used by retail outlets to change from the use of RFG containing ethanol to RFG not containing ethanol or vice versa. (Such a change is usually referred to as a ''tank turnover.'') Such blending can result in additional VOC emissions, perhaps resulting in gasoline that does not comply with downstream VOC standards. The Energy Act is unclear as to when the gasoline in the tank where blending occurs must be in compliance with the downstream VOC standard.

EPA has already promulgated regulations setting out a methodology for making tank turnovers. 40 CFR 80.78(a)(10). EPA believes retailers and wholesale purchaser-consumers should have additional flexibility during the time that they are converting their tanks from one type of RFG to another, while minimizing the time period during which non-compliant gasoline is present in their tanks and being sold. Today's changes provide additional flexibility to the regulated parties by interpreting the Energy Act to provide retailers and wholesale purchaser-consumers with relief from compliance with the downstream VOC standard during the ten-day blending period, but requiring that the gasoline in the tank thereafter be in compliance or be deemed in compliance with the downstream VOC standard.

To provide assurance that gasoline is in compliance with the downstream VOC standard after the ten-day period,

[4] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1513, 119 STAT 594, 1088–1090 (2005).

today's regulations provide that there be two options available for retailers and wholesale purchaser-consumers. Under the first option, the retailer may add both ethanol-blended RFG and non-ethanol-blended RFG to the same tank an unlimited number of times during the ten-day period, but must test the gasoline in the tank at the end of the ten-day period to make sure that the RFG is in compliance with the VOC standard. Under the second option, the retailer must draw the tank down as much as practicable at the start of the ten-day period, before RFG of another type is added to the tank, and add only RFG of one type to the tank during the ten-day period. That is, the retailer may not add both ethanol-blended RFG and non-ethanol-blended RFG to the tank during the ten-day period, but may add only one of these types of RFG. EPA believes that when retailers and wholesale purchaser-consumers use this second option it is likely that their gasoline will comply with the downstream VOC standard at the end of the ten-day period, so that testing will not be necessary. We also believe that this approach is compatible with current practices of most retailers and wholesale purchaser-consumers, and expect that most will find it preferable to testing at the end of the ten-day period.

The commingling provisions apply at a retail level such that each retailer may take advantage of a maximum of two ten-day blending periods between May 1 and September 15 of each calendar year. Thus, the options described above are available to each retail outlet for each of two ten-day periods during the VOC control period. During each ten-day period the options are available for all tanks at that retail outlet.

Regarding the requirement that each batch of gasoline to be blended must have been individually certified as in compliance with subsections (h) and (k), EPA notes that all gasoline in compliance with RFG requirements is deemed certified under Section 211(k) pursuant to § 80.40(a). Section 211(h) addresses RVP requirements for gasoline, but EPA does not have a program to certify gasoline as in compliance with this provision. For purposes of the commingling exception for retail outlets incorporated today in § 80.78(a)(8), EPA will deem gasoline that is in compliance with the regulatory requirements implementing Section 211(h) to be certified under that section. Regarding the requirement that retailers retain and make available to EPA upon request ''certifications'' accounting for all gasoline at the retail outlet, EPA will deem this requirement fulfilled where the retailer retains and makes available to EPA, upon request, the product transfer documentation required under § 80.77 for all gasoline at the retail outlet.

Under this direct final rule, the provisions which allow retailers to sell non-ethanol-blended California RFG that has been combined with ethanol-blended California RFG also apply to wholesale purchaser-consumers. Like retailers, wholesale purchaser-consumers are parties who dispense gasoline into vehicles, and EPA interprets the Energy Act reference to retailers as applying equally to them. As a result, wholesale purchaser-consumers are treated in the same manner as retailers under this rule. This is consistent with the manner in which wholesale purchaser-consumers have been treated in the past under the fuels regulations.

Most of the provisions of this rule are necessary to implement amendments to the Clean Air Act included in the Energy Act that eliminate the RFG oxygen content requirement and allow limited commingling of ethanol-blended and non-ethanol-blended RFG. The extension of the general commingling prohibition in the fuels regulations to cover non-oxygenated RFG is necessary because of the Energy Act amendments, but is issued pursuant to authority of CAA Section 211(k). This provision extends the current program to reflect the presence of non-oxygenated RFG, and is designed to enhance environmental benefits of the RFG program at reasonable cost to regulated parties.

IV. Environmental Effects of This Action

Little or no environmental impact is anticipated to occur as a result of today's action to remove the oxygenate requirement for California RFG. The RFG standards consist of content and emission performance standards. Refiners and importers will have to continue to meet all the emission performance standards for RFG whether or not the RFG contains any oxygenate. This includes both the VOC and NO_X emission performance standards, as well as the air toxics emission performance standards which were tightened in the mobile source air toxics (MSAT) rule in 2001.[5] New MSAT standards currently under development are anticipated to achieve even greater air toxics emission reductions.

We have analyzed the potential impacts on emissions that could result from removal of the oxygenate requirement in the context of requests for waivers of the federal oxygen requirement.[6] We found that changes in ethanol use could lead to small increases in some emissions and small decreases in others while still meeting the RFG performance standards. These potential impacts are associated with the degree to which ethanol will continue to be blended into RFG after removal of the oxygen requirement. Past analyses have projected significant use of ethanol in RFG in California despite removal of the oxygenate requirement.[7] Given current gasoline prices and the tightness in the gasoline market, the favorable economics of ethanol blending, a continuing concern over MTBE use by refiners, the emission performance standards still in place for RFG, and the upcoming renewable fuels mandate,[8] we believe that ethanol will continue to be used in RFG in California after the oxygen requirement is removed. As a result, we believe that the removal of the oxygenate mandate will have little or no environmental impact in the near future. We will be looking at the long term effect of oxygenate use in the context of the rulemaking to implement the renewable fuels mandate.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

[5] 66 FR 17230 (March 29, 2001).

[6] See e.g., California Oxygen Waiver Decision, EPA420–S–05–005 (June 2005); Analysis of and Action on New York Department of Conservation's Request for a Waiver of the Oxygen Content Requirement in Federal Reformulated Gasoline, EPA420–D–05–06 (June 2005).

[7] Technical Support Document: Analysis of California's Request for Waiver of the Reformulated Gasoline Oxygen Content Requirement for California Covered Areas, EPA420–R–01–016 (June 2001).

[8] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1501, 119 STAT 594, 1067–1076, (2005).

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this direct final rule does not satisfy the criteria stated above. As a result, this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review. Today's rule removes certain requirements for all refiners, importers and oxygenate blenders of RFG in California. As a result, this rule is expected to greatly reduce overall compliance costs for all refiners, importers and oxygenate blenders of California RFG. This rule also provides options for gasoline retailers in California to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Although there may be small compliance costs associated with one of these options, we believe that the additional flexibility provided by this option will reduce overall compliance costs for these parties.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Refiners, importers and oxygenate blenders of California RFG are exempt from the reporting and recordkeeping requirements under the RFG regulations. 40 CFR 80.81. Therefore, the removal of the oxygen requirement for California RFG will not have any ICR implications for refiners, importers and oxygenate blenders of California RFG. Small testing costs may be associated with one of the options for California gasoline retailers to commingle compliant gasolines. However, these testing costs are expected to be minimal and will be greatly outweighed by the flexibility provided by the option to commingle compliant gasolines. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations in 40 CFR part 80 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0277, EPA ICR number 1591.15. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures 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 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 today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This direct final rule removes certain requirements for all refiners, importers and oxygenate blenders of California RFG, including small business refiners, importers and oxygenate blenders. Specifically, this rule removes the burden on refiners, importers and oxygenate blenders to comply with the RFG oxygen requirement and associated compliance requirements. This rule also provides options for gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Although one option requires some compliance testing, the testing costs are expected to be minimal. As a result, we have concluded that this direct final rule, overall, will relieve regulatory burden for small entities subject to the RFG regulations.

D. Unfunded Mandates Reform Act

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 proposed and 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. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes

any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This direct final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector that will result in expenditures of $100 million or more. This rule affects gasoline refiners, importers and oxygenate blenders by removing the oxygen content requirement for RFG and associated compliance requirements, and allows gasoline retailers options for commingling compliant gasolines which otherwise would be prohibited from being commingled. This rule will have the overall effect of reducing the burden of the RFG regulations on these regulated parties. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

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 Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule removes the burden on regulated parties of having to comply with the oxygen standard for RFG in California, and allows gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, 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.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.''

This direct final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This rule applies to gasoline refiners, importers, oxygenate blenders and retailers who supply RFG in California. This action contains certain modifications to the federal requirements for RFG, and does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under the Order has the potential to influence the regulation. This direct final rule is not subject to Executive Order 13045 because it is not economically significant and does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Acts That Significantly Affect Energy Supply, Distribution, or Use

This direct final rule is not an economically ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it does not have a significant adverse effect on the supply, distribution, or use of energy. This rule eliminates the oxygen content requirement for RFG in California. This change will have the effect of reducing burdens on suppliers of RFG, which, in turn, may have a positive effect on gasoline supplies. RFG refiners and blenders may continue to use oxygenates at their discretion where and when it is most economical to do so. With the implementation of the renewable fuels standard also contained in the Energy Act, the blending of ethanol, in particular, into gasoline is expected to increase considerably, not decrease. Therefore, despite this action to remove the oxygenate mandate for RFG in California, when viewed in the context of companion energy legislation, overall use of oxygenates is expected to increase in the future. This rule also allows gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. This also may have a positive effect on gasoline supplies.

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, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This direct final rule does not establish new technical standards within the meaning of the NTTAA. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A ''major rule'' cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(a).

K. Clean Air Act Section 307(d)

This rule is subject to Section 307(d) of the CAA. Section 307(d)(7)(B) provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the 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 the rule.'' Any person seeking to make such a demonstration to the EPA should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Director of the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20004.

VI. Statutory Provisions and Legal Authority

The statutory authority for the actions in today's direct final rule comes from sections 211(c), 211(k) and 301(a) of the CAA.

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: February 14, 2006.

Stephen L. Johnson,

Administrator.

■ 40 CFR part 80 is amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7545 and 7601(a)).

Subpart D—[Amended]

■ 2. Section 80.41 is amended by:

■ a. In the tables in paragraphs (e) and (f), revising the entries ''Oxygen content (percent, by weight)''; and

■ b. adding paragraph (o)(4), to read as follows:

§ 80.41 Standards and requirements for compliance.

* * * * *

(e) * * *

* * * * *

Oxygen content (percent, by weight) (does not apply to gasoline subject to the provisions in § 80.81)	≥2.0

* * * * *

(f) * * *

* * * * *

Oxygen content (percent, by weight) (does not apply to gasoline subject to the provisions in § 80.81):	
Standard	≥2.1
Per-Gallon Minimum	≥1.5

* * * * *

* * * * *

(o) * * *

(4) Paragraph (o) of this section does not apply to gasoline subject to the provisions in § 80.81.

* * * * *

■ 3. Section 80.78 is amended by adding paragraphs (a)(1)(ii)(C), (a)(8)(i) through (iv), and (a)(11)(iv)(D) to read as follows:

§ 80.78 Controls and prohibitions on reformulated gasoline.

* * * * *

(a) * * *

(1) * * *

(ii) * * *

(C) Paragraph (a)(1)(ii)(A) does not apply to gasoline subject to the provisions in § 80.81.

* * * * *

(8) * * *

(i) For gasoline that is subject to the provisions in § 80.81, no person may combine any ethanol-blended VOC-controlled reformulated gasoline with any non-ethanol-blended VOC-controlled reformulated gasoline during the period January 1 through September 15, except that:

(ii) Retailers and wholesale purchaser-consumers may combine at a retail outlet or wholesale purchaser-consumer facility ethanol-blended VOC-controlled reformulated gasoline with non-ethanol-blended VOC-controlled reformulated gasoline, provided that the retailer or wholesale purchaser-consumer:

(A) Combines only batches of reformulated gasoline that have been certified under this subpart;

(B) Notifies EPA prior to combining the gasolines and identifies the exact location of the retail outlet or wholesale purchase-consumer facility and the specific tank in which the gasolines will be combined;

(C) Retains and, upon request by EPA, makes available for inspection product transfer documentation accounting for all gasoline at the retail outlet or wholesale purchaser-consumer facility; and

(D) Does not combine any VOC-controlled gasoline with any non-VOC controlled gasoline between June 1 and September 15 of each calendar year;

(iii) A retailer or wholesale purchaser-consumer may combine ethanol-blended reformulated gasoline with non-ethanol-blended reformulated gasoline under paragraph (a)(8)(ii) of this section a maximum of two periods between May 1 and September 15 of each calendar year, each such period to extend for a period of no more than ten consecutive calendar days. At the end of the ten-day period, the gasoline must be in compliance with the VOC minimum standard under § 80.41.

(A) The retailer or wholesale purchaser-consumer may demonstrate compliance with the VOC minimum standard by testing the gasoline at the end of the ten-day period using the test methods in § 80.46, where the test results show that the gasoline meets the VOC minimum standard. Under this option, the retailer or wholesale purchaser-consumer may add both ethanol blended reformulated gasoline and non-ethanol blended reformulated gasoline to the same tank an unlimited number of times during the ten-day period; or

(B) The retailer or wholesale purchaser-consumer will be deemed in compliance with the VOC minimum standard where the retailer or wholesale purchaser-consumer draws the tank down as low as practicable before receiving product of the other type into the tank and receives only product of the other type into the tank during the ten-day period. Under this option, the retailer or wholesale purchaser-consumer is not required to test the gasoline at the end of the ten-day period.

(iv) Nothing in paragraphs (a)(8)(ii) or (iii) of this section shall preempt existing State laws or regulations regulating the combining of ethanol-blended reformulated gasoline with non-ethanol-blended reformulated gasoline or prohibit a State from adopting such laws or regulations in the future.

* * * * *

(11) * * *

(iv) * * *

(D) Paragraphs (a)(11)(iv)(A) and (C) of this section do not apply to gasoline subject to the provisions in § 80.81.

* * * * *

■ 4. Section 80.79 is amended by adding paragraph (a)(5) and adding a sentence at the end of paragraph (c)(1), to read as follows:

§ 80.79 Liability for violations of the prohibited activities.

(a) * * *

(5) Notwithstanding the provisions in paragraphs (a)(1) through (a)(4) of this section, for gasoline subject to the provisions in § 80.81:

(i) Only a retailer or wholesale purchaser-consumer shall be deemed in violation for combining gasolines in a manner that is in inconsistent with § 80.78(a)(8)(ii) or (iii), or for gasoline which does not comply with the VOC minimum standard under § 80.41 after the retailer or wholesale purchaser-consumer combines or causes the combining of compliant gasolines in a manner inconsistent with § 80.78(a)(8)(ii) or (iii);

(ii) No person shall be deemed in violation for gasoline which does not comply with the VOC minimum standard under § 80.41 where the non-compliance is solely due to the combining of compliant gasolines by a retailer or wholesale purchaser-consumer in a manner that is consistent with § 80.78(a)(8)(ii) and (iii).

* * * * *

(c) * * *

(1) * * * For gasoline subject to the provisions in § 80.81, a party is not required to conduct periodic sampling and testing to determine compliance with the oxygen minimum standard.

* * * * *

■ 5. Section 80.81 is amended by revising paragraphs (d), (e)(3), and (h)(1) introductory text, and removing and reserving paragraph (e)(2) to read as follows:

§ 80.81 Enforcement exemptions for California gasoline.

* * * * *

(d) Any refiner or importer that produces or imports gasoline that is sold, intended for sale, or made available for sale as a motor vehicle fuel in the State of California subsequent to March 1, 1996, shall demonstrate compliance with the standards specified in §§ 80.41 and 80.90 by excluding the volume and properties of such gasoline from all conventional gasoline and reformulated gasoline that it produces or imports that is not sold, intended for sale, or made available for sale as a motor vehicle fuel in the State of California subsequent to such date. The exemption provided in this section does not exempt any refiner or importer from demonstrating compliance with such standards for all gasoline that it produces or imports.

(e) * * *

(2) [Reserved]

(3)(i) Such exemption provisions shall not apply to any refiner or importer of California gasoline who has been assessed a civil, criminal or administrative penalty for a violation of subpart D, E or F of this part or for a violation of the California Phase 2 reformulated gasoline regulations set forth in Title 13, California Code of Regulations, sections 2260 *et seq.*, effective 90 days after the date of final agency or district court adjudication of such penalty assessment.

(ii) Any refiner or importer subject to the provisions of paragraph (e)(3)(i) of this section may submit a petition to the Administrator for relief, in whole or in part, from the applicability of such provisions, for good cause. Good cause may include a showing that the violation for which a penalty was assessed was not a substantial violation of the Federal California reformulated gasoline regulations.

* * * * *

(h)(1) For the purposes of the batch sampling and analysis requirements contained in § 80.65(e)(1) and § 80.101(i)(1)(i)(A), any refiner or importer of California gasoline may use a sampling and/or analysis methodology prescribed in Title 13, California Code of Regulations, section 2260 *et seq.* (as amended July 2, 1996), in lieu of any applicable methodology specified in § 80.46, with regards to:

* * * * *

[FR Doc. 06–1613 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2005–0170; FRL–8035–1]

Regulation of Fuels and Fuel Additives: Removal of Reformulated Gasoline Oxygen Content Requirement and Revision of Commingling Prohibition To Address Non-Oxygenated Reformulated Gasoline

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: In the Energy Policy Act of 2005 (Energy Act), Congress removed the oxygen content requirement for reformulated gasoline (RFG) in section 211(k) of the Clean Air Act (CAA). To be consistent with the current CAA section 211(k), this direct final rule amends the fuels regulations to remove the oxygen content requirement for RFG. This rule also removes requirements which were included in the regulations to implement and ensure compliance with the oxygen content requirement. In addition, this rule extends the current prohibition against combining VOC-controlled RFG blended with ethanol with VOC-controlled RFG blended with any other type of oxygenate from January 1 through September 15, to also prohibit combining VOC-controlled RFG blended with ethanol with non-oxygenated VOC-controlled RFG during that time period, except in limited circumstances authorized by the Act.

DATES: This rule is effective on May 5, 2006, or April 24, 2006, whichever is later, without further notice unless we receive adverse comment by March 24, 2006. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the portion of the final rule on which adverse comment was received will not take effect. Those portions of the rule on which adverse comment was not received will go into effect on the effective date noted above.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2005–0170 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. E-mail: Group *A–AND–R–DOCKET@epa.gov.* Attention Docket ID No. OAR–2005–0170.

4. Mail: Air and Radiation Docket, Environmental Protection Agency, Mailcode: 6406J, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

5. Hand Delivery: EPA Docket Center, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B102, Mail Code 6102T, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2005–0170. 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 information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* is an ''anonymous access'' systems, 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.*

We are only taking comment on issues related to the removal of the oxygen requirement for RFG and associated compliance requirements, and the provisions regarding the combining of ethanol blended RFG with non-oxygenated RFG and provisions for retailers regarding the combining of ethanol blended RFG with non-ethanol blended RFG. Comments on any other issues or provisions in the RFG regulations are beyond the scope of this rulemaking.

Docket: All documents in the 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, 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 Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Marilyn Bennett, Transportation and Regional Programs Division, Office of Transportation and Air Quality (6406J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343–9624; fax number: (202) 343–2803; e-mail address: *mbennett@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA is publishing this rule without prior proposal because we view this action to be noncontroversial and anticipate no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register** publication, we are publishing a separate document that will serve as the proposal to adopt the provisions in this Direct Final Rule if adverse comments are filed. This rule is effective on May 5, 2006, or April 24, 2006, whichever is later, without further notice unless we receive adverse comment by March 24, 2006. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the portion of the rule on which adverse comment was received will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Any distinct amendment, paragraph, or section of today's rule for which we do not receive adverse comment will become effective on the date set out above, notwithstanding any adverse comment on any other distinct amendment, paragraph, or section of today's rule.

EPA is also publishing today a direct final rule that removes the oxygen content requirement for RFG, and makes associated changes in the fuels regulations, for California only. Although the California rule is similar in effect to this one, it has an earlier effective date.

I. General Information

A. Does This Action Apply To Me?

Entities potentially affected by this action include those involved with the production and importation of conventional gasoline motor fuel. Regulated categories and entities affected by this action include:

Category	NAICS codes [a]	SIC codes [b]	Examples of potentially regulated parties
Industry	324110	2911	Petroleum Refiners, Importers.
Industry	422710	5171	Gasoline Marketers and Distributors.
	422720	5172	
Industry	484220	4212	Gasoline Carriers.
	484230	4213	

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of part 80, subparts D, E and F of title 40 of the Code of Federal Regulations. If you have any question regarding applicability of this action to a particular entity, consult the person in the preceding **FOR FURTHER INFORMATION CONTACT** section above.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.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:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

2. 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.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR part 2.

C. Outline of This Preamble

I. General Information
II. Removal of the RFG Oxygen Content Requirement
III. Combining Ethanol Blended RFG With Non-Ethanol Blended RFG
IV. Environmental Effects of This Action
V. Statutory and Executive Order Reviews
VI. Statutory Provisions and Legal Authority

II. Removal of the RFG Oxygen Content Requirement

Section 211(k) of the 1990 Amendments to the CAA required reformulated gasoline (RFG) to contain oxygen in an amount that equals or exceeds 2.0 weight percent. CAA section 211(k)(2)(B). Accordingly, EPA's current regulations require RFG refiners, importers and oxygenate blenders to meet a 2.0 or greater weight percent oxygen content standard. 40 CFR 80.41. Recently, Congress passed legislation which amended section 211(k) of the CAA to remove the RFG oxygen requirement.[1] To be consistent with the current CAA section 211(k), today's rule modifies the RFG regulations to remove the oxygen standard in § 80.41.[2]

Today's rule also modifies several other sections of the RFG regulations which contain provisions designed to implement and ensure compliance with the oxygen standard. The modifications to the affected sections are listed in the following table:

§ 80.2(ii)	Removes oxygen in the definition of ''reformulated gasoline credit.'' With the removal of the oxygen standard, there is no basis for the generation of oxygen credits.
§§ 80.41(e) and (f)	Removes the per-gallon and averaged oxygen standards for Phase II Complex Model RFG[3]
§ 80.41(o)	Removes the provisions relating to oxygen survey failures. With the removal of the oxygen standard, oxygen surveys will no longer be needed.
§ 80.41(q)	Removes reference to § 80.41(o). Also removes reference to oxygenate blenders since oxygenate blenders were subject only to adjusted standards in the case of an oxygen survey failure and not any other survey failure.
§ 80.65 heading	Removes oxygenate blenders from the heading since oxygenate blenders were only responsible for demonstrating compliance with the oxygen standard which has been removed.
§ 80.65(c)	Removes requirements relating to compliance with the oxygen standard which have been removed.
§ 80.65(d)	Removes the designation requirement relating to oxygen content, removes the RBOB designation categories of ''any oxygenate'' and ''ether only,'' and adds a requirement for RBOB to be designated regarding the type and amount of oxygenate required to be added.
§ 80.65(h)	Removes the requirement for oxygenate blenders to comply with the audit requirements under subpart F since they will no longer be required to demonstrate compliance with the oxygen standard.
§ 80.67(a)	Removes the option to comply with the oxygen standard on average for oxygenate blenders since there no longer is an oxygen standard. Also removes provisions for refiners and importers to use gasoline that exceeds the average standard for oxygen to offset gasoline which does not achieve the average standard for oxygen.
§ 80.67(b)	Removes requirements relating to oxygenate blenders who meet the oxygen standard on average since there no longer is an oxygen standard.
§ 80.67(f)	Removes requirements relating to compliance with the oxygen standard on average since there no longer is an oxygen standard.
§ 80.67(g)	Removes requirements relating to compliance calculations for meeting the oxygen standard on average, since there no longer is an oxygen standard. Also removes requirements relating to the generation and use of oxygen credits.
§ 80.67(h)	Removes requirements relating to the transfer of oxygen credits.

[1] Energy Policy Act of 2005, Public Law No. 109–58 (HR6), section 1504(a), 119 STAT 594, 1076–1077(2005).

[2] The RFG regulations were promulgated under authority of CAA section 211(c) as well as CAA section 211(k). The regulations were adopted under section 211(c) primarily for the purpose of applying the preemption provisions in section 211(c)(4). *See* 59 FR 7809 (February 16, 1994.)

§ 80.68(a) and (b)	Removes references to oxygenate blenders since, with the removal of the requirement for oxygen survey, they are no longer subject to survey requirements. Also removes reference to oxygen regarding consequences of a failure to conduct a required survey.
§ 80.68(c)	Removes general survey requirements relating to oxygen surveys.
§ 80.73	Clarifies the applicability of this section to oxygenate blenders.
§ 80.74(c)	Removes recordkeeping requirements for oxygenate blenders who comply with the oxygen standard on average, since they no longer will be required to demonstrate compliance with an oxygen standard. Also removes reference to ''types'' of credits, since there now is only one type of credit (*i.e.*, benzene.)
§ 80.74(d)	Revises this paragraph to clarify recordkeeping requirements for oxygenate blenders.
§ 80.75 heading and paragraph (a)	Removes reporting requirements for oxygenate blenders since they no longer will be required to demonstrate compliance with an oxygen standard.
§ 80.75(f)	Removes requirement for submitting oxygen averaging reports since there no longer is a requirement to comply with the oxygen standard.
§ 80.75(h)	Removes credit transfer report requirements for oxygen credits, since oxygen credits will no longer be generated.
§ 80.75(i)	Removes requirement for oxygenate blenders to submit a report identifying each covered area that was supplied with averaged RFG, since they no longer will be required to demonstrate compliance with an oxygen standard.
§ 80.75(l)	Removes reporting requirement for oxygenate blenders who comply with the oxygen standard on a per-gallon basis, since they are no longer required to demonstrate compliance with an oxygen standard.
§ 80.75(m)	Removes requirement for oxygenate blenders to submit a report of the audit required under § 80.65(h), since oxygenate blenders will no longer be required to comply with the audit requirement.
§ 80.75(n)	Removes requirement for oxygenate blenders to have reports signed and certified, since they no longer will be required to submit reports under this section.
§ 80.76(a)	Clarifies registration requirements for oxygenate blenders.
§ 80.77(g)	Removes product transfer documentation requirement for oxygen content.
§ 80.77(i)	Removes requirement for RBOB to be identified on product transfer documents as suitable for blending with ''any-oxygenate,'' ''ether-only,'' since these categories have been removed.
§ 80.78(a)	Removes the prohibition against producing and marketing RFG that does not meet the oxygen minimum standard since the oxygen standard has been removed. Also removes requirements to meet the oxygen minimum standard during transition from RBOB to RFG in a storage tank. (Today's rule also removes the provision in § 80.78(a)(1) regarding compliance with the maximum oxygen standard in § 80.41 for simple model RFG. See footnote 3.)
§ 80.79	Removes quality assurance requirement to test for compliance with the oxygen standard.
§ 80.81(b)	Removes exemptions for California gasoline survey and independent analysis requirements for oxygenate blenders since they are no longer subject to these requirements.
§ 80.125(a), (c) and (d)	Removes attest engagement auditor requirements for oxygenate blenders, since they are no longer required to conduct attest engagement audits.
§ 80.126(b)	Revises attest engagement definition of credit trading records to remove reference to oxygen credits.
§ 80.128(e)	Removes reference to RBOB designations of ''any-oxygenate'' and ''ether-only'' with regard to refiner and importer contracts with downstream oxygenate blenders, since these designations have been removed from the regulations.
§ 80.129	Removes and reserves this section which provided for alternative attest engagement procedures for oxygenate blenders, since they are no longer required to conduct attest audits.
§ 80.130(a)	Removes requirement for a certified public accountant or an internal auditor certified by the Institute of Internal Auditors, Inc. to issue an attest engagement report to blenders, since they are no longer required to conduct attest audits. Removes requirement for blenders to provide a copy of the auditor's report to EPA.
§ 80.133(h)	Removes references to ''any-oxygenate'' and ''ether-only'' RBOB under § 80.69(a)(8) since this section has been removed.
§ 80.134	Removes this section which provides attest procedures for oxygenate blenders since they are no longer required to conduct attest audits.

Today's rule also modifies the provisions for downstream oxygenate blending in § 80.69. Under the current regulations, some refiners and importers produce or import a product called ''reformulated gasoline blendstock for oxygenate blending,'' or RBOB, which is gasoline that becomes RFG upon the addition of an oxygenate. The refiner or importer of the RBOB determines the type(s) and amount (or range of amounts) of oxygenate that must be added to the RBOB. The RBOB is then transported to an oxygenate blender downstream from the refiner or importer who adds the type and amount of oxygenate designated for the RBOB by the refiner or importer. The RBOB refiner or importer includes the designated amount of oxygenate in its emissions performance compliance calculations for the RBOB, however, it is the oxygenate blender who actually adds the oxygenate to the RBOB to comply with the 2.0 weight percent oxygen standard for the RFG that is produced by blending oxygenate into the RBOB. The regulations require oxygenate blenders to conduct testing for oxygen content to ensure that each batch of RFG complies with the oxygen standard. With the removal of the oxygen standard, the current requirement for oxygenate blenders to conduct testing to ensure compliance with the oxygen standard will no longer be necessary. Accordingly, the provisions for oxygenate blenders in § 80.69 have been modified to remove the requirement for oxygenate blenders

[3] The regulations also include oxygen minimum standards for simple model RFG and Phase I complex Model RFG, and an oxygen maximum standard for simple model RFG. *See* §§ 80.41(a) through (d), and (g). These standards are no longer in effect and today's rule does not modify the regulations to remove these standards or compliance requirements relating to these standards, except where such requirements are included in provisions requiring other changes in today's rule.

to test RFG for compliance with the oxygen standard.

Although there will no longer be an oxygen content requirement for RFG, we believe that many refiners and importers will want to continue to include oxygenate blended downstream in their emissions performance compliance calculations. As a result, the category of RBOB is being retained and RBOB refiners and importers will be required to comply with the contract and quality assurance (QA) oversight requirements in § 80.69 for any RBOB produced or imported.[4]

Under the current regulations, RBOB refiners and importers are required to have a contract with the downstream oxygenate blender and conduct QA oversight testing of the oxygenate blending operation to ensure that the proper type and amount of oxygenate is added downstream. § 80.69(a)(6) and (7). The regulations also provide that, in lieu of complying with these requirements, a refiner or importer may designate one of two generic categories of oxygenates to be added to the RBOB, and assume for purposes of its emissions compliance calculations that the minimum amount of oxygenate needed to result in RFG containing 2.0 weight percent oxygen will be added downstream. § 80.69(a)(8). RBOB refiner or importer compliance with the contract and oversight requirements is not required in this situation because, as discussed above, the oxygenate blender has been required to meet the 2.0 weight percent oxygen standard and conduct testing designed to ensure that each batch of RFG complies with the oxygen standard.[5] Where an RBOB refiner or importer wishes to include a larger amount of oxygenate in its compliance calculations (i.e, an amount that would result in RFG containing more than 2.0 weight percent oxygen), the refiner or importer must comply with the contract and oversight requirements in § 80.69(a)(6) and (7) to ensure that the proper type and amount of oxygenate is added.

Because oxygenate blenders will no longer be conducting testing to ensure compliance with the oxygen standard, we believe that RBOB refiner or importer compliance with the contract and QA oversight requirements will be necessary for RBOB designated to be blended with any amount of oxygenate, including an amount of oxygenate that would result in RFG containing 2.0 weight percent (or less) oxygen. As a result, today's rule requires RBOB refiners and importers to comply with the contract and QA oversight requirements in § 80.69 for any RBOB produced or imported. This approach is consistent with the oversight requirements in § 80.101(d)(4) for refiners and importers of conventional gasoline who wish to include oxygen added downstream from the refinery or importer in anti-dumping emissions compliance calculations.

Although oxygenate blenders will no longer be subject to the oxygen standard and associated testing requirements, we believe that the current requirements for oxygenate blenders to be registered with EPA, to add the specific type(s) and amount (or range of amounts) of oxygenate designated for the RBOB, and to maintain records of their blending operation continue to be necessary in order to ensure compliance with, and facilitate enforcement of, the emissions performance standards for the RFG produced by blending oxygenate with RBOB downstream. As a result, these oxygenate blender requirements are being retained.

The effective date for the removal of the oxygen requirement will occur during 2006.[6] As a result, refiners, importers and oxygenate blenders will be subject to the oxygen standard for the months in 2006 prior to the effective date of this rule. The current regulations allow parties to demonstrate compliance either on a per-gallon basis or on an annual average basis. Parties wishing to base their compliance on the per-gallon requirements, may formulate and sell RFG without oxygen after the effective date of the rule. EPA will interpret its regulations regarding annual average as follows. Parties may demonstrate compliance based on the average oxygen content of RFG during the months prior to the effective date for the removal of the oxygen content requirement. In addition, any refiner, importer or oxygenate blender who is unable to meet the annual average oxygen standard in 2006 based on the months prior to the effective date for the removal of the oxygen content standard may include all of the oxygenated RFG it produces or imports during 2006 in its annual average compliance calculations.

III. Combining Ethanol Blended RFG With Non-Ethanol Blended RFG

As discussed above, section 211(k) required RFG to contain a minimum of 2.0 weight percent oxygen, and the current fuels regulations reflect this requirement. Refiners, importers and oxygenate blenders have used different oxygenates to meet this requirement. RFG that contains ethanol must be specially blended to account for the RVP ''boost'' that ethanol provides, and the consequent possibility of increased VOC emissions. EPA's existing regulations prohibit the commingling of ethanol-blended RFG with RFG containing other oxygenates because the non-ethanol RFG is typically not able to be mixed with ethanol and still comply with the VOC performance standards. Since all RFG is currently required to contain oxygen, the regulations do not now contain a prohibition against combining ethanol-blended RFG with non-oxygenated RFG. With the removal of the oxygen content requirement for RFG, EPA expects that refiners and importers will be producing some RFG without oxygen and some with ethanol or other oxygenates. Mixing ethanol-blended RFG with non-oxygenated RFG has the same potential to create an RVP ''boost'' for the non-oxygenated gasoline as mixing ethanol-blended RFG with RFG blended with other oxygenates. This is of particular concern regarding RFG because most refiners and importers comply with the RFG VOC emissions performance standard on an annual average basis calculated at the point of production or importation. All downstream parties are prohibited from marketing RFG which does not comply with a less stringent downstream VOC standard. However, even though the combined gasoline may meet the downstream VOC standard, combining ethanol-blended RFG with non-oxygenated RFG may cause some gasoline to have VOC emissions which are higher on average than the gasoline as produced or imported. Thus, today's rule extends the commingling prohibition currently in the fuels regulations to include a prohibition against combining VOC-controlled ethanol-blended RFG with VOC-controlled non-oxygenated RFG during the period January 1 through September 15, with one exception, described below.

[4] EPA is developing a rule which will allow RBOB refiners and importers to use an alternative method of quality assurance (QA) oversight of downstream oxygenate blenders in lieu of the contract and QA requirements in §§ 80.69(a)(6) and (a)(7). This alternative method consists of a QA sampling and testing survey program carried out by an independent surveyor pursuant to a survey plan approved by EPA. This alternative QA method is available to RBOB refiners and importers under enforcement discretion until the rule is promulgated, or December 31, 2007, whichever is earlier. *See* Letter to Edward H. Murphy, Downstream General Manager, American Petroleum Institute, dated December 22, 2005, from Grant Y. Nakayama, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

[5] For a discussion of the downstream oxygenate blending requirements, see the preamble to the RFG final rule at 59 FR 7770 (February 16, 1994).

[6] The effective date for this rule is May 5, 2006, or 60 days from the date of publication of the rule in the **Federal Register**, whichever is later.

The Energy Act contains a provision which specifically addresses the combining of ethanol-blended RFG with non-ethanol-blended RFG.[7] Under this new provision, retail outlets are allowed to sell non-ethanol-blended RFG which has been combined with ethanol-blended RFG under certain conditions. First, each batch of gasoline to be blended must have been ''individually certified as in compliance with subsections (h) and (k) prior to being blended.'' Second, the retailer must notify EPA prior to combining the gasolines and identify the exact location of the retail outlet and specific tank in which the gasoline is to be combined. Third, the retailer must retain, and, upon request by EPA, make available for inspection certifications accounting for all gasoline at the retail outlet. Fourth, retailers are prohibited from combining VOC-controlled gasoline with non-VOC-controlled gasoline between June 1 and September 15. Retailers are also limited with regard to the frequency in which batches of non-ethanol-blended RFG may be combined with ethanol-blended RFG. Retailers may combine such batches of RFG a maximum of two periods between May 1 and September 15. Each period may be no more than ten consecutive calendar days. Today's direct final rule implements this provision of the Energy Act.

This new provision will typically be used by retail outlets to change from the use of RFG containing ethanol to RFG not containing ethanol or vice versa. (Such a change is usually referred to as a ''tank turnover.'') Such blending can result in additional VOC emissions, perhaps resulting in gasoline that does not comply with downstream VOC standards. The Energy Act is unclear as to when the gasoline in the tank where blending occurs must be in compliance with the downstream VOC standard.

EPA has already promulgated regulations setting out a methodology for making tank turnovers. 40 CFR 80.78(a)(10). EPA believes retailers and wholesale purchaser-consumers should have additional flexibility during the time that they are converting their tanks from one type of RFG to another, while minimizing the time period during which non-compliant gasoline is present in their tanks and being sold. Today's changes provide additional flexibility to the regulated parties by interpreting the Energy Act to provide retailers and wholesale purchaser-consumers with relief from compliance with the downstream VOC standard during the ten-day blending period, but requiring that the gasoline in the tank thereafter be in compliance or be deemed in compliance with the downstream VOC standard.

To provide assurance that gasoline is in compliance with the downstream VOC standard after the ten-day period, today's regulations provide that there be two options available for retailers and wholesale purchaser-consumers. Under the first option, the retailer may add both ethanol-blended RFG and non-ethanol-blended RFG to the same tank an unlimited number of times during the ten-day period, but must test the gasoline in the tank at the end of the ten-day period to make sure that the RFG is in compliance with the VOC standard. Under the second option, the retailer must draw the tank down as much as practicable at the start of the ten-day period, before RFG of another type is added to the tank, and add only RFG of one type to the tank during the ten-day period. That is, the retailer may not add both ethanol-blended RFG and non-ethanol-blended RFG to the tank during the ten-day period, but may add only one of these types of RFG. EPA believes that when retailers and wholesale purchaser-consumers use this second option it is likely that their gasoline will comply with the downstream VOC standard at the end of the ten-day period, so that testing will not be necessary. We also believe that this approach is compatible with current practices of most retailers and wholesale purchaser-consumers, and expect that most will find it preferable to testing at the end of the ten-day period.

The commingling provisions apply at a retail level such that each retailer may take advantage of a maximum of two ten-day blending periods between May 1 and September 15 of each calendar year. Thus, the options described above would be available to each retail outlet for each of two ten-day periods during the VOC control period. During each ten-day period the options are available for all tanks at that retail outlet.

Regarding the requirement that each batch of gasoline to be blended must have been individually certified as in compliance with subsections (h) and (k), EPA notes that all gasoline in compliance with RFG requirements is deemed certified under section 211(k) pursuant to § 80.40(a). Section 211(h) addresses RVP requirements for gasoline, but EPA does not have a program to certify gasoline as in compliance with this provision. For purposes of the commingling exception for retail outlets incorporated today in § 80.78(a)(8), EPA will deem gasoline that is in compliance with the regulatory requirements implementing section 211(h) to be certified under that section. Regarding the requirement that retailers retain and make available to EPA upon request ''certifications'' accounting for all gasoline at the retail outlet, EPA will deem this requirement fulfilled where the retailer retains and makes available to EPA, upon request, the product transfer documentation required under § 80.77 for all gasoline at the retail outlet.

Under today's direct final rule, the provisions which allow retailers to sell non-ethanol-blended RFG that has been combined with ethanol-blended RFG also apply to wholesale purchaser-consumers. Like retailers, wholesale purchaser-consumers are parties who dispense gasoline into vehicles, and EPA interprets the Energy Act reference to retailers as applying equally to them. As a result, wholesale purchaser-consumers are treated in the same manner as retailers under this rule. This is consistent with the manner in which wholesale purchaser-consumers have been treated in the past under the fuels regulations.

Most of the provisions of this rule are necessary to implement amendments to the Clean Air Act included in the Energy Act that eliminate the RFG oxygen content requirement and allow limited commingling of ethanol-blended and non-ethanol-blended RFG. The extension of the general commingling prohibition in the fuels regulations to cover non-oxygenated RFG, and the provisions requiring refiners and importers to conduct oversight of downstream blenders adding oxygen to RBOB, are necessary because of the Energy Act amendments, but are issued pursuant to authority of CAA section 211(k). Both provisions extend current programs to reflect the presence of non-oxygenated RFG, and are designed to enhance environmental benefits of the RFG program at reasonable cost to regulated parties.

IV. Environmental Effects of This Action

Little or no environmental impact is anticipated to occur as a result of today's action to remove the oxygenate requirement for RFG. The RFG standards consist of content and emission performance standards. Refiners and importers will have to continue to meet all the emission performance standards for RFG whether or not the RFG contains any oxygenate. This includes both the VOC and NO_X emission performance standards, as well as the air toxics emission performance standards which were tightened in the

[7] Energy Policy Act of 2005, Public Law 109–58 (HR6), section 1513, 119 STAT 594, 1088–1090 (2005).

mobile source air toxics (MSAT) rule in 2001.[8] New MSAT standards currently under development are anticipated to achieve even greater air toxics emission reductions.

We have analyzed the potential impacts on emissions that could result from removal of the oxygenate requirement in the context of requests for waivers of the Federal oxygen requirement.[9] We found that changes in ethanol use could lead to small increases in some emissions and small decreases in others while still meeting the RFG performance standards. These potential impacts are associated with the degree to which ethanol will continue to be blended into RFG after removal of the oxygen requirement. Past analyses have projected significant use of ethanol in RFG in California despite removal of the oxygenate requirement.[10] Given current gasoline prices and the tightness in the gasoline market, the favorable economics of ethanol blending, a continuing concern over MTBE use by refiners, the emission performance standards still in place for RFG, and the upcoming renewable fuels mandate,[11] we believe that ethanol will continue to be used in RFG after the oxygen requirement is removed, and that as MTBE is phased out, it is likely to be replaced with ethanol to a large degree despite the removal of the oxygenate requirement. As a result, we believe that the removal of the oxygenate mandate will have little or no environmental impact in the near future. We will be looking at the long term effect of oxygenate use in the context of the rulemaking to implement the renewable fuels mandate.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this direct final rule does not satisfy the criteria stated above. As a result, this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review. Today's rule removes certain requirements for all refiners, importers and oxygenate blenders of RFG. Although small additional compliance costs may be incurred by some refiners and importers as a result of this rule, on balance, this rule is expected to greatly reduce overall compliance costs for all refiners, importers and oxygenate blenders. This rule also provides options for gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Although there may be small compliance costs associated with one of these options, we believe that the additional flexibility provided by this option will reduce overall compliance costs for these parties.

B. Paperwork Reduction Act

The modifications to the RFG 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 modifications are not enforceable until OMB approves them.

This rule will have the effect of reducing the burdens on certain regulated parties under the reformulated gasoline regulations. All parties currently subject to the requirement to submit an annual oxygen averaging report will no longer be required to submit such report, resulting in an estimated total burden reduction of 100 hours and $6,500(100 parties × 1 report/yr × 1 hr/report × $65/hr). Oxygenate blenders currently subject to the following requirements will no longer be subject to these requirements and associated burdens:

RFG batch reports: Total 2500 hours, $162,500(25 blenders × 100 reports/yr × 1 hr/report × $65/hr) plus $600,000 in purchased services;

RFG annual report: Total 25 hours, $1,625(25 blenders × 1 report/yr × 1 hr/report × $65/hr);

RFG survey reports: Total 500 hours, $32,500(25 blenders × 1 report/yr × 20 hrs/report × $65/hr) plus $1,200,000 for purchased services;

RFG attest engagement reports: Total 3000 hours, $195,000(25 blenders × 1 report/yr × 120 hrs/report × $65/hr) plus $250,000 for purchased services.

The estimated total reduction in burdens for this rule is 6,125 hours and $398,125, plus $2,050,000 in purchased services.

Small testing costs may be associated with one of the options for gasoline retailers to commingle compliant gasolines. However, these testing costs are expected to be minimal and will be greatly outweighed by the flexibility provided by the option to commingle compliant gasolines.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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 direct final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare

[8] 66 FR 17230 (March 29, 2001).

[9] *See e.g.*, California Oxygen Waiver Decision, EPA420-S–05–005 (June 2005); Analysis of and Action on New York Department of Conservation's Request for a Waiver of the Oxygen Content Requirement in Federal Reformulated Gasoline, EPA420–D–05–06 (June 2005).

[10] Technical Support Document: Analysis of California's Request for Waiver of the Reformulated Gasoline Oxygen Content Requirement for California Covered Areas, EPA420–R–01–016 (June 2001).

[11] Energy Policy Act of 2005, Public Law No. 109–58 (HR6), section 1501, 119 STAT 594, 1067–1076, (2005).

a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures 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 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 today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This direct final rule removes certain requirements for all refiners, importers and oxygenate blenders of RFG, including small business refiners, importers and oxygenate blenders. Specifically, this rule removes the burden on refiners, importers and oxygenate blenders to comply with the RFG oxygen requirement and associated compliance requirements. Although in certain situations some refiners and importers, including some small refiners and importers, may be required to conduct additional oversight of oxygenate blenders, we believe that the relief from the burden of complying with the oxygen requirement will more than outweigh the burden of having to conduct any additional oversight. This rule also provides options for gasoline retailers, including small gasoline retailers, to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Although there may be small compliance costs associated with one of these options, we believe that the additional flexibility provided by this option will reduce overall compliance costs for these parties. We have therefore concluded that today's direct final rule will relieve regulatory burden for all small entities subject to the RFG regulations.

D. Unfunded Mandates Reform Act

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 proposed and 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. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's direct final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector that will result in expenditures of $100 million or more. This rule affects gasoline refiners, importers and oxygenate blenders by removing the oxygen content requirement for RFG and associated compliance requirements. This rule also allows gasoline retailers an option to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. As a result, this rule will have the overall effect of reducing the burden of the RFG regulations on these regulated parties. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

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 Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule removes the oxygen standard for RFG and provides gasoline retailers the option to commingle certain compliant gasolines that otherwise would be prohibited from being commingled. The requirements of the rule will be enforced by the Federal government at the national level. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, 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.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the

relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This direct final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This rule applies to gasoline refiners and importers who supply RFG, and to other parties downstream in the gasoline distribution system. Today's action contains certain modifications to the Federal requirements for RFG, and does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under the Order has the potential to influence the regulation. This direct final rule is not subject to Executive Order 13045 because it is not economically significant and does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Acts That Significantly Affect Energy Supply, Distribution, or Use

This direct final rule is not an economically ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it does not have a significant adverse effect on the supply, distribution, or use of energy. This rule eliminates the oxygen content requirement for RFG and associated compliance requirements. This change will have the effect of reducing burdens on suppliers of RFG, which, in turn, may have a positive effect on gasoline supplies. RFG refiners and blenders may continue to use oxygenates at their discretion where and when it is most economical to do so. With the implementation of the renewable fuels standard also contained in the Energy Act, the blending of ethanol, in particular, into gasoline is expected to increase considerably, not decrease. Therefore, despite this action to remove the oxygenate mandate in RFG, when viewed in the context of companion energy legislation, overall use of oxygenates is expected to increase in the future. This rule also allows gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. This also may have a positive effect on gasoline supplies.

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, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This direct final rule does not establish new technical standards within the meaning of the NTTAA. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A ''major rule'' cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(a).

K. Clean Air Act Section 307(d)

This rule is subject to section 307(d) of the CAA. Section 307(d)(7)(B) provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the 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 the rule.'' Any person seeking to make such a demonstration to the EPA should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Director of the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20004.

VI. Statutory Provisions and Legal Authority

The statutory authority for the actions in today's direct final rule comes from sections 211(c), 211(k) and 301(a) of the CAA.

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: February 14, 2006.

Stephen L. Johnson,

Administrator.

■ 40 CFR part 80 is amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7545 and 7601(a)).

Subpart A—[Amended]

■ 2. Section 80.2 is amended by revising paragraph (ii) to read as follows:

§ 80.2 Definitions.

* * * * *

(ii) *Reformulated gasoline credit* means the unit of measure for the paper transfer of benzene content resulting from reformulated gasoline which contains less than 0.95 volume percent benzene.

* * * * *

Subpart D—[Amended]

■ 3. Section 80.41 is amended by:
■ a. In the table in paragraph (e), removing the entry

''Oxygen content (percent, by weight)	≥2.0'';

■ b. In the table in paragraph (f), removing the entry

''Oxygen content (percent by weight):	
Standard	≥2.1
Per-Gallon Minimum	≥1.5''

■ b. Removing and reserving paragraph (o); and
■ c. Revising paragraph (q) heading and introductory text and (q)(1), with paragraphs (o) and (q) to read as follows:

§ 80.41 Standards and requirements for compliance.

* * * * *

(o) [Reserved]

* * * * *

(q) *Refineries and importers subject to adjusted standards.* Standards for average compliance that are adjusted to be more or less stringent by operation of paragraphs (k), (l) (m) or (n) of this section apply to average reformulated gasoline produced at each refinery or imported by each importer as follows:

(1) Adjusted standards for a covered area apply to averaged reformulated gasoline that is produced at a refinery if:

(i) Any averaged reformulated gasoline from that refinery supplied the covered area during any year a survey was conducted which gave rise to a standards adjustment; or

(ii) Any averaged reformulated gasoline from that refinery supplies the covered area during any year that the standards are more stringent than the initial standards; unless

(iii) The refiner is able to show that the volume of averaged reformulated gasoline from a refinery that supplied the covered area during any years under paragraphs (q)(1)(i) or (ii) of this section was less than one percent of the reformulated gasoline produced at the refinery during that year, or 100,000 barrels, whichever is less.

* * * * *

■ 4. Section 80.65 is amended by:
■ a. Revising the heading;
■ b. Revising paragraphs (c)(1)(ii) and (c)(3), removing and reserving paragraph (c)(2) and removing paragraph (c)(1)(iii);
■ c. Revising paragraph (d)(2)(vi), removing and reserving (d)(2)(v)(D); and
■ d. Revising paragraph (h) to read as follows:

§ 80.65 General requirements for refiners and importers.

* * * * *

(c) * * *

(1) * * *

(ii) Those standards and requirements it designated under paragraph (d) of this section for average compliance on an average basis over the applicable averaging period.

(2) [Reserved]

(3)(i) For each averaging period, and separately for each parameter that may be met either per-gallon or on average, any refiner shall designate for each refinery, or any importer shall designate its gasoline or RBOB as being subject to the standard applicable to that parameter on either a per-gallon or average basis. For any specific averaging period and parameter all batches of gasoline or RBOB shall be designated as being subject to the per-gallon standard, or all batches of gasoline and RBOB shall be designated as being subject to the average standard. For any specific averaging period and parameter a refiner for a refinery, or any importer may not designate certain batches as being subject to the per-gallon standard and others as being subject to the average standard.

(ii) In the event any refiner for a refinery, or any importer fails to meet the requirements of paragraph (c)(3)(i) of this section and for a specific averaging period and parameter designates certain batches as being subject to the per-gallon standard and others as being subject to the average, all batches produced or imported during the averaging period that were designated as being subject to the average standard shall, *ab initio*, be redesignated as being subject to the per-gallon standard. This redesignation shall apply regardless of whether the batches in question met or failed to meet the per-gallon standard for the parameter in question.

* * * * *

(d) * * *

(2) * * *

(v) * * *

(D) [Reserved]

* * * * *

(vi) In the case of RBOB, the gasoline must be designated as RBOB and the designation must include the type(s) and amount(s) of oxygenate required to be blended with the RBOB.

* * * * *

(3) Every batch of reformulated or conventional gasoline or RBOB produced or imported at each refinery or import facility shall be assigned a number (the ''batch number''), consisting of the EPA-assigned refiner or importer registration number, the EPA facility registration number, the last two digits of the year in which the batch was produced, and a unique number for the batch, beginning with the number one for the first batch produced or imported each calendar year and each subsequent batch during the calendar year being assigned the next sequential number (e.g., 4321–54321–95–000001, 4321–543321–95–000002, etc.)

* * * * *

(h) *Compliance audits.* Any refiner and importer of any reformulated gasoline or RBOB shall have the reformulated gasoline and RBOB it produced or imported during each calendar year audited for compliance with the requirements of this subpart D, in accordance with the requirements of subpart F, at the conclusion of each calendar year.

* * * * *

■ 5. Section 80.67 is amended by:
■ a. Revising paragraphs (a)(1) and (a)(2)(i)(A);
■ b. Removing and reserving paragraph (b)(3);
■ c. Removing and reserving paragraph (f);
■ d. Revising paragraphs (g) introductory text, (g)(3), (g)(5) introductory text, (g)(6) introductory text, and removing and reserving paragraphs (g)(5)(i) and (g)(6)(i); and
■ e. Revising paragraphs (h)(1) introductory text, (h)(1)(iv), (h)(1)(v) and (h)(3)(ii), and removing paragraphs (h)(1)(vi), (h)(1)(vii) and (h)(1)(viii), to read as follows:

§ 80.67 Compliance on average

* * * * *

(a) * * *

(1) Any refiner or importer that complies with the compliance survey requirements of § 80.68 has the option of meeting the standards specified in § 80.41 for average compliance in addition to the option of meeting the standards specified in § 80.41 for per-gallon compliance; any refiner or importer that does not comply with the survey requirements must meet the standards specified in § 80.41 for per-gallon compliance, and does not have

the option of meeting standards on average.

(2)(i)(A) A refiner or importer that produces or imports reformulated gasoline that exceeds the average standard for benzene (but not for other parameters that have average standards) may use such gasoline to offset reformulated gasoline which does not achieve this average standard, but only if the reformulated gasoline that does not achieve this average standard is sold to ultimate consumers in the same covered area as was the reformulated gasoline which exceeds the average standard; provided that:

* * * * *

(b) * * *

(3) [Reserved]

* * * * *

(f) [Reserved]

(g) * * * To determine compliance with the averaged standards in § 80.41, any refiner for each of its refineries at which averaged reformulated gasoline or RBOB is produced, and any importer that imports averaged reformulated gasoline or RBOB shall, for each averaging period and for each portion of gasoline for which standards must be separately achieved, and for each relevant standard, calculate:

* * * * *

(3) For the VOC, NO_X, and toxics emissions performance standards, the actual totals must be equal to or greater than the compliance totals to achieve compliance.

* * * * *

(5) If the actual total for the benzene standard is greater than the compliance total, credits for this parameter must be obtained from another refiner or importer in order to achieve compliance:

(i) [Reserved]

* * * * *

(6) If the actual total for the benzene standard is less than the compliance totals, credits for this parameter are generated.

(i) [Reserved]

* * * * *

(h) * * *

(1) Compliance with the averaged standards specified in § 80.41 for benzene (but for no other standards or requirements) may be achieved through the transfer of benzene credits provided that:

* * * * *

(iv) The credits are transferred, either through inter-company or intra-company transfers, directly from the refiner or importer that creates the credits to the refiner or importer that uses the credits to achieve compliance; and

(v) Benzene credits are not used to achieve compliance with the maximum benzene content standards in § 80.41.

* * * * *

(3) * * *

(ii) No refiner or importer may create, report, or transfer improperly created credits; and

* * * * *

■ 6. Section 80.68 is amended by revising paragraphs (a) introductory text, (a)(3), (b) introductory text, (b)(4)(i), (b)(4)(ii), (c)(3), (c)(4)(i), and (c)(13)(v)(L), and removing and reserving paragraph (c)(12) to read as follows:

§ 80.68 Compliance surveys.

(a) * * * In order to satisfy the compliance survey requirements, any refiner or importer shall properly conduct a program of compliance surveys in accordance with a survey program plan which has been approved by the Administrator of EPA in each covered area which is supplied with any gasoline for which compliance is achieved on average that is produced by that refinery or imported by that importer. Such approval shall be based upon the survey program plan meeting the following criteria:

* * * * *

(3) In the event that any refiner or importer fails to properly carry out an approved survey program, the refiner or importer shall achieve compliance with all applicable standards on a per-gallon basis for the calendar year in which the failure occurs, and may not achieve compliance with any standard on an average basis during this calendar year. This requirement to achieve compliance per-gallon shall apply *ab initio* to the beginning of any calendar year in which the failure occurs, regardless of when during the year the failure occurs.

(b) * * * A refiner or importer shall be deemed to have satisfied the compliance survey requirements described in paragraph (a) of this section if a comprehensive program of surveys is properly conducted in accordance with a survey program plan which has been approved by the Administrator of EPA. Such approval shall be based upon the survey program plan meeting the following criteria:

* * * * *

(4) * * *

(i) Each refiner or importer who supplied any reformulated gasoline or RBOB to the covered area and who has not satisfied the survey requirements described in paragraph (a) of this section shall be deemed to have failed to carry out an approved survey program; and

(ii) The covered area will be deemed to have failed surveys for VOC and NO_X emissions performance, and survey series for benzene and toxic and NO_X emissions performance.

(c) * * *

(3)(i) A VOC survey and a NO_X survey shall consist of any survey conducted during the period June 1 through September 15;

(ii) A sample of gasoline taken at a retail outlet or wholesale purchaser-consumer facility that has within the past 30 days commingled ethanol blended reformulated gasoline with non-ethanol blended reformulated gasoline in accordance with the provisions in § 80.78(a)(8) shall not be used in a VOC survey required under this section.

(4)(i) A toxics and benzene survey series shall consist of all surveys conducted in a single covered area during a single calendar year.

* * * * *

(12) [Reserved]

(13) * * *

(v) * * *

(L) The average toxics emissions reduction percentage for simple model samples and the percentage for complex model samples, the average benzene percentage, and for each survey conducted during the period June 1 through September 15, the average VOC emissions reduction percentage for simple model samples and the percentage for complex model samples, and the average NO_X emissions reduction percentage for all complex model samples;

* * * * *

■ 7. Section 80.69 is amended by:

■ a. Revising paragraphs (a)(6)(ii) and (iii), (a)(10) introductory text, removing and reserving paragraphs (a)(8) and (a)(9), and removing paragraph (a)(6)(iv);

■ b. Revising paragraph (b);

■ c. Removing and reserving paragraph (c);

■ d. Revising paragraph (d); and

■ e. Revising paragraph (e), to read as follows:

§ 80.69 Requirements for downstream oxygenate blending.

* * * * *

(a) * * *

(6) * * *

(ii) Allow the refiner or importer to conduct the quality assurance sampling and testing required under this paragraph (a); and

(iii) Stop selling any gasoline found not to comply with the standards under which the RBOB was produced or imported.

* * * * *

(8) [Reserved]

(9) [Reserved]

(10) Specify in the product transfer documentation for the RBOB each oxygenate type or types and amount or range of amounts which, if blended with the RBOB will result in reformulated gasoline which:

* * * * *

(b) *Requirements for oxygenate blenders.* For all RBOB received by any oxygenate blender, the oxygenate blender shall:

(1) Add oxygenate of the type(s) and amount (or within the range of amounts) specified in the product transfer documents for the RBOB; and

(2) Meet the recordkeeping requirements specified in § 80.74.

(c) [Reserved]

(d) *Requirements for distributors dispensing RBOB into trucks for blending.* Any distributor who dispenses any RBOB into any truck which delivers gasoline to retail outlets or wholesale purchase-consumer facilities, shall for such RBOB so dispensed:

(1) Transfer the RBOB only to an oxygenate blender who has registered with the Administrator or EPA as such; and

(2) Obtain from the oxygenate blender the oxygenate blender's EPA registration number.

(e) *Additional requirements for oxygenate blenders who blend oxygenate in trucks.* Any oxygenate blender who obtains any RBOB in any gasoline delivery truck shall on each occasion it obtains RBOB from a distributor, supply the distributor with the oxygenate blender's EPA registration number.

■ 8. Section 80.73 is amended by revising the introductory text to read as follows:

§ 80.73 Inability to produce conforming gasoline in extraordinary circumstances.

In appropriate extreme and unusual circumstances (e.g., natural disaster or Act of God) which are clearly outside the control of the refiner, importer, or oxygenate blender and which could not have been avoided by the exercise of prudence, diligence, and due care, EPA may permit a refiner, importer, or oxygenate blender, for a brief period, to distribute gasoline which does not meet the requirements for reformulated gasoline, or does not contain the type(s) and amount(s) of oxygenate required under § 80.69(b)(1), if:

* * * * *

■ 9. Section 80.74 is amended by revising paragraph (c) heading and introductory text, (c)(2), and (d) introductory text to read as follows:

§ 80.74 Recordkeeping requirements.

* * * * *

(c) *Refiners and importers of averaged gasoline.* In addition to other requirements of this section, any refiner or importer who produces or imports any reformulated gasoline for which compliance with one or more applicable standard is determined on an average shall maintain records containing the following information:

* * * * *

(2) For any credits bought, sold, traded or transferred pursuant to § 80.67(h), the dates of the transactions, the names and EPA registration numbers of the parties involved, and the number of credits transferred.

(d) * * * Any oxygenate blender who blends any oxygenate with any RBOB shall, for each occasion such blending occurs, maintain records containing the following:

* * * * *

■ 10. Section 80.75 is amended by revising the introductory text, paragraph (a) introductory text, (h), (i), (l), (m) and (n)(2); and removing and reserving paragraphs (a)(2)(vii) and (f) to read as follows:

§ 80.75 Reporting requirements.

Any refiner or importer shall report as specified in this section, and shall report such other information as the Administrator may require.

(a) * * * Any refiner or importer that produces or imports any reformulated gasoline or RBOB shall submit quarterly reports to the Administrator for each refinery at which such reformulated gasoline or RBOB was produced and for all such reformulated gasoline or RBOB imported by each importer. The refiner or importer shall include notification to EPA of per-gallon versus average election with the first quarterly reports submitted each year.

* * * * *

(2) * * *

(vii) [Reserved]

* * * * *

(f) [Reserved]

* * * * *

(h) *Credit transfer reports.* As an additional part of the fourth quarterly report required by this section, any refiner or importer shall, for each refinery or importer, supply the following information for any benzene credits that are transferred from or to another refinery or importer:

(1) The names, EPA-assigned registration numbers and facility identification numbers of the transferor and transferee of the credits;

(2) The number(s) of credits that were transferred; and

(3) The date(s) of the transaction(s).

(i) *Covered areas of gasoline use report.* Any refiner that produced any reformulated gasoline that was to meet any reformulated gasoline standard on average (''averaged reformulated gasoline'') shall, for each refinery at which such averaged reformulated gasoline was produced submit to the Administrator, with the fourth quarterly report, a report that contains the identity of each covered area that was supplied with any averaged reformulated gasoline produced at each refinery during the previous year.

* * * * *

(l) *Reports for per-gallon compliance gasoline.* In the case of reformulated gasoline or RBOB for which compliance with each of the standards set forth in § 80.41 is achieved on a per-gallon basis, the refiner or importer shall submit to the Administrator, by the last day of February of each year beginning in 1996, a report of the volume of each designated reformulated gasoline or RBOB produced or imported during the previous calendar year for which compliance is achieved on a per-gallon basis, and a statement that each gallon of this reformulated gasoline or RBOB met the applicable standards.

(m) *Reports of compliance audits.* Any refiner or importer shall cause to be submitted to the Administrator, by May 31 of each year, the report of the compliance audit required by § 80.65(h).

(n) * * *

(2) Signed and certified as correct by the owner or a responsible corporate officer of the refiner or importer.

■ 11. Section 80.76 is amended by revising paragraph (a) to read as follows:

§ 80.76 Registration of refiners, importers or oxygenate blenders.

(a) Registration with the Administrator of EPA is required for any refiner and importer that produces or imports any reformulated gasoline or RBOB, and any oxygenate blender that blends oxygenate into RBOB.

* * * * *

■ 12. Section 80.77 is amended by removing and reserving paragraph (g)(2)(ii) and revising paragraph (i)(1) to read as follows:

§ 80.77 Product transfer documentation.

* * * * *

(g) * * *

(2) * * *

(ii) [Reserved]

* * * * *

(i) * * *

(1) The oxygenate type(s) and amount(s) that are suitable for blending with the RBOB;

* * * * *

■ 13. Section 80.78 is amended by revising paragraphs (a)(8) and (a)(11)(iv), and removing and reserving paragraph (a)(1)(ii) to read as follows:

§ 80.78 Controls and prohibitions on reformulated gasoline.

* * * * *

(a) * * *

(1) * * *

(ii) [Reserved]

* * * * *

(8)(i) No person may combine any ethanol-blended VOC-controlled reformulated gasoline with any non-ethanol-blended VOC-controlled reformulated gasoline during the period January 1 through September 15, except that:

(ii) Notwithstanding the prohibition in paragraph (a)(8)(i), retailers and wholesale purchaser-consumers may combine at a retail outlet or wholesale purchaser-consumer facility ethanol-blended VOC-controlled reformulated gasoline with non-ethanol-blended VOC-controlled reformulated gasoline, provided that the retailer or wholesale purchaser-consumer:

(A) Combines only batches of reformulated gasoline that have been certified under this subpart;

(B) Notifies EPA prior to combining the gasolines and identifies the exact location of the retail outlet or wholesale purchase-consumer facility and the specific tank in which the gasolines will be combined;

(C) Retains and, upon request by EPA, makes available for inspection product transfer documentation accounting for all gasoline at the retail outlet or wholesale purchaser-consumer facility; and

(D) Does not combine any VOC-controlled gasoline with any non-VOC controlled gasoline between June 1 and September 15 of each calendar year;

(iii) A retailer or wholesale purchaser-consumer may combine ethanol-blended reformulated gasoline with non-ethanol-blended reformulated gasoline under paragraph (a)(8)(ii) of this section a maximum of two periods between May 1 and September 15 of each calendar year, each such period to extend for a period of no more than ten consecutive calendar days. At the end of the ten-day period, the gasoline must be in compliance with the VOC minimum standard under § 80.41.

(A) The retailer or wholesale purchaser-consumer may demonstrate compliance with the VOC minimum standard by testing the gasoline at the end of the ten-day period using the test methods in § 80.46, where the test results show that the gasoline meets the VOC minimum standard. Under this option, the retailer or wholesale purchaser-consumer may add both ethanol-blended reformulated gasoline and non-ethanol-blended reformulated gasoline to the same tank an unlimited number of times during the ten-day period; or

(B) The retailer or wholesale purchaser-consumer will be deemed in compliance with the VOC minimum standard where the retailer or wholesale purchaser-consumer draws the tank down as low as practicable before receiving product of the other type into the tank and receives only product of the other type into the tank during the ten-day period. Under this option, the retailer or wholesale purchaser-consumer is not required to test the gasoline at the end of the ten-day period.

(iv) Nothing in paragraphs (a)(8)(ii) or (iii) of this section shall preempt existing State laws or regulations regulating the combining of ethanol-blended reformulated gasoline with non-ethanol-blended reformulated gasoline or prohibit a State from adopting such laws or regulations in the future.

* * * * *

(11) * * *

(iv) When transitioning from RBOB to reformulated gasoline, the reformulated gasoline must meet all applicable standards that apply at the terminal subsequent to any oxygenate blending;

* * * * *

■ 14. Section 80.79 is amended by adding paragraph (a)(5) and revising paragraph (c)(1) to read as follows:

§ 80.79 Liability for violations of the prohibited activities.

(a) * * *

(5) Notwithstanding the provisions in paragraphs (a)(1) through (a)(4) of this section: (i) Only a retailer or wholesale purchaser-consumer shall be deemed in violation for combining gasolines in a manner that is inconsistent with § 80.78(a)(8)(ii) or (iii), or for gasoline which does not comply with the VOC minimum standard under § 80.41 after the retailer or wholesale purchaser-consumer combines or causes the combining of compliant gasolines in a manner inconsistent with § 80.78(a)(8)(ii) or (iii);

(ii) No person shall be deemed in violation for gasoline which does not comply with the VOC minimum standard under § 80.41 where the non-compliance is solely due to the combining of compliant gasolines by a retailer or wholesale purchaser-consumer in a manner that is consistent with § 80.78(a)(8)(ii) and (iii).

* * * * *

(c) * * *

(1) Of a periodic sampling and testing program to determine if the applicable maximum and/or minimum standards for benzene, RVP, or VOC emission performance are met.

* * * * *

■ 15. Section 80.81 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 80.81 Enforcement exemptions for California gasoline.

* * * * *

(b)(1) Any refiner or importer of gasoline that is sold, intended for sale, or made available for sale as a motor fuel in the State of California is, with regard to such gasoline, exempt from the compliance survey provisions contained in § 80.68.

(2) Any refiner or importer of California gasoline is, with regard to such gasoline, exempt from the independent analysis requirements contained in § 80.65(f).

* * * * *

Subpart F—[Amended]

■ 16. Section 80.125 is amended by revising paragraphs (a), (c) and (d) introductory text, to read as follows:

§ 80.125 Attest engagements.

(a) Any refiner and importer subject to the requirements of this subpart F shall engage an independent certified public accountant, or firm of such accountants (hereinafter referred to in this subpart F as ''CPA''), to perform an agreed-upon procedures attestation engagement of the underlying documentation that forms the basis of the reports required by §§ 80.75 and 80.105.

* * * * *

(c) The CPA may complete the requirements of this subpart F with the assistance of internal auditors who are employees or agents of the refiner or importer, so long as such assistance is in accordance with the Statements on Standards for Attestation Engagements.

(d) Notwithstanding the requirements of paragraph (a) of this section, any refiner or importer may satisfy the requirements of this subpart F if the requirements of this subpart F are completed by an auditor who is an employee of the refiner or importer, provided that such employee:

* * * * *

■ 17. Section 80.126 is amended by revising paragraph (b) to read as follows:

§ 80.126 Definitions.

* * * * *

(b) *Credit Trading Records.* Credit trading records shall include worksheets and EPA reports showing actual and complying totals for benzene; credit calculation worksheets; contracts; letter agreements; and invoices and other documentation evidencing the transfer of credits.

* * * * *

■ 18. Section 80.128 is amended by revising paragraph (e)(2) to read as follows:

§ 80.128 Alternative agreed upon procedures for refiners and importers.

* * * * *

(e) * * *

(2) Determine that the requisite contract was in place with the downstream blender designating the required blending procedures;

* * * * *

■ 19. Section 80.129 is removed and reserved.

■ 20. Section 80.130 is amended by revising paragraph (a) to read as follows:

§ 80.130 Agreed upon procedures reports.

(a) *Reports.* (1) The CPA or CIA shall issue to the refiner or importer a report summarizing the procedures performed in the findings in accordance with the attest engagement or internal audit performed in compliance with this subpart.

(2) The refiner or importer shall provide a copy of the auditor's report to the EPA within the time specified in § 80.75(m).

* * * * *

■ 21. Section 80.133 is amended by revising paragraphs (h)(1) and (h)(4) to read as follows:

§ 80.133 Agreed upon procedures for refiners and importers.

* * * * *

(h) * * *

(1) Obtain from the refiner or importer the oxygenate type and volume, and oxygen volume required to be hand blended with the RBOB, in accordance with § 80.69(a)(2).

* * * * *

(4) Perform the following procedures for each batch report included in paragraph (h)(4)(i)(B) of this section:

(i) Obtain and inspect a copy of the executed contract with the downstream oxygenate blender (or with an intermediate owner), and confirm that the contract:

(A) Was in effect at the time of the corresponding RBOB transfer; and

(B) Allowed the company to sample and test the reformulated gasoline made by the blender.

(ii) Obtain a listing of RBOB blended by downstream oxygenate blenders and the refinery's or importer's oversight test results, and select a representative sample, in accordance with the guidelines in § 80.127, from the listing of test results and for each test selected perform the following:

(A) Obtain the laboratory analysis for the batch, and agree the type of oxygenate used and the oxygenate content appearing in the laboratory analysis to the instructions stated on the product transfer documents corresponding to a RBOB receipt immediately preceding the laboratory analysis and used in producing the reformulated gasoline batch selected within the acceptable ranges set forth at § 80.65(e)(2)(i);

(B) Calculate the frequency of sampling and testing or the volume blended between the test selected and the next test; and

(C) Agree the frequency of sampling and testing or the volume blended between the test selected and the next test to the sampling and testing frequency rates stated in § 80.69(a)(7).

* * * * *

■ 22. Section 80.134 is removed.

[FR Doc. 06–1612 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–303, MB Docket No. 05–52, RM–10300]

Digital Television Broadcast Service; Johnstown and Jeannette, PA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Viacom Television Stations Group of Pittsburgh, Inc., licensee of station WNPA-DT, channel 30, Johnstown, Pennsylvania, substitutes DTV channel 49 for DTV channel 30 at Johnstown and re-allots DTV channel 49 from Johnstown to Jeannette, Pennsylvania. *See* 70 FR 10351, March 3, 2005. DTV channel 49 can be allotted to Jeannette, Pennsylvania, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 40–23–34 N. and 79–46–54 W. with a power of 437, HAAT of 301 meters and with a DTV service population of 2851 thousand. Since the community of Jeannette is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government has been obtained for this allotment. With this action, this proceeding is terminated.

DATES: Effective April 3, 2006.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 05–52, adopted February 7, 2006, and released February 15, 2006. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document 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 301–816–2820, facsimile 301–816–0169, or via-e-mail *joshir@erols.com.*

This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

The Commission will send a copy of this Report & Order in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under Pennsylvania, is amended by removing DTV channel 30 at Johnstown and adding Jeannette, DTV channel 49.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 06–1616 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–263; MB Docket No. 05–267, RM–10365, RM–11278]

Radio Broadcasting Services; Ocala, FL, and St. Simons Island, GA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a *Notice of Proposed Rule Making,* 70 FR 59293 (October 12, 2005), this *Report and Order* allots Channel 229C3 to St. Simons Island, Georgia, as its second local aural transmission service. The coordinates for Channel 229C3 at St. Simons Island, Georgia, are 31–14–54 NL and 81–29–57 WL, with a site restriction of 16.4 kilometers (10.2 miles) northwest of the center city coordinates for St. Simons Island. Further, the *Report and Order* reclassifies Station WOGK(FM), Ocala, Florida, from Channel 229C to Channel 229C0, in order to accommodate the allotment of Channel 229C3 to St. Simons Island, Georgia.

DATES: Effective March 23, 2006.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order* in MB Docket No. 05–267, adopted February 2, 2006, and released February 6, 2006. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A). In addition, the *Report and Order* makes an editorial change in the existing FM Table of Allotments under Florida by replacing Channel 224A, Ocala, with Channel 225C2, Ocala.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by adding Channel 229C3 at St. Simons Island.

■ 3. Section 73.202(b), the Table of FM Allotments under Florida, is amended by removing Channel 229C and Channel 224A and by adding Channel 229C0 and Channel 225C2 at Ocala.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1520 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–267; MB Docket No. 05–140, RM–11225]

Radio Broadcasting Services; Arlington and Memphis, TN, and Saint Florian, AL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Clear Channel Broadcasting Licenses, Inc., licensee of Station WEGR(FM), Channel 274C1, Memphis, Tennessee, deletes Channel 274C1 at Memphis, Tennessee, from the FM Table of Allotments, allots Channel 274C1 at Arlington, Tennessee, as the community's first local FM service, and modifies the license of Station WEGR(FM) to specify operation on Channel 274C1 at Arlington. Channel 274C1 can be allotted to Arlington, Tennessee, in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.8 km (6.7 miles) west of Arlington. The coordinates for Channel 274C1 at Arlington, Tennessee, are 89–46–38 North Latitude and 89–46–38 West Longitude. In order to accommodate that allotment, the Audio Division also modifies the reference coordinates for vacant Channel 274A at Saint Florian, Alabama. The reference coordinates for vacant Channel 274A at Saint Florian, Alabama, can be changed to comply with the Commission's minimum distance separation requirements with a site restriction of 4.1 km (2.5 miles) west of Arlington. The revised coordinates for Channel 274A at Saint Florian, Alabama, are 34–50–12 NL and 87–37–27 WL.

DATES: Effective March 23, 2006.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 05–140, adopted February 2, 2006, and released February 6, 2006. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Tennessee is amended by adding Arlington, Channel 274C1 and by removing Channel 274C1 at Memphis.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1521 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–264; MB Docket No. 05–134; RM–11207]

Radio Broadcasting Services; Naples and Sanibel, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a petition filed by Meridian Broadcasting Inc., licensee of Station WTLT(FM), Channel 229C3, Naples, Florida, requesting the substitution of Channel 229C2 for Channel 229C3 at Naples, Florida, reallotment of Channel 229C2 from Naples to Sanibel, Florida, as its first local service, and modification of the Station WTLT(FM) license to reflect the change. *See* 70 FR 19400, published April 13, 2005. Channel 229C2 can be allotted to Sanibel in conformity with the Commission's rules, provided there is a site restriction of 8.3 kilometers (5.2 miles) northwest at coordinates 26–30–00 NL and 82–05–00 WL.

DATES: Effective March 23, 2006

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* MB Docket No. 05–134, adopted February 2, 2006, and released February 6, 2006. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

The FM Table of Allotments currently reflects Channel 228A at Naples, Florida. Station WTLT(FM) was granted a license to specify operation on Channel 229C3 in lieu of Channel 228A at Naples, Florida. *See* BLH–20030407AAL.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ The Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by removing Channel 228A at Naples and by adding Sanibel, Channel 229C2.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1524 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–266; MB Docket No. 05–120, RM–11194]

Radio Broadcasting Services; Prospect, KY and Salem, IN

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Clear Channel Broadcasting Licenses, Inc., licensee of Station WZKF(FM), Channel 255B, Salem, Indiana, deletes Channel 255B at Salem, Indiana, from the FM Table of Allotments, allots Channel 255B at Prospect, Kentucky, as the community's first local FM service, and modifies the license of Station WZKF(FM) to specify operation on Channel 255B at Prospect, Kentucky. Channel 255B can be allotted to Prospect, Kentucky, in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.4 km (13.0 miles) northwest of Prospect. The coordinates for Channel 255B at Prospect, Kentucky, are 38–25–59 North Latitude and 85–50–01 West Longitude.

DATES: Effective March 23, 2006.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 05–120, adopted February 2, 2006, and released February 6, 2006. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under section 73.202(b), the Table of FM Allotments under Kentucky, is amended by adding Prospect, Channel 255B.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1525 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–625; MB Docket No. 04–426, RM–11125]

Radio Broadcasting Services; Beaumont and Mont Belvieu, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: At the request of Cumulus Licensing, LLC, licensee of Station KRWP(FM), Beaumont, Texas, the Audio Division reallots Channel 248C from Beaumont to Mont Belvieu, Texas, as the community's first local aural transmission service, and modifies the license for Station KRWP(FM) to reflect

the changes. *See* 69 FR 77976, December 29, 2004. Channel 248C is reallotted at Mont Belvieu at Station KRWP(FM)'s license site 50.1 kilometers (31.1 miles) east of the community at coordinates 29–41–52 NL and 94–24–09 WL.

DATES: Effective March 23, 2006.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 04–426 adopted February 2, 2006, and released February 6, 2006. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ 47 CFR part 73 is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 248C1 at Beaumont and adding Mont Belvieu, Channel 248C.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1526 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1823 and 1852

RIN 2700–AD12

Safety and Health—Alternate I to Major Breach of Safety or Security Clause

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: This rule adopts as final, with a minor editorial change, the proposed rule published in the **Federal Register** (70 FR 33726–33727) on June 9, 2005. This final rule amends the NASA FAR Supplement (NFS) to add Alternate I to the ''Major Breach of Safety or Security'' clause. Alternate I deletes references to termination for default and makes other changes to be consistent with the FAR termination clauses prescribed for use with educational or nonprofit institutions performing research and development work on a nonprofit or no-fee basis, and in contracts for commercial items.

EFFECTIVE DATE: February 22, 2006.

FOR FURTHER INFORMATION CONTACT: Carl Weber, Office of Procurement, Contract Management Division, (202) 358–1784, e-mail: *carl.c.weber@nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Since July 13, 2000, NFS has required the Major Breach of Safety or Security clause (1852.223–75) in new solicitations and contracts with an estimated value over $500,000. The clause declares the Government's right to terminate for default in the event of a major breach of safety or security. However, contracts for commercial items procured under FAR Part 12 and certain contracts with educational or nonprofit institutions do not provide the Government the right to terminate for ''default''. Commercial contracts provide rights to terminate for convenience and ''cause'', and contracts with educational or nonprofit institutions provide the right to terminate for convenience.

NASA Procurement Information Circular (PIC 02–11) issued June 24, 2002, provided a class deviation to use an Alternate I to the clause, which deleted references to termination for default, under certain circumstances.

This final rule adds the Alternate I to the Major Breach of Safety or Security clause at 1852.223–75, eliminating the need for PIC 02–11 and the class deviation. Use of the clause with its Alternate I in contracts for commercial items procured under FAR Part 12, and contracts for research and development work with educational or nonprofit institutions on a nonprofit or no-fee basis will be consistent with FAR termination clauses prescribed for use in such contracts. NASA published a proposed rule in the **Federal Register** (70 FR 33726–33727) on June 9, 2005. No comments were received, and the proposed rule is being adopted with a minor editorial change to 1823.7001(d)(2)(ii) that simplifies the clause prescription to require it when FAR 52.212–4 is included in a solicitation or contract. This is not a significant regulatory action, and therefore, is not subject to Office of Management and Budget review under section 6(b), of Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

NASA certifies that this final rule does not have a significant economic impact on a substantial number of small entities with the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, since it only clarifies agency regulations so they are employed consistently with FAR termination provisions.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes do not impose any new recordkeeping or information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 1823 and 1852

Government Procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

■ Accordingly, 48 CFR parts 1823 and 1852 are amended as follows:

PART 1823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 1. The authority citation for 48 CFR parts 1823 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

■ 2. Amend section 1823.7001 by revising paragraph (d) to read as follows:

1823.7001 NASA solicitation provisions and contract clauses.

* * * * *

(d)(1) The contracting officer shall insert the clause at 1852.223–75, Major Breach of Safety or Security, in all solicitations and contracts with estimated values of $500,000 or more, unless waived at a level above the contracting officer with the concurrence of the project manager and the installation official(s) responsible for matters of security, export control, safety, and occupational health.

(2) Insert the clause with its Alternate I if—

(i) The solicitation or contract is with an educational or other nonprofit institution and contains the termination clause at FAR 52.249–5; or

(ii) The solicitation or contract is for commercial items and contains the clause at FAR 52.212–4.

(3) For contracts with estimated values below $500,000, use of the clause is optional.

* * * * *

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 1852.223–75 by adding Alternate I to read as follows:

1852.223–75 Major Breach of Safety or Security.

* * * * *

Alternate I

(FEB 2006)

As prescribed in 1823.7001(d)(2), substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:

(a) Safety is the freedom from those conditions that can cause death, injury, occupational illness, damage to or loss of equipment or property, or damage to the environment. Safety is essential to NASA and is a material part of this contract. NASA's safety priority is to protect: (1) The public; (2) astronauts and pilots; (3) the NASA workforce (including contractor employees working on NASA contracts); and (4) high-value equipment and property. A major breach of safety may constitute a breach of contract that entitles the Government to exercise any of its rights and remedies applicable to material parts of this contract, including termination. A major breach of safety must be related directly to the work on the contract. A major breach of safety is an act or omission of the Contractor that consists of an accident, incident, or exposure resulting in a fatality or mission failure; or in damage to equipment or property equal to or greater than $1 million; or in any ''willful'' or ''repeat'' violation cited by the Occupational Safety and Health Administration (OSHA) or by a state agency operating under an OSHA approved plan.

(b) Security is the condition of safeguarding against espionage, sabotage, crime (including computer crime), or attack. A major breach of security may constitute a breach of contract that entitles the Government to exercise any of its rights and remedies applicable to material parts of this contract, including termination. A major breach of security may occur on or off Government installations, but must be related directly to the work on the contract. A major breach of security is an act or omission by the Contractor that results in compromise of classified information, illegal technology transfer, workplace violence resulting in criminal conviction, sabotage, compromise or denial of information technology services, equipment or property damage from vandalism greater than $250,000, or theft greater than $250,000.

[FR Doc. 06–1572 Filed 2–21–06; 8:45 am]

BILLING CODE 7510–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 050922245–6038–06; I.D. 020906A]

RIN 0648–AT89

Sea Turtle Conservation; Shrimp Trawling Requirements

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

ACTION: Temporary rule.

SUMMARY: NMFS issues this 30–day temporary rule to allow shrimp fishermen to continue to use limited tow times as an alternative to Turtle Excluder Devices (TEDs) in inshore and offshore waters from the Florida/Alabama border, westward to the Louisiana/Texas border, and extending offshore 10 nautical miles. The previous 30–day variances of the TED requirements were from September 23 through October 24, 2005; October 11 through November 10, 2005; October 24 through November 23, 2005; November 23 through December 23, 2005; and from December 23, 2005, through January 23, 2006, for waters affected by Hurricanes Katrina and Rita. These variances were initially for 50 nautical miles, while the most recent variance was for 20 nautical miles. After an investigation, the Alabama Department of Conservation and Natural Resources (ALDCNR), Mississippi Department of Marine Resources (MDMR), and the Louisiana Department of Wildlife and Fisheries (LADWF) have determined that excessive debris is still affecting fishermen's ability to use TEDs effectively in an area extending approximately 10 nm offshore. This action is necessary because environmental conditions resulting from Hurricanes Katrina and Rita persist on the fishing grounds, preventing some fishermen from using TEDs effectively.

DATES: Effective from February 16, 2006 through 11:59 p.m, local time, March 20, 2006.

ADDRESSES: Requests for copies of the Environmental Assessment on this action should be addressed to the Chief, Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Michael Barnette, 727–551–5794.

SUPPLEMENTARY INFORMATION:

Background

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

Sea turtles are incidentally taken, and some are killed, as a result of numerous activities, including fishery-related trawling activities in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, the taking of sea turtles is prohibited, with exceptions identified in 50 CFR 223.206(d), or according to the terms and conditions of a biological opinion issued under section 7 of the ESA, or according to an incidental take permit issued under section 10 of the ESA. The incidental taking of turtles during shrimp or summer flounder trawling is exempted from the taking prohibition of section 9 of the ESA if the conservation measures specified in the sea turtle conservation regulations (50 CFR 223) are followed. The regulations require most shrimp trawlers and summer flounder trawlers operating in

the southeastern United States (Atlantic area, Gulf area, and summer flounder sea turtle protection area; see 50 CFR 223.206) to have a NMFS-approved TED installed in each net that is rigged for fishing to allow sea turtles to escape. TEDs currently approved by NMFS include single-grid hard TEDs and hooped hard TEDs conforming to a generic description, the flounder TED, and one type of soft TED, the Parker soft TED (see 50 CFR 223.207).

TEDs incorporate an escape opening, usually covered by a webbing flap, which allows sea turtles to escape from trawl nets. To be approved by NMFS, a TED design must be shown to be 97 percent effective in excluding sea turtles during testing based upon specific testing protocols (50 CFR 223.207(e)(1)). Most approved hard TEDs are described in the regulations (50 CFR 223.207(a)) according to generic criteria based upon certain parameters of TED design, configuration, and installation, including height and width dimensions of the TED opening through which the turtles escape.

The regulations governing sea turtle take prohibitions and exemptions provide for the use of limited tow times as an alternative to the use of TEDs for vessels with certain specified characteristics or under certain special circumstances. The provisions of 50 CFR 223.206(d)(3)(ii) specify that the NOAA Assistant Administrator for Fisheries (AA) may authorize compliance with tow time restrictions as an alternative to the TED requirement if the AA determines that the presence of algae, seaweed, debris, or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable. The provisions of 50 CFR 223.206(d)(3)(i) specify the maximum tow times that may be used when tow time limits are authorized as an alternative to the use of TEDs. Each tow may be no more than 55 minutes from April 1 through October 31 and no more than 75 minutes from November 1 through March 31, as measured from the time that the trawl doors enter the water until they are removed from the water. These tow time limits are designed to minimize the level of mortality of sea turtles that are captured by trawl nets not equipped with TEDs.

Recent Events

On September 12, 2005, the NMFS Southeast Regional Administrator received requests from the Marine Fisheries Division of the ALDCNR and the LADWF to allow the use of tow times as an alternative to TEDs in inshore and offshore waters because of excessive storm related debris on the fishing grounds as a result of Hurricane Katrina. NMFS received a similar request from the MDMR on September 13. On September 27, 2005, the NMFS Southeast Regional Administrator received requests from the LADWF and the Texas Parks and Wildlife Department (TPWD) to allow the use of tow times as an alternative to TEDs in inshore and offshore waters because of excessive storm related debris on the fishing grounds as a result of Hurricane Rita. Subsequent to these requests, NMFS issued 30–day exemptions to the TED requirements from September 23 through October 23, 2005, and October 11 through November 10, 2005, for waters affected by Hurricanes Katrina and Rita, respectively (70 FR 56593 and 70 FR 60013, respectively).

On October 11, 2005, the NMFS Southeast Regional Administrator received requests from the ALDCNR, MDMR, LADWF, and the TPWD for an additional 30–day period allowing the use of restricted tow times as an alternative to TEDs in inshore and offshore waters because of excessive storm-related debris that was still present on the fishing grounds as a result of Hurricanes Katrina and Rita. Subsequent to these requests, NMFS issued a 30–day extension encompassing both previous exemptions to the TED requirements, from October 24, 2005, through November 23, 2005 (70 FR 61911).

On November 15, 2005, the NMFS Southeast Regional Administrator received requests from the Marine Fisheries Division of the ALDCNR, MDMR, LADWF, and TPWD for an additional 30–day period allowing the use of restricted tow times as an alternative to TEDs in state and federal waters because of excessive storm-related debris on the fishing grounds as a result of Hurricanes Katrina and Rita. Subsequent to these requests, NMFS issued a 30–day extension encompassing both previous exemptions to the TED requirements, from November 23, 2005, through December 23, 2005 (70 FR 71406).

On December 7, 2005, the NMFS Southeast Regional Administrator received a request from the Marine Fisheries Division of the ALDCNR to allow the use of tow times as an alternative to TEDs in inshore and offshore waters because of excessive storm related debris on the fishing grounds as a result of Hurricane Katrina. NMFS received similar requests on December 19, 2005, from the MDMR and the LADWF due to the cumulative effects of Hurricanes Katrina and Rita. At that time, the area cumulatively affected by the two hurricanes extended from the Florida/Alabama border, westward to the Louisiana/Texas border, and offshore 20 nautical miles. NMFS issued a 30–day extension encompassing both previous exemptions to the TED requirements, from December 23, 2005, through January 23, 2006 (70 FR 77054).

On January 23, 2006, the NMFS Southeast Regional Administrator received a request from the ALDCNR, MDMR and the LADWF for an additional 30–day period allowing the use of restricted tow times as an alternative to turtle excluder devices in inshore and offshore waters because of excessive storm-related debris on the fishing grounds as a result of Hurricanes Katrina and Rita. The area cumulatively affected by the two hurricanes currently extends from the Florida/Alabama border, westward to the Louisiana/Texas border, and offshore 10 nautical miles. Phone conversations between NMFS Southeast Region's Protected Resources staff, fishermen, and state resource agency staffs confirm there are problems with debris in state and federal waters from the Florida/Alabama border, westward to the Louisiana/Texas border, and offshore 10 nautical miles. ALDCNR interviewed shrimp fishermen who indicated there are still serious debris problems out to 10 nautical miles, while MDMR's investigation indicates debris problems are still very serious nearshore, with continuing problems into the exclusive economic zone. LADWF's investigation and interviews with shrimp fishermen indicates there are still significant debris problems in state and Federal waters.

Interviews between these state agencies and NMFS indicated some shrimp fishermen continue to use TEDs in these areas as the TED is able to exclude debris from the trawl; however, these interviews also indicated there are still significant amounts of large debris that can and does render TEDs ineffective at releasing turtles. NMFS Gear Technician's investigations indicate that debris large enough to clog TEDs tends to be nearshore and does not extend past 10 nautical miles. They also indicate that most offshore fishermen are using their TEDs due to the fact the debris offshore is of a nature and size that the TEDs can ''shoot'' the debris from the trawl.

Special Environmental Conditions

The AA finds that debris washed into inshore and offshore waters by Hurricanes Katrina and Rita off Alabama, westward to the Louisiana/Texas border, and extending offshore 10

nautical miles, has created ongoing special environmental conditions that make trawling with TED-equipped nets impracticable. Therefore, the AA issues this notification to extend the current authorization for the use of restricted tow times as an alternative to the use of TEDs in inshore and offshore waters off Alabama, westward to the Louisiana/Texas border, and extending offshore 10 nautical miles, through 11:59 p.m., local time, March 20, 2006. Tow times must be limited to no more than 75 minutes measured from the time trawl doors enter the water until they are retrieved from the water.

Continued Use of TEDs

NMFS encourages shrimp trawlers in the affected areas to continue to use TEDs if possible, even though they are authorized under this action to use restricted tow times.

NMFS gear experts have provided several general operational recommendations to fishermen to maximize the debris exclusion ability of TEDs that may allow some fishermen to continue using TEDs without resorting to restricted tow times. To exclude debris, NMFS recommends the use of hard TEDs made of either solid rod or of hollow pipe that incorporate a bent angle at the escape opening, in a bottom-opening configuration. In addition, the installation angle of a hard TED in the trawl extension is an important performance element in excluding debris from the trawl. High installation angles can trap debris either on or in front of the bars of the TED; NMFS recommends an installation angle of 45°, relative to the normal horizontal flow of water through the trawl, to optimize the TED's ability to exclude turtles and debris. Furthermore, the use of accelerator funnels, which are allowable modifications to hard TEDs, is not recommended in areas with heavy amounts of debris or vegetation. Lastly, the webbing flap that is usually installed to cover the turtle escape opening may be modified to help exclude debris quickly: the webbing flap can either be cut horizontally to shorten it so that it does not overlap the frame of the TED or be slit in a fore-and-aft direction to facilitate the exclusion of debris. The use of the double cover flap TED will also aid in debris exclusion.

All of these recommendations represent legal configurations of TEDs for shrimpers fishing in the affected areas. This action does not authorize any other departure from the TED requirements, including any illegal modifications to TEDs. In particular, if TEDs are installed in trawl nets, they may not be sewn shut.

Due to Hurricanes Katrina and Rita, tow time authorizations have been granted in the affected area since September 23, 2005. Evidence from state and Federal investigations indicate that more fishermen are using TEDs even though tow times are authorized because TEDs are effective at shooting the debris from the trawl. This indicates that although there is still much debris in the affected areas, the problem is dissipating. The end of this authorization will represent five months of tow time authorizations. This amount of time will have allowed fishermen to find areas that can be trawled effectively with TEDS. Therefore, based on the dissipating debris problem and the amount of time fishermen have had to fish under tow time restrictions NMFS believes that this will be the last time tow time authorizations will be required due to debris problems caused by Hurricanes Katrina and Rita.

Alternative to Required Use of TEDs

The authorization provided by this rule applies to all shrimp trawlers that would otherwise be required to use TEDs in accordance with the requirements of 50 CFR 223.206(d)(2) who are operating in inshore and offshore waters affected by Hurricanes Katrina and Rita off Alabama, westward to the Louisiana/Texas border, and extending offshore 10 nautical miles, through March 20, 2006. Through this temporary rule, shrimp trawlers may choose either restricted tow times or TEDs to comply with the sea turtle conservation regulations, as prescribed above.

Alternative to Required Use of TEDs; Termination

The AA, at any time, may withdraw or modify this temporary authorization to use tow time restrictions in lieu of TEDs through publication of a notice in the **Federal Register**, if necessary to ensure adequate protection of endangered and threatened sea turtles. Under this procedure, the AA may modify the affected area or impose any necessary additional or more stringent measures, including more restrictive tow times, synchronized tow times, or withdrawal of the authorization if the AA determines that the alternative authorized by this rule is not sufficiently protecting turtles or no longer needed. The AA may also terminate this authorization if information from enforcement, state authorities, or NMFS indicates compliance cannot be monitored effectively. This authorization will expire automatically at 11:59 p.m., local time, March 20, 2006, unless it is explicitly extended through another notification published in the **Federal Register**.

Classification

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

The AA has determined that this action is necessary to respond to special environmental conditions to allow effective fishing for shrimp, while providing adequate protection for endangered and threatened sea turtles pursuant to the ESA and applicable regulations.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that there is good cause to waive prior notice and opportunity to comment on this rule. The AA finds that unusually high amounts of debris has created ongoing special environmental conditions that make trawling with TED-equipped nets impracticable. Prior notice and opportunity to comment are impracticable and contrary to the public interest in this instance because providing notice and comment would prevent the agency from providing the affected industry relief from the effects of Hurricanes Katrina and Rita in a timely manner.

The AA finds that there is good cause to waive the 30–day delay in effective date pursuant to 5 U.S.C. 553(d)(3) to provide alternatives to comply with the sea turtle regulations in a timely manner. Many fishermen may be unable to operate under the special environmental conditions created by Hurricanes Katrina and Rita without an alternative to using TEDs. Providing a 30–day delay in effective date would prevent the agency from providing the affected industry relief from the effects of Hurricanes Katrina and Rita in a timely manner. For the reasons stated above, the AA finds that this temporary rule should not be subject to a 30–day delay in effective date, pursuant to 5 U.S.C. 553(d)(1).

Since prior notice and an opportunity for public comment are not required to be provided for this action by 5 U.S.C. 553, or by any other law, the analytical requirements of 5 U.S.C. 601 *et seq.* are inapplicable.

The AA prepared an Environmental Assessment (EA) for this rule. Copies of the EA are available (see **ADDRESSES**).

Dated: February 16, 2006.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 06–1623 Filed 2–16–06; 1:42 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126333–5040–02; I.D. 021506A]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 630 of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 630 of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2006 total allowable catch (TAC) of pollock for Statistical Area 630 of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 15, 2006, through 1200 hrs, A.l.t., March 10, 2006.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of the 2006 TAC of pollock in Statistical Area 630 of the GOA is 4,159 metric tons (mt) as established by the 2005 and 2006 harvest specifications for groundfish of the GOA (70 FR 8958, February 24, 2005).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the A season allowance of the 2006 TAC of pollock in Statistical Area 630 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 4,013 mt, and is setting aside the remaining 146 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 630 of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 630 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 14, 2006.

The AA also finds good cause to waive the 30 day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: February 15, 2006.

James P. Burgess,

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

[FR Doc. 06–1622 Filed 2–16–06; 1:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 71, No. 35
Wednesday, February 22, 2006

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 AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. AO–90–A7; FV05–916–1]

Nectarines and Peaches Grown in California; Secretary's Decision and Referenda Order on Proposed Amendments to Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referenda order.

SUMMARY: This decision proposes amendments to Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917 (orders), which regulate the handling of nectarines and peaches grown in California, and provides growers with the opportunity to vote in referenda to determine if they favor the changes. The amendments are based on those proposed by the Nectarine Administrative Committee (NAC), the Peach Commodity Committee (PCC), and the Control Committee (part of M.O. No. 917) (Committees), which are responsible for local administration of orders 916 and 917. The proposed amendments to order 917 only apply to peaches. The proposed amendments would: update definitions for ''handle'', ''grower'', and add a definition for ''pure grower'' to both orders; increase committee membership of the NAC from eight to thirteen members and modify sections of order 916 to conform to the increased membership; eliminate the Shippers Advisory Committee in order 916; allow the Control Committee under order 917 to be suspended if the provisions of one commodity are suspended and transfer applicable duties and responsibilities to the remaining Commodity Committee; authorize interest and late payment charges on assessments paid late in both orders; and other related amendments. The proposed amendments are intended to streamline and improve the administration, operation, and functioning of the orders.

DATES: The referenda will be conducted from March 6 to 24, 2006. The representative periods for the purpose of the referenda for both nectarines and peaches are March 1, 2005, through February 28, 2006.

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 1035, Moab, Utah; telephone: (435) 259–7988, Fax: (435) 259–4945; or Kathleen M. Finn, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on this proceeding by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on January 25, 2005 and published in the January 28, 2005 issue of the **Federal Register** (70 FR 4041), and a Recommended Decision issued on November 18, 2005, and published in the November 29, 2005, issue of the **Federal Register** (70 FR 71734).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Preliminary Statement

The proposed amendments are based on the record of a public hearing held on February 15 and 16, 2005, in Fresno, California. The hearing was held to consider the proposed amendment of the orders. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*) hereinafter referred to as the ''Act,'' and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900). The notice of hearing contained numerous proposed order changes jointly proposed by the Nectarine Administrative Committee, the Peach Commodity Committee, and the Control Committee (order 917), which are responsible for local administration of orders 916 and 917. Marketing order 917 regulates both California pears and peaches. However, the proposed amendments to order 917 only apply to peaches. The pear provisions of the order have been suspended since 1994. Because the Pear Commodity Committee and the pear provisions are suspended, the Pear Commodity Committee did not participate in any amendment discussions.

The proposed amendments to marketing orders 916 and 917 would:

1. Allow hybrid fruit that exhibits the characteristics of nectarines or peaches and is subject to cultural practices common to such fruit be subject to marketing order regulations under both orders.

2. Specify that the act of packing be considered a handling function under both orders.

3. Change the marketing season for nectarines from May 1 through November 30 to April 1 through November 30.

4. Allow the duties and responsibilities of the Control Committee under order 917 to be transferred to one Commodity Committee if the provisions for the other commodity are suspended.

5. Increase membership on the NAC from eight to thirteen members and revise the procedures that constitute quorum and voting requirements to conform to the increased committee size. The proposal would also add to both orders that the Committees may vote by facsimile and set forth voting requirements for video conferencing.

6. Eliminate the Shippers' Advisory Committee under the nectarine order.

7. Modify the definition of grower under both orders to clarify that officers of grower corporations are eligible to serve as committee grower members.

8. Add a definition of ''pure grower'' for purposes of eligibility for membership on the Committees. This proposal would also allow alternative methods to conduct nominations, change the date for holding nominations, authorize positions for pure growers and add tenure requirements for Committee members.

9. Authorize nominees to state their willingness to serve on the Committees prior to the selection.

10. Change the district boundaries under the nectarine order and redefine the peach districts.

11. Change the names and the composition of the districts of the Peach Commodity Committee.

12. Allow for interest and/or late payments for assessments not paid timely under both orders and authorize the Peach Commodity Committee to borrow money.

13. Clarify that subcommittees may be established by the Peach Commodity Committee.

The Fruit and Vegetable Programs of AMS proposed to allow such changes as may be necessary to the orders, if any of the proposed changes are adopted, so that all of the orders' provisions conform to the effectuated amendments. None were deemed necessary.

One proposed amendment was not recommended for adoption. That amendment would have provided authority to recommend different regulations for different market destinations of the products.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on November 18, 2005, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by December 19, 2005.

One exception was filed on behalf of the proponents during the exception period. The exception expressed general support for the proposals, including modifications to those proposals recommended by USDA in its recommended decision. This decision adopts these amendments as proposed in the recommended decision.

Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural growers are defined by the Small Business Administration (SBA)(13 CFR 121.201) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers regulated under the order, were defined at the time of the hearing as those with annual receipts of less than $5,000,000. The definition of small agricultural service firm has subsequently changed to one with annual receipts of $6,000,000.

According to the record, there are approximately 207 California nectarine and peach handlers (combined) and approximately 1,500 growers (combined nectarines and peaches) in the production area, the State of California. A majority of these handlers and growers may be classified as small entities.

Based on calculations made by the Peach and Nectarine Committees' staff, witnesses indicated that about 26 handlers (13 percent) would qualify as large business entities under the SBA definition of a large agricultural service firm ($5,000,000). For the 2004 season, it was estimated that the average handler price received was eight dollars per container or container equivalent of nectarines or peaches. Thus, a handler would have to ship at least 625,000 containers to have annual receipts of 5 million dollars. Given data on shipments presented at the hearing and the estimated 8 dollar average handler price received during the 2004 season, small handlers represented approximately 87 percent of all the handlers within the industry. Under the 6 million dollar definition, more than 87 percent of handlers would qualify as small handler entities.

Record evidence also indicated that less than 20 percent of the combined number of California nectarine and peach growers could be defined as other than small entities. The Committees estimated that the average 2004 grower price received for nectarines and peaches was 5 dollars per container or a container equivalent. A grower would have to produce at least 150,000 containers of nectarines and peaches to have annual receipts of 750,000 dollars. Given data maintained by the Committees' staff and the 5 dollar estimated average grower price received during the 2004 season, the staff estimates that more than 80 percent of growers can be classified as small growers.

Evidence presented at the hearing indicates an average 2004 grower price of 5 dollars per container or container equivalent for both nectarines and peaches, and a combined pack-out of approximately 40,422,900 containers. Thus, the value of the 2004 pack-out is estimated to be $202,114,500. Dividing this total estimated grower revenue by the estimated number of combined nectarine and peach growers (1,500) yields an estimate of 2004 average revenue per grower of about $134,743. Because many growers produce both commodities, industry nectarine and peach production statistics were presented at the hearing as combined totals.

National Agricultural Statistical Service (NASS) data presented at the hearing provides the following production profile for California nectarines and peaches, respectively (all numbers are two-year averages for the 2003 crop year and preliminary data for 2004): bearing acres, 36,500 of nectarines and 37,000 of peaches; yield per acre of utilized production, 7.19 tons and 10.84 tons; annual utilized production, 262,500 tons and 401,000 tons. Utilized production of both nectarines and peaches was less than total production in 2004; utilized production data was therefore used in the computation. Two-year (2003 and 2004) average grower prices per ton for nectarines and peaches were $391 and $309.50 respectively. However, $309.50 is the peach price per ton for both fresh and processed uses. Approximately one third of California freestone peaches are sold for processing at a price lower than growers receive for fresh market sales. Therefore, a better estimate of the price per ton for fresh peach sales is to use the U.S. estimated grower price for fresh peaches of 27 cents per pound ($540 per ton) for 2003, the most recent year for which a U.S. fresh peach price was available from the Economic Research Service of the USDA.

This NASS and ERS data is used to compute an additional estimate of average annual sales revenue per producer. By assuming that growers of nectarines are also growers of peaches, the 2004 average acreage for these crops (dividing the sum of nectarine and peach bearing acres by 2) is equal to 36,750 acres. Dividing this number by the number of combined peach and nectarine growers reported by CTFA (1,500) yields an estimate of 24.5 acres as the average size of a sample nectarine or peach farm in 2004. If the sample farm's acreage was split evenly between nectarines and peaches (12.5 acres of each fruit) and production yields equal to the statewide average (reported above), that farm would have produced and sold 89.88 tons of nectarines and 134.42 tons of peaches. The value of production for that sample farm would have been $35,143 for nectarines and $72,587 for peaches, or $107,730 total.

This figure is lower than the $134,743 estimate using industry data. However, both computations confirm that the average nectarine or peach grower qualifies as a small grower under the SBA definition.

The proposed amendments would: update definitions and districts in both orders; increase membership of the Nectarine Administrative Committee from 8 to 13 members and modify sections of the order to conform to the increased membership; eliminate the Shippers Advisory Committee (M.O. No. 916); allow the Control Committee under M.O. No. 917 to be suspended if the provisions of one commodity are suspended and transfer applicable duties and responsibilities to the remaining Commodity Committee; and authorize interest and late payment charges on assessments that are paid late.

All of the proposals are intended to streamline and improve the administration, operation, and functioning of the programs. Many of the proposed amendments would update the language of these two orders, thus better representing, and conforming with, current practices in these industries. The proposed amendments are not expected to result in any significant cost increases for growers or handlers. More efficient administration of program activities may result in cost savings for the Peach and Nectarine Committees.

Proposal 1 would amend the order to allow hybrid fruit that exhibits the characteristics of nectarines or peaches and is subject to cultural practices common to nectarines and peaches to be subject to marketing order regulations. This proposed amendment provides a procedure for the Committees to recommend to USDA the specific hybrids to be included under the definitions and subject to order provisions.

The cultivation of hybrid fruit has been a practice of the nectarine and peach industries. The improvement in breeding technology provides for the development of fruit and fruit trees with more favorable characteristics, such as disease resistance. As breeding technology becomes more sophisticated, it is anticipated that nectarines and peaches will be crossbred with other tree fruit, such as apricots and plums.

The proposal would require that all hybrids for which regulation is contemplated would need to be recommended to USDA by the Committees. If this amendment is adopted, the Committees would identify hybrids currently in production that have characteristics of nectarines or peaches. The characteristics of the fruit would help determine whether the hybrid should be regulated. The Committees would also consider the cultural practices used on that specific hybrid, as cultural practices differ among various fruit trees. USDA would then proceed with rulemaking, as appropriate, as to what hybrids would be included under the order.

The proposed amendment would provide flexibility in including hybrids as they are developed and provides sufficient safeguards to ensure compliance of order provisions. Incorporating specific reference to hybrid fruit into the definitions of ''nectarine'' and ''peach'' is not expected to result in any significant increase in costs to growers or handlers. There may be slight increases in the administration costs of the nectarine and peach orders in terms of program oversight, but it is expected that any increases would be offset by the benefits of including hybrids under the orders' provisions.

Proposal 2 would specify that the act of ''packing'' nectarines and peaches would be a handling function under the orders. Most packers already assume all of the responsibilities of a handler, except the selling of the fruit and thus, this proposal is not expected to result in any significant increases in costs and would likely result in efficiencies that would benefit the administration of marketing orders 916 and 917.

Proposal 3, which seeks to extend the marketing season for nectarines, would more accurately reflect the nectarine industry's current production and marketing season and would conform to current handling regulations. The proposed amendment would change the current marketing season from May 1 through November 30 to April 1 through November 30. According to record evidence, aligning the marketing year with current production would not result in any increases in costs.

Proposal 4 would allow for the temporary suspension of the Control Committee, the oversight committee for peaches and pears under marketing order 917, when one of the commodity programs is suspended. Since the pear program has been suspended, the duties of the Control Committee have been lessened, as there is only one Commodity Committee that is active under the marketing order program. In the Pear Commodity Committee's absence, the Peach Commodity Committee has continued to operate in conjunction with the Control Committee. The proposed amendment would also allow the Control Committee to become active again if both commodity groups were to become active under the order. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 5 would increase the membership on the NAC from eight to thirteen members and revise quorum requirements. Proposal 5 would also provide for voting by facsimile and holding meetings via video teleconference for both the Nectarine and Peach Commodity Committees. Record evidence indicated that these amendments were necessary in order to update the business practices of the Nectarine and Peach Committees to include current day technology. The increase in Committee members from 8 to 13 would allow for greater industry participation and would provide for a larger pool of committee members to attend meetings and meet quorum requirements. This amendment is not expected to result in any significant increases in costs to growers or handlers.

Regarding the increase in committee membership, this proposal would benefit growers by allowing more growers to be appointed to the Committee, thereby increasing industry participation in the marketing order program functions.

Regarding the use of facsimile and video teleconference, this provision would allow both the Nectarine and Peach Committees to take advantage of technology that is available currently, but was not known when the orders were promulgated. Amendments proposed under this material issue are not expected to result in any significant increases in costs to growers or handlers.

Proposal 6 would eliminate the Shipper's Advisory Committee under the nectarine marketing order and bring the language of the order into conformance with current day operations of the program. Record evidence indicates that the Shipper's Advisory Committee has not been active for over 30 years and, while it once served a function under the marketing order program, it is no longer necessary. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 7 would modify the definition of grower to specify that both employees of growers and corporate officers of growers are eligible to serve on the Nectarine and Peach Committees in grower positions. This proposed amendment would be a clarifying change and would bring the language of the order into conformance with current-day operations of the program. This amendment is not expected to

result in any increases in costs to growers or handlers.

Proposal 8 would add a definition for pure grower to both the nectarine and peach orders. If implemented, pure growers would be defined as growers that grow their own product (and are not employees or officers of a packing business) or, that grow and pack primarily their own product. If they do pack for other growers, the total production packed from other growers cannot exceed 25 percent of the total production packed for that marketing season for that pure grower's packing facility. Pure growers, who only pack a limited amount of fruit for other growers, are still essentially dependent on their own production, which is the essential component of being a pure grower.

Proposal 8 would also modify the current nomination procedures for the Committees, as well as modify the deadline for conducting the nominations, add a 50-percent pure grower membership requirement for the Committees and establish tenure requirements for members. According to the hearing record, nomination procedures would be modified to provide for mailings of ballots and would change the beginning date of the nomination period from February 15 to January 31. The change in the beginning date would be necessary in order to provide extra time for the mailing of ballots.

While some increases in administration costs could arise as a result of the mailing of ballots, record evidence indicates that the benefit of increased industry participation would merit that expense.

Proposal 9 would modify the current acceptance procedure for persons nominated to serve on the Nectarine and Peach Committees. Currently, the acceptance procedure for persons nominated and selected to serve on the Committees involves a two-step process. If this amendment were implemented, the two steps could be combined into one, thus resulting in less paperwork, a shorter acceptance procedure and improved efficiency in the acceptance process. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 10 would modify the Fresno and Tulare districts under the peach marketing order by moving Kings County from the Fresno district to the Tulare district and by including all of Tulare County in the Tulare district, and would also modify district boundaries under the nectarine order. This change would also serve as the basis for modifying committee representation for the Tulare district under the peach order, as discussed under Proposal 11. These amendments are not expected to result in any significant increases in costs to growers or handlers.

Proposal 11 would modify the names of the peach producing districts under that marketing order and change district representation on the Peach Commodity Committee to reflect the modified districts discussed under Proposal 10. This proposal would provide for more accurate representation of current-day peach production. This amendment is not expected to result in any significant increases in costs to growers or handlers.

Proposal 12 would provide for interest and penalty provisions for late payment of assessments to be added to both the nectarine and peach orders and would authorize the borrowing of funds for administration of the peach order. These amendments would strengthen the assessment collection functions of the orders and, in the case of peaches, allow access to additional funds. The implementation of interest and late payments would serve as an incentive for handlers to pay their assessments in a timely manner. The authority to borrow funds under marketing order 917 would allow the Control and Peach Committees access to additional funds to administer the order when the carry forward of assessment monies is inadequate. While these amendments are expected to result in some costs under the marketing orders, the more timely assessment payments and the authority to borrow funds (for peaches) are expected to benefit the industries.

Lastly, Proposal 14 would clarify that ''other committees'' established by the Peach Committee would be referred to as ''subcommittees.'' This amendment is not expected to result in any increases in costs to growers or handlers.

The proposals put forth at the hearing would streamline program operations, but are not expected to result in a significant change in industry production, handling or distribution activities. In discussing the impacts of the proposed amendments on growers and handlers, record evidence indicates that the changes are expected to be positive because the administration of the programs would be more efficient, and therefore more effective, in executing Committee duties and responsibilities. There would be no significant cost impact on either small or large growers or handlers.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record evidence is that the amendments are designed to increase efficiency in the functioning of the orders.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are designed to enhance the administration and functioning of marketing orders 916 and 917 to the benefit the California nectarine and peach industries.

Paperwork Reduction Act

Current information collection requirements for Parts 916 and 917 have been previously approved by the Office of Management and Budget (OMB) under OMB number 0581–0189, ''Generic Fruit Crops.'' The proposed changes would have an insignificant impact on total burden hours currently approved under this information collection.

Specifically, the proposed amendment to increase the Nectarine Administrative Committee (committee) from 8 to 13 members would require an additional 5 members and 5 alternates to complete existing confidential background and acceptance statements every 2 years. Increasing committee members from 16 (8 members and 8 alternates) to 26 (13 members and 13 alternates) would result in an increase of .43 burden hours, or 26 minutes. In addition, because the Shipper's Advisory Committee is being recommended to be abolished, form FV–75, ''Confidential California Tree Fruit Agreement Questionnaire'', which is currently approved under OMB No. 0581–0189 for 1.99 burden hours, would no longer be needed. Removing this form would result in an overall decrease of 1.56 burden hours.

Also, the proposal would authorize nominees under the nectarine order to state their willingness to serve on the committee prior to their selection, which would result in the combining of Confidential Background statement and the acceptance statement, which are already approved by OMB. There would be no change in the burden hours by combining these forms.

The Peach Commodity Committee proposed to amend the provisions relating to the Control Committee under marketing order 917 to allow the duties and responsibilities of the Control Committee to be transferred to one commodity committee if the provisions of the other commodity committee are suspended. If this change was implemented, and the Peach Commodity Committee was to assume the duties and responsibilities of the Control Committee, some forms used by the Control Committee would require a

modification in the name of the committee using those forms. However, the functioning of the forms and the current burden would remain the same.

In addition, any changes to forms, or increased burden generated in nominating and selecting pure growers on the Committees would be submitted to OMB for approval prior to implementation.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Witnesses stated that existing forms could be adequately modified to serve the needs of the Nectarine and Peach Commodity Committees.

Civil Justice Reform

The amendments to Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

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

Findings and Conclusions

The material issues, findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the November 29, 2005, issue of the **Federal Register** are hereby approved and adopted.

Marketing Agreements and Orders

Annexed hereto and made a part hereof is the document entitled ''Order Amending the Orders Regulating the Handling of Nectarines and Peaches Grown in California.'' This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

It is hereby ordered, That this entire decision be published in the **Federal Register**.

Referenda Order

It is hereby directed that referenda be conducted in accordance with the procedure for the conduct of referenda (7 CFR 900.400 *et seq.*) to determine whether the annexed order amending the orders regulating the handling of nectarines and peaches grown in California is approved or favored by growers, as defined under the terms of the orders, who during a representative period were engaged in the production of nectarines and peaches in the production areas.

The representative period for the conduct of such referenda is hereby determined to be March 1, 2005 through February 28, 2006.

The agents of the Secretary to conduct such referenda are hereby designated to be Laurel May and Kurt Kimmel, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; telephone (559) 487–5901.

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

Order Amending the Orders Regulating the Handling of Nectarines and Peaches Grown in California [1]

Findings and Determinations

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreements and orders; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) Findings and Determinations Upon the Basis of the Hearing Record

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917 (7 CFR parts 916 and 917), regulating the handling of nectarines and peaches grown in California, respectively. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, regulate the handling of nectarines and peaches grown in the production areas in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreements and orders upon which a hearing has been held;

(3) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, are limited in their application to the smallest regional production areas which are practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production areas would not effectively carry out the declared policy of the Act;

(4) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production areas as are necessary to give due recognition to the differences in the production and marketing of nectarines and peaches grown in the production areas; and

(5) All handling of nectarines and peaches grown in the production area as defined in the marketing agreements and orders is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

[1] These orders shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, all handling of nectarines and peaches grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing agreements and order amending the orders contained in the Recommended Decision issued by the Administrator on November 18, 2005, and published in the **Federal Register** on November 29, 2005, will be and are the terms and provisions of this order amending the orders and are set forth in full herein.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

1. The authority citation for 7 CFR part 916 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

2. Revise § 916.5 to read as follows:

§ 916.5 Nectarines.

Nectarines means: (a) All varieties of nectarines grown in the production area; and

(b) Hybrids grown in the production area that exhibit the characteristics of a nectarine and are subject to cultural practices common to nectarines, as recommended by the committee and approved by the Secretary.

3. Revise § 916.9 to read as follows:

§ 916.9 Grower.

Grower is synonymous with producer and means any person who produces nectarines for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing nectarines are eligible to serve in grower positions on the committee.

4. Revise § 916.11 to read as follows:

§ 916.11 Handle.

Handle and ship are synonymous and mean to pack, sell, consign, deliver, or transport nectarines, or to cause nectarines to be packed, sold, consigned, delivered, or transported, between the production area and any point outside thereof, or within the production area: *Provided,* That the term handle shall not include the sale of nectarines on the tree, the transportation within the production area of nectarines from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such nectarines to such packing facility for such preparation.

5. Revise paragraphs (a) and (b) of § 916.12 to read as follows:

§ 916.12 District.

* * * * *

(a) *District 1* shall include the counties of Madera and Fresno.

(b) *District 2* shall include the counties of Kings and Tulare.

* * * * *

6. Revise § 916.15 to read as follows:

§ 916.15 Marketing season.

Marketing season means the period beginning on April 1 and ending on November 30 of any year.

7. Add a new § 916.16 to read as follows:

§ 916.16 Pure Grower or Pure Producer.

(a) Pure grower means any grower: (1) Who produces his or her own product (and is not an employee or officer of a packing business); or

(2) Who produces and handles his or her own product; *Provided,* That a pure grower can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year for that pure grower's packing facility. Pure grower is synonymous with pure producer.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

8. Revise § 916.20 to read as follows:

§ 916.20 Establishment and membership.

There is hereby established a Nectarine Administrative Committee consisting of thirteen members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he/she is an alternate. The members and their alternates shall be growers or authorized employees of growers. Six of the members and their respective alternates shall be growers of nectarines in District 1. Four members and their respective alternates shall be growers of nectarines in District 2; two of the members and their respective alternates shall be growers of nectarines in District 3; and one member and his/her alternate shall be growers of nectarines in District 4; *Provided,* That at least 50% of the nominees from each representation area shall be pure growers. Furthermore, no person shall serve more than three consecutive two-year terms of office or a total of six consecutive years; *Provided further,* That an appointment to fill less than a two year term of office, or serving one term as an alternate, shall not be included in determining the three consecutive terms of office; *Provided further,* That time served prior to the effective date of this section shall not be counted toward consecutive term limits.

9. Revise paragraph (b) of § 916.22 to read as follows:

§ 916.22 Nomination.

* * * * *

(b) *Successor members.* (1) The committee shall appoint a nominating committee, which will hold or cause to be held, not later than January 31 of each odd numbered year, a nomination procedure or a meeting or meetings of growers in each district for the purpose of designating nominees for successor members and alternate members of the committee. Meetings may be supervised by the nominating committee that shall prescribe such procedure as shall be reasonable and fair to all persons concerned. After the nomination procedure or meetings have concluded, the nominating committee by February 15 will verify consent to place the nominee's name on the ballot and will cause a ballot listing all of the nominees for a given district to be mailed to all growers within the district. Members and their alternates will be chosen based on a descending ranking of votes received. Once ballots have been tabulated, the Nectarine Administrative Committee will announce to the growers the nominees that have been selected and recommended to the Secretary.

(2) Nominations may only be by growers, or by duly authorized employees. At meetings, only growers who are present at such nomination meetings may participate in the nomination of nominees for members and their alternates. All known growers will then receive a ballot for the nominees in the district in which they produce and are entitled to vote accordingly. A grower who produces in multiple districts is allowed to vote only in one district, and may exchange his/her ballot for that of the nominees in another district provided the grower is producing in the district for which he/she wants to participate. Employees of such grower shall be eligible for membership as principal or alternate to fill only one position on the committee.

(3) A particular grower, including authorized employees of such grower,

shall be eligible for membership as principal or alternate to fill only one position on the committee.

10. Revise § 916.25 to read as follows:

§ 916.25 Acceptance.

Each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

11. Revise § 916.32 to read as follows:

§ 916.32 Procedure.

(a) Nine members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require the concurring vote of the majority of those present: *Provided,* That actions of the committee with respect to expenses and assessments, or recommendations for regulations pursuant to §§ 916.50 to 916.55, shall require at least nine concurring votes.

(b) The committee may vote by telephone, telegraph, or other means of communication, such as facsimile, and any votes so cast shall be confirmed promptly in writing: *Provided,* That if an assembled meeting is held, all votes shall be cast in person. A videoconference shall be considered an assembled meeting and all votes shall be considered as cast in person.

12. Remove § 916.37.

13. Add three new sentences at the end of paragraph (b) of § 916.41 to read as follows:

§ 916.41 Assessments.

* * * * *

(b) * * * Furthermore, any assessment not paid by a handler within a period of time prescribed by the committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the committee and approved by the Secretary. Subsequent to such approval, all assessments not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

14. The authority citation for part 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

15. Revise § 917.4 to read as follows:

§ 917.4 Fruit.

Fruit means the edible product of the following kinds of trees:

(a) All varieties of peaches grown in the production area;

(b) All hybrids grown in the production area exhibiting the characteristics of a peach and subject to cultural practices common to peaches as recommended by the committee and approved by the Secretary; and

(c) All varieties of pears except Beurre Hardy, Beurre D'Anjou, Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Clairgeau.

16. Revise § 917.5 to read as follows:

§ 917.5 Grower.

Grower is synonymous with producer and means any person who produces fruit for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing peaches are eligible to serve in grower positions on the committee.

17. Revise § 917.6 to read as follows:

§ 917.6 Handle.

Handle and ship are synonymous and mean to sell, consign, deliver or transport fruit or to cause fruit to be sold, consigned, delivered or transported between the production area and any point outside thereof, or within the production area: *Provided,* That for peaches, packing or causing the fruit to be packed also constitutes handling; *Provided further,* That the term handle shall not include the sale of fruit on the tree, the transportation within the production area of fruit from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such fruit to such packing facility for such preparation.

18. Add a new § 917.8 to read as follows:

§ 917.8 Pure grower or pure producer.

(a) For peaches, pure grower means any grower:

(1) Who produces his or her own product (and is not an employee or officer of a packing business); or

(2) Who produces and handles his or her own product; *Provided,* That a pure producer can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year by that pure grower's packing facility. Pure grower is synonymous with pure producer.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

19. Revise paragraphs (n) and (o) of § 917.14 to read as follows:

§ 917.14 District.

* * * * *

(n) *Fresno District* includes and consists of Madera County, Fresno County, and Mono County.

(o) *Tulare District* includes and consists of Tulare County and Kings County.

* * * * *

20. Revise § 917.18 to read as follows:

§ 917.18 Nomination of commodity committee members of the Control Committee.

Nominations for the 13 members of the Control Committee to represent the commodity committees shall be made in the following manner:

(a) A nomination for one member shall be made by each commodity committee selected pursuant to § 917.25. Nominations for the remaining members shall be made by the respective commodity committees as provided in this section. The number of remaining members which each respective commodity shall be entitled to nominate shall be based upon the proportion that the previous three fiscal periods' shipments of the respective fruit is of the total shipments of all fruit to which this part is applicable during such periods. In the event provisions of this part are terminated as to any fruit, the members of the commodity committee of the remaining fruit shall have all of the powers, duties, and functions given to the Control Committee under this part and sections of this part pertaining to the designation of the Control Committee shall be terminated. In the event provisions of this part are suspended as to any fruit, the members of the commodity committee of the remaining fruit shall have all the powers, duties, and functions given to the Control Committee under this part and sections of this part pertaining to the designation of the Control Committee shall be suspended.

(b) A person nominated by any commodity committee for membership on the Control Committee shall be an individual person who is a member or alternate member of the commodity committee that nominates him/her. Each member of each commodity committee shall have only one vote in the selection of nominees for membership on the Control Committee.

21. Revise § 917.22 to read as follows:

§ 917.22 Nomination of Peach Commodity Committee members.

Nominations for membership on the Peach Commodity Committee shall be made by growers of peaches in the

respective representation areas, as follows:

(a) *District 1* composed of the Fresno District: seven nominees.

(b) *District 2* composed of the Tulare District: three nominees.

(c) *District 3* composed of the Tehachapi District and Kern District: one nominee.

(d) *District 5* composed of the South Coast District and Southern California District: one nominee.

(e) *District 4* composed of the Stanislaus District, Stockton District and all of the production area not included in paragraphs (a) through (d) of this section: one nominee.

22. Revise § 917.24 to read as follows:

§ 917.24 Procedure for nominating members of various commodity committees.

(a) The Control Committee shall hold or cause to be held not later than January 31 for peaches and not later than February 15 for pears of each odd numbered year a nomination procedure or a meeting or meetings of the growers of the fruits in each representation area set forth in §§ 917.21 and 917.22 for purposes of designating nominees for successor members and alternate members of the commodity committees. These meetings shall be supervised by the Control Committee, which shall prescribe such procedure as shall be reasonable and fair to all persons concerned.

(b) With respect to each commodity committee only growers of the particular fruit who are present at such nomination meetings or represented at such meetings by duly authorized employees may participate in the nomination and election of nominees for commodity committee members and alternates. For peaches, those who may receive nomination forms if the nominations are conducted via a mail process may also participate in the nomination and election of nominees for Peach Commodity Committee members and alternates. All peach growers, or authorized employees, will receive a ballot for the nominees in the district in which they produce and are entitled to vote accordingly. A peach grower who produces in multiple districts is allowed to vote only in one district, and may exchange his/her ballot for that of nominees in another district provided the grower is producing in the district for which he/she wants to participate. For both commodity committees, each such grower, including employees of such grower, shall be entitled to cast but one vote for each position to be filled for the representation area in which he/she produces such fruit.

(c) A particular grower, including employees of such growers, shall be eligible for membership as principle or alternate to fill only one position on a commodity committee. A grower nominated for membership on the Pear Commodity Committee must have produced at least 51 percent of the pears shipped by him/her during the previous fiscal period, or he/she must represent an organization that produced at least 51 percent of the pears shipped by it during such period. The members and alternates of the Peach Commodity Committee shall be growers, or shall be authorized employees of such growers and at least 50% of the nominees from each representation area shall be pure growers.

(d) For peaches, no person shall serve more than three (3) consecutive two-year terms of office or a total of six (6) consecutive years; *Provided,* That an appointment to fill less than a two year term of office, or serving one (1) term as an alternate, shall not be included in determining the (3) consecutive terms of office; *Provided further,* That time served prior to the effective date of this section shall not be counted toward consecutive term limits. The members shall serve until their respective successors are selected and have qualified.

23. Revise § 917.25 to read as follows:

§ 917.25 Acceptance.

(a) The Secretary shall select the members of each commodity committee, except for the Peach Commodity Committee, from nominations made by growers, as provided in §§ 917.21 through 917.24, or from among other eligible persons. Any person selected as a member of the Pear Commodity Committee shall qualify by filing with the Secretary a written acceptance of the appointment.

(b) For the Peach Commodity Committee, each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

24. Revise paragraph (d) of § 917.29 to read as follows:

§ 917.29 Organization of committees.

* * * * *

(d) The Control Committee or any commodity committee may, upon due notice to all of the members of the respective committee, vote by letter, telegraph or telephone: *Provided,* That any member voting by telephone shall promptly thereafter confirm in writing his/her vote so cast. The Peach Commodity Committee may, upon due notice to all of the members of the respective committee, vote by letter, telegraph, telephone, facsimile, video teleconference, or any other means of communication recommended by the committee and approved by the Secretary; *Provided,* That any member voting by telephone shall promptly thereafter confirm in writing his/her vote so cast.

25. Add a sentence at the end of paragraph (d) of § 917.35 to read as follows:

§ 917.35 Powers and duties of each commodity committee.

* * * * *

(d) * * * To establish subcommittees to aid the Peach Commodity Committee in the performance of its duties under this part as may be deemed advisable.

* * * * *

26. Revise § 917.37 to read as follows:

§ 917.37 Assessments.

(a) As his/her pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the Control Committee, upon demand, assessments on all fruit handled by him/her. The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the respective rate of assessment, which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses, which may be incurred during such period. At any time during or after the fiscal period, the Secretary may increase the rates of assessment in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period. Furthermore, any assessment not paid by a peach handler within a period of time prescribed by the Control Committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the committee and approved by the Secretary. Subsequent to such approval, all assessments for peaches not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower. The Control Committee may also borrow money for such purposes for peaches.

[FR Doc. 06–1583 Filed 2–21–06; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 945

[Docket No. FV06–945–1 PR]

Irish Potatoes Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon; Proposed Modification of Handling Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule invites comments on removing the exception for yellow fleshed Finnish-type potatoes from the minimum quantity exemption paragraph of the handling regulations issued under the Idaho-Eastern Oregon potato marketing order. The marketing order regulates the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, and is administered locally by the Idaho-Eastern Oregon Potato Committee (Committee). A minimum quantity shipment exemption of up to 200 hundredweight is provided for yellow fleshed Finnish-type potatoes. Because yellow fleshed Finnish-type potatoes are no longer produced in the production area covered under the marketing order, the exemption is no longer necessary.

DATES: Comments must be received by April 24, 2006.

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

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Marketing Specialist, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, Suite 385, Portland, OR 97204; Telephone: (503) 326–2724, Fax: (503) 326–7440; or George J. Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938.

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

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Agreement No. 98 and Marketing Order No. 945, both as amended (7 CFR part 945), regulating the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

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

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

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

This proposed rule invites comments on removing the exception for yellow fleshed Finnish-type potatoes from the minimum quantity exemption paragraph of the handling regulations issued under the order. The minimum quantity exemption in the regulation allows handlers to ship up to five hundredweight of potatoes without regard to the inspection and assessment requirements of the order. Included in the minimum quantity exemption is an exception for yellow fleshed Finnish-type potatoes which allows up to 200 hundredweight to be shipped without regard to inspection or assessment requirements. The Committee unanimously recommended the removal of the exception at its meeting on November 2, 2005.

Section 945.42 of the order provides the authority to assess first handlers of potatoes to provide funds to cover the expenses of the Committee. Sections 945.51 and 945.52 provide the authority for the establishment and modification of regulations applicable to the handling of potatoes, including required inspections. Section 945.54 provides the authority to establish exemptions from the regulations based on shipment size.

Section 945.341 establishes minimum quality, maturity, pack, and inspection requirements for potatoes handled subject to the order. Paragraphs (e), (f), and (g) of § 945.341 delineate the circumstances in which the shipment of potatoes subject to the order may be granted an exemption from the regulation. Paragraph (g) of that section specifies that shipments of potatoes, except yellow fleshed Finnish-type, weighing five hundredweight or less may be shipped without regard to the inspection or assessment requirements of the order. An exception included in that paragraph increases the minimum quantity exemption threshold to 200 hundredweight for yellow fleshed Finnish-type potatoes.

At its meeting on November 2, 2005, the Committee unanimously recommended the removal of the special

exception for yellow fleshed Finnish-type from the handling regulations. In its deliberations, the Committee commented that yellow fleshed Finnish-type potatoes are no longer produced within the production area and that the exception is no longer needed.

The exception to the minimum quantity exemption for yellow fleshed Finnish-type potatoes was added to the regulation in 1987, specifically to promote the production and marketing of this new type potato by relieving shipments of less than 200 hundredweight from inspection and assessment requirements. Nonetheless, the production of yellow fleshed Finnish-type potatoes declined over time and is currently nonexistent. The Committee noted, however, that the production of other colorful varieties (some with yellow flesh but not Finnish-type) has increased and that the exception, if retained, may cause confusion to industry participants. Since the niche market for which the exception was intended no longer exists, and there is the potential for misunderstanding within the industry, the Committee believes the exception should be removed from the regulation.

Initial Regulatory Flexibility Analysis

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

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

There are approximately 48 handlers of Idaho-Eastern Oregon potatoes who are subject to regulation under the order and about 1,000 potato producers in the regulated area. Small agricultural service firms, which include potato handlers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $6,000,000, and small agricultural producers are defined as those whose annual receipts are less than $750,000.

Based on a three-year average fresh potato production of 33,623,000 hundredweight as calculated from Committee records, a three-year average of producer prices of $4.64 per hundredweight reported by the National Agricultural Statistics Service, and 1,000 Idaho-Eastern Oregon potato producers, the average annual producer revenue is approximately $156,000. It can be concluded, therefore, that a majority of these producers would be classified as small entities.

In addition, based on Committee records and 2004–05 f.o.b. shipping point prices ranging from about $4.00 to $28.00 per hundredweight reported by USDA's Market News Service, most of the Idaho-Eastern Oregon potato handlers do not ship over $6,000,000 worth of potatoes. In view of the foregoing, it can be concluded that a majority of the handlers would be classified as small entities as defined by the SBA.

This rule would remove the exception for yellow fleshed Finnish-type potatoes from the minimum quantity exemption in the order. The exception was added to the regulation in 1987 to allow less restrictive requirements for yellow fleshed Finnish-type potatoes. The intent was to facilitate the production and marketing of this new experimental type potato. In the years that have followed, though, the production and marketing of that type potato has shifted to other potato producing regions. Consequently, yellow fleshed Finnish-type potatoes are currently not produced within the production area covered by the order and the exception to the minimum quantity exemption in handling regulations is no longer warranted. Authority for the establishment and modification of a minimum quantity exemption is provided in § 945.54 of the order.

At the November 2, 2005, meeting, the Committee discussed the impact of this change on producers and handlers. Since there currently is not any production of the type of potato covered by the exception, producers and handlers should not be adversely impacted. In addition, there should be no increased costs associated with this modification of the handling regulations.

As an alternative to the proposal, the Committee discussed leaving the handling regulation as currently issued. The Committee rejected this idea because it would have left outdated language in the rules and regulations. They also felt that the exception, if unchanged, could be misinterpreted by the industry. No other alternatives were discussed.

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

Further, the Committee's meeting was widely publicized throughout the potato industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the November 2, 2005, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 945

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth above, 7 CFR part 945 is proposed to be amended as follows:

PART 945—IRISH POTATOES GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON

1. The authority citation for 7 CFR part 945 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. In § 945.341, paragraph (g) is revised to read as follows:

§ 945.341 Handling regulation.

* * * * *

(g) *Minimum quantity exemption.* Each handler may ship up to, but not to exceed, five hundredweight of potatoes any day without regard to the inspection and assessment requirements of this part, but this exception shall not apply to any shipment that exceeds five hundredweight of potatoes.

* * * * *

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6–2436 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1030

[Docket No. AO–361–A39; DA–04–03B]

Milk in the Upper Midwest Marketing Area; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; Recommended Decision.

SUMMARY: This decision recommends adoption of proposals that would amend certain features of the Upper Midwest (UMW) Federal milk marketing order. Specifically, this decision recommends adoption of proposals that would deter the de-pooling of milk and increase the order's maximum administrative assessment rate.

DATES: Comments must be submitted on or before April 24, 2006.

ADDRESSES: Comments (six copies) should be filed with the Hearing Clerk, United States Department of Agriculture, STOP 9200—Room 1031, 1400 Independence Avenue, SW., Washington, DC 20250–9200. Comments may also be submitted at the Federal e-Rulemaking portal: *http://www.regulations.gov* or by e-mail: *amsdairycomments@usda.gov.* Reference should be made to the title of action and docket number.

FOR FURTHER INFORMATION CONTACT: Gino Tosi, Associate Deputy Administrator, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231—Room 2968, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–1366, e-mail *gino.tosi@usda.gov.*

SUPPLEMENTARY INFORMATION: This decision recommends adoption of amendments that would: (1) Establish a limit on the volume of milk a handler may pool during the months of April through February to 125 percent of the volume of milk pooled in the prior month; (2) Establish a limit on the volume of milk a handler may pool during the month of March to 135 percent of the volume of milk pooled in the prior month; and (3) Allow the market administrator to increase the maximum administrative assessment rate up to 8 cents per hundredweight on all pooled milk if necessary to maintain the required fund reserves.

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During August 2004, the month during which the hearing occurred, there were 15,802 dairy producers pooled on and 60 handlers regulated by the UMW order. Approximately 15,608 producers, or 97 percent, were considered small businesses based on the above criteria. Of the 60 handlers regulated by the UMW during August 2004, 49 handlers, or 82 percent, were considered small businesses.

The recommended amendments for adoption of the pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with and consistently serve the fluid needs of the UMW marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the Class I fluid needs of the market and, by doing so, determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk.

Criteria for pooling are established without regard to the size of any dairy industry organization or entity. Administrative assessments are similarly charged without regard to the size of any dairy industry organization or entity. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This recommended decision does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the approved forms are routinely used in

most business transactions. The forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This rulemaking proceeding does not duplicate, overlap, or conflict with any existing Federal rules.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

Prior Documents in This Proceeding

Notice of Hearing: Issued June 15, 2004; published June 23, 2004 (69 FR 34963).

Notice of Hearing Delay: Issued July 14, 2004; published July 21, 2004 (69 FR 43538).

Tentative Partial Decision: Issued April 8, 2005; published April 14, 2005 (70 FR 19709).

Interim Final Rule: Issued May 26, 2005; published June 1, 2005 (70 FR 31321).

Final Partial Decision: Issued September 29, 2005; published October 5, 2005 (70 FR 58086).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the UMW marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, STOP 9200—Room 1031, 1400 Independence Avenue, SW., Washington DC 20250–9200, by April 24, 2006. Six copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. Some evidence was received that specifically addressed these issues and some of the evidence encompassed entities of various sizes.

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the UMW marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The proposed amendments set forth below are based on the record of a public hearing held at Bloomington, Minnesota, on August 16–19, 2004, pursuant to a notice of hearing issued June 16, 2004, published June 23, 2004, and a notice of hearing delay issued July 14, 2004, and published July 21, 2004.

The material issues on the record of hearing relate to:

1. Pooling Standards
   A. Establishing Pooling Limits
   B. Producer definition.
2. Administrative assessment rate.

Findings and Conclusions

This recommended decision specifically addresses proposals published in the hearing notice as Proposals 3, 4, 5 and features of Proposal 2 that seek to establish a limit on the volume of milk that can be pooled on the order, features of Proposal 6 intending to clarify the *Producer* definition by providing a definition of ''temporary loss of Grade A approval,'' and Proposal 7 which seeks to increase the order's maximum administrative assessment rate. As published in the hearing notice, Proposals 1, 6, and a portion of Proposal 2 concerning diversion limit standards and transportation credits were addressed in a tentative partial decision published on April 14, 2005 (70 FR 19709). For the purpose of this recommended decision, references to Proposal 2 will only pertain to the first portion regarding de-pooling and references to Proposal 6 will only pertain to establishing a definition of ''temporary loss of Grade A approval.''

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Pooling Standards

A. Establishing Pooling Limits

Preliminary Statement

Federal milk marketing orders rely on the tools of classified pricing and marketwide pooling to assure an adequate supply of milk for fluid (Class I) use and to provide for the equitable sharing of the revenues arising from the classified pricing of milk. Classified pricing assigns a value to milk according to how the milk is used. Regulated handlers who buy milk from dairy farmers are charged class prices according to how they use the farmer's milk. Dairy farmers are then paid a weighted average or ''blend'' price. The blend price that dairy farmers are paid for their milk is derived through the marketwide pooling of all class uses of milk in a marketing area. Thus each producer receives an equal share of each use class of milk and is indifferent as to the actual Class for which the milk was used. The Class I price is usually the highest class price for milk. Historically the Class I use of milk provides the additional revenue to a marketing area's total classified use value of milk.

The series of Class prices that are applicable for any given month are not announced simultaneously. The Class I price and the Class II skim milk price are announced prior to the beginning of the month for which they will be effective. Class prices for milk in all other uses are not determined until on or before the 5th day of the following month. The Class I price is determined by adding a differential value to the higher of either an advanced Class III or Class IV value. These values are calculated based on a formula using National Agricultural Statistics Service (NASS) survey prices of cheese, butter, and nonfat dried milk powder for the first two weeks of the preceding month. For example, the Class I price for August is announced in late July and is based on the higher of the Class III or IV value computed using NASS commodity price surveys for the first two weeks of July.

The Class III and IV prices for the month are determined and announced after the end of the month based on the NASS survey prices for the selected dairy commodities during the month. For example, the Class III and IV prices for August are based on NASS survey commodity prices during August. A large increase in the NASS survey price for the selected dairy commodities from one month to the next can result in the Class III or IV price exceeding the Class I price. This occurrence is commonly referred to by the dairy industry as a

''Class price inversion.'' A producer price inversion generally refers to when the Class III or IV price exceeds the classified use value, or blend price, of milk for the month. Price inversions have occurred with increasing frequency in Federal milk orders since the current pricing plan was implemented on January 1, 2000, despite efforts made during Federal Order Reform to reduce such occurrences. Price inversions can create an incentive for dairy farmers and manufacturing handlers who voluntarily participate in the marketwide pooling of milk to elect not pool their milk on the order. Class I handlers do not have this option; their participation in the marketwide pool is mandatory.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Classes. In essence, the PPD is the dairy farmer's share of the additional/reduced revenues associated with the Class I, II and IV milk pooled in the market. If the value of the Class I, II and IV milk in the pool is greater than the Class III value, dairy farmers receive a positive PPD. However a negative PPD can occur if the value of the Class III milk in the pool exceeds the value of the remaining classes of milk in the pool. This can occur as a result of the price inversions discussed above.

The UMW Federal order operates a marketwide pool. The Order contains pooling provisions which specify criteria that, if met, allow dairy farmers to share in the benefits that arise from classified pricing through pooling. The equalization of all class prices among handlers regulated by an order is accomplished through a mechanism known as the producer settlement fund (PSF). Typically, Class I handlers pay the difference between the blend price and their use-value of milk into the PSF. Manufacturing handlers typically receive a draw from the PSF, usually the difference between the Class II, III or IV price and the blend price. In this way, all handlers pay the Class value for milk and all dairy farmer supplies receive at least the order's blend price.

When manufacturing class prices of milk are high enough to result in a use-value of milk for a handler that is higher than the blend price, manufacturing handlers may choose to not pool their milk receipts. Opting to not pool their milk receipts allows these handlers to avoid the obligation of paying into the PSF. The choice by a manufacturing handler to not pool their milk receipts is commonly referred to as ''de-pooling''. When the blend price rises above the manufacturing class use-values of milk these same handlers again opt to pool their milk receipts. This is often referred to as ''re-pooling''. The ability of manufacturing handlers to de-pool and re-pool manufacturing milk is viewed by some market participants as being inequitable to both producers and handlers.

The ''De-Pooling'' Proposals

Proponents are in agreement that milk marketing orders should contain provisions that will tend to deter the practice of de-pooling. Four proposals intending to deter the de-pooling of milk were considered in this proceeding. The proposals offered different degrees of deterrence against de-pooling by establishing limits on the amount of milk that can be re-pooled. The proponents of these four proposals are generally of the opinion that de-pooling erodes equity among producers and handlers, undermines the orderly marketing of milk and is detrimental to the Federal order system.

Two different approaches on how to best limit de-pooling are represented by these four proposals. The first approach, published in the hearing notice as Proposals 2 and 5, addresses de-pooling by limiting the volume of milk a handler can pool in a month to a specified percentage of what the handler pooled in the prior month. The second approach, published in the hearing notice as Proposals 3 and 4, addresses de-pooling by establishing what is commonly referred to as a ''dairy farmer for other markets'' provision. These proposals would require milk of a producer that was de-pooled to not be able to be re-pooled by that producer for a defined time period. All proponents agreed that while none of the proposals would completely eliminate de-pooling, they would likely deter the practice.

Of the four proposals received that would limit de-pooling, this decision recommends adoption of Proposal 2, offered by Mid-West Dairymen's Company (Mid-West) on behalf of Cass-Clay Creamery Inc. (Cass-Clay), Dairy Farmers of America, Inc. (DFA), Foremost Farms USA Cooperative (Foremost Farms), Land O'Lakes Inc. (LOL), Milwaukee Cooperative Milk Producers (MCMP), Manitowoc Milk Producers Cooperative (MMPC), Swiss Valley Farms Company (Swiss Valley), and Woodstock Progressive Milk Producers Association (Woodstock). Hereinafter, this decision will refer to these proponents as ''Mid-West, et al.'' Although Foremost Farms was a proponent of Proposal 2, no testimony was offered on their behalf. At the hearing, Plainview Milk Products Cooperative and Westby Cooperative Creamery also supported the testimony given on behalf of Mid-West, et al. The proponents of Proposal 2 are all cooperatives representing producers whose milk supplies the milk needs of the marketing area and is pooled on the UMW order.

Specifically, adoption of Proposal 2 will limit the volume of milk a handler could pool in a month to no more than 125 percent of the volume of milk pooled in the prior month during the months of April through February, and to no more than 135 percent of the prior month's pooled volume in the month of March. Milk diverted to nonpool plants in excess of this limit will not be pooled, and milk shipped to pool distributing plants will not be subject to the 125 or 135 percent limitation

As published in the hearing notice, Proposal 5, offered by Dean Foods Company (Dean), addresses de-pooling in a similar manner as Proposal 2, but would establish a limit on the total volume of milk a handler could pool in a given month to 115 percent of the volume that was pooled in the prior month. Dean is a handler who operates manufacturing plants and distributing plants in the UMW marketing area. Producer milk shipped to and physically received at a pool distributing plant, and producer milk that was pooled continuously on another Federal Order during the previous six months, would not be subject to this pooling standard. Proposal 5 is not recommended for adoption.

As published in the hearing notice, Proposals 3 and 4, also offered by Dean, address de-pooling by establishing defined time periods during which de-pooled milk could not be pooled. Proposal 3 would require an annual pooling commitment by a handler to the UMW market. As advanced in Proposal 3, if the milk of a producer is de-pooled in a month, the milk of a producer could not re-establish eligibility for pooling on the order during the following 11 months unless 10 days' milk production of a producer was delivered to a pool distributing plant during the month. Under Proposal 3, handlers that de-pool milk have limited options to return milk to the pool, either shipping 10 days' milk production of a producer to a pool distributing plant during the month or waiting 11 months to regain pooling eligibility

Proposal 4 is similar to Proposal 3 but is less restrictive. Under Proposal 4, as modified at the hearing, if a producer's milk is de-pooled in any of the months of February through June, or during any of the preceding three months, or during any of the preceding months of July through January, the equivalent of at

least 10 days' milk production would need to be physically received at a pool distributing plant in order to pool all of the dairy farmer's production for the month. Additionally, if the milk of a dairy farmer is de-pooled in any of the months of July through January, or in a preceding month, at least 10 days' milk production of the dairy farmer would need to be delivered to a pool distributing plant to have all the milk of the dairy farmer pooled for the month.

The current *Producer milk* provision of the UMW order considers the milk of a dairy farmer to be producer milk when it is delivered directly from farms to pool plant or diverted by a pool plant or cooperative handler to a nonpool plant. Milk is not eligible for diversion to nonpool plants unless at least one days' production of such dairy farmer is received at a pool plant anytime during the initial qualifying month, often referred to as ''touching-base''. To be eligible to pool all of its milk receipts, the pooling handler must ship at least 10 percent of its milk receipts to a pool distributing plant, producer-handler, a partially regulated distributing plant, or a pool distributing plant regulated by another Federal order. A handler's diversion of milk to nonpool plants can only be made to nonpool plants located in the States of Illinois, Iowa, Minnesota, Wisconsin, North Dakota, South Dakota, and the Upper Peninsula of Michigan, or to a distributing plant regulated under another Federal order. Milk that is subject to inclusion in another marketwide equalization program operated by a state government is not considered producer milk. The order currently does not limit a handler's ability to de-pool milk.

The proponents of Proposals 2, 3, 4 and 5 are all of the opinion that the current pooling standards are inadequate because they enable manufacturing handlers to de-pool milk when advantageous to do so and immediately re-pool milk in a following month if advantageous to do so. According to the proponents, the UMW blend price is lowered when large volumes of sometimes higher valued milk used for manufacturing is de-pooled and when the large volumes of de-pooled milk returns to the pool. Furthermore, the witnesses argued that de-pooling handlers do not account to the UMW pool at the order's classified prices and therefore face different costs than their similarly situated pooling competitors. The proponents insisted that the pooling standards of the order need to be amended to ensure producer and handler equity, even though the proposals differed on how best to meet this end.

A witness appearing on behalf of Mid-West, et al., testified in support of Proposal 2. The witness was of the opinion that the underlying principles of the Federal order program are to supply milk to the fluid market, equitably share pool proceeds among all participating producers, and promote orderly marketing. The witness explained that the Federal order program achieves these objectives through classified pricing, through which Class I milk generates revenue for the pool; and marketwide pooling, which equalizes payments to all participating producers who serve the market regardless of how the milk of any single producer is utilized.

The Mid-West, et al., witness said that currently milk utilized at manufacturing plants can be de-pooled and again pooled in a subsequent month when it is economically beneficial to the handler. When choosing to pool or not to pool, the witness explained, handlers assess whether participating in the marketwide pool would require them to make a payment into or receive a payment from the PSF. According to the witness, milk utilized as Class I must always be pooled regardless of whether the pooling handler would make a payment into, or receives a payment from, the PSF.

The Mid-West, et al., witness testified that because manufacturing milk can freely exit and return to the pool, producers who regularly and consistently service the UMW fluid market are not being treated equitably under the terms of the order. According to the witness, these producers receive a lower blend price because the value of the milk that was de-pooled was not shared equitably among all the market's producers.

The Mid-West, et al., witness maintained that the ability of manufacturing handlers to de-pool milk creates inequities among handlers and producers. The witness said that when the PPD is negative, dairy farmers receive different payments for their milk depending on if their milk was pooled, and handlers are not required to account to the pool at classified prices depending on their pooling decisions. Class I handlers who must pool their milk receipts always have a disadvantage when the PPD is negative, explained the witness, because a manufacturing handler can opt to de-pool and avoid paying into the PSF. According to the witness this results in higher prices that can be paid to the producers supplying the manufacturing handler. The witness contrasted that when the PPD is positive, milk that had been de-pooled seeks to return to the pool. According to the witness, this also dilutes the blend price paid to producers who had been supplying the Class I handler.

The Mid-West, et al., witness, relying on Market Administrator statistics, noted that in May 2004, all producer milk pooled on the order was subject to a negative $1.97 per hundredweight (cwt) PPD. However, the witness emphasized that a manufacturing handler who chose to de-pool their milk supply and did not have to account to the pool at classified prices had an imputed PPD of zero. In other words, the witness explained, milk used in manufactured products was worth more than milk used in fluid products. Relying on additional Market Administrator statistics, the witness demonstrated that if 100 percent of eligible Class III milk had pooled in July 2003 through May 2004, the estimated PPD would have averaged a negative $0.098 per cwt rather than the actual average PPD of negative $0.773 per cwt.

The Midwest, et al., witness explained how adoption of Proposal 2 would improve both producer and handler equity. The witness said that Proposal 2 would only limit the amount of milk a handler could pool up to 125 or 135 percent of the previous month's pooled volume and clarified that any milk delivered to a distributing plant would not be subject to the 125 or 135 percent pooling calculation. If Proposal 2 were adopted, the witness claimed, no current handler would have to change the physical operations of their plant. While adoption of this proposal would not end the practice of de-pooling, speculated the witness, it would establish financial consequences for handlers who might not otherwise consistently pool their milk receipts.

In explaining why adoption of Proposal 2 would be reasonable and appropriate for the UMW order, the Mid-West, et al., witness said that a 125 percent standard should accommodate any change in the potential growth of a handler's pooled milk volume resulting from seasonal fluctuations in milk supply or the addition of new producers, assuming that the handler did not de-pool. Additionally, the witness added that to ensure no handler would need to change its physical operations, Proposal 2 allows a 135 percent re-pooling standard in March because of the fewer calendar days in February. The witness stressed that the 125 and 135 percent standards allow a handler to de-pool a portion of its milk supply and over a period of months, regain the ability to again pool its entire supply. The witness added that the proposal does not restrict the volume of

milk able to be pooled in August since this is generally considered the start of the new marketing year

The Mid-West, et al., witness also emphasized that establishing a standard on the basis of the prior month's pooled volume has been done in other orders. The Northeast order has a ''producer for other markets'' provision that restricts the ability to pool the milk of a producer if the milk of that producer had been previously de-pooled, noted the witness. Furthermore, the witness said, milk orders in the south and southeastern part of the country had provisions which limited the sharing of marketwide returns in the spring months to only those producers whose milk served the fluid market during the fall months.

The Mid-West, et al., witness predicted that price volatility would continue in the future and result in negative PPD's and the further de-pooling of milk. The witness was of the opinion that price volatility and de-pooling have created emergency marketing conditions that would warrant the Department to omit issuing a recommended decision.

A witness from DFA, appearing on behalf of Mid-West, et al., testified in support of Proposal 2. The witness testified that DFA engages in the practice of de-pooling when warranted to earn sufficient revenue to pay their producer members a competitive milk price. The DFA witness emphasized that de-pooling creates disorderly marketing conditions and supported Proposal 2 as the best option to deter the practice of de-pooling. The witness offered scenarios that demonstrated the financial incentives available to handlers who de-pool milk. The witness asserted that the current pooling standards of the UMW order where producers qualify for pooling by meeting a one-day touch base standard allow handlers the opportunity to reap financial rewards from the market by de-pooling and re-pooling their milk receipts.

The DFA witness explained that Proposal 2 was a compromise position among all the entities of Mid-West, et al., noting that its adoption would improve the current disorderly market conditions arising from the practice of de-pooling. The witness noted that many alternatives were considered but the proponents were of the opinion that Proposal 2 is a significant improvement to the order's pooling provisions while still allowing handlers to make their own pooling decisions.

Witnesses from LOL, Swiss Valley, Cass-Clay, MMPC, and DFA Central Council, all appearing on behalf of Mid-West, et al., testified in support of Proposal 2. Many of the witnesses testified that their respective organizations engage in the practice of de-pooling when it is to their advantage but that they recognize that the practice has a negative impact on the PPD and creates disorderly marketing conditions. Consequently, they are of the opinion that while a moderate level of de-pooling should be tolerated, a set of standards should be established to deter de-pooling in order to maintain orderly marketing conditions.

The Mid-West, et al., witnesses identified above expressed support for Proposal 2 as an acceptable and moderate approach to limiting the practice of de-pooling. The proposal would allow flexibility in making pooling decisions, explained the witnesses, but would also establish significant consequences for those who opt to de-pool large volumes of their producer milk supply. In this regard, the witnesses said that Proposal 2 would result in ensuring more equity among handlers and producers during times of price inversions.

A DFA dairy farmer member, whose milk is pooled on the UMW order, testified in support of Proposal 2. The witness was of the opinion that if a dairy farmer wants to participate in the UMW marketwide pool and share in the revenue generated from the market, they should be prepared to service the market every month. When handlers engage in the practice of de-pooling their milk receipts, the witness said, the results are severe price fluctuations and larger negative PPDs that negatively impact the price paid to pooled producers. The witness was of the opinion that the adoption of Proposal 2 would result in more stable pooled milk volumes and consequently would lessen the severe and volatile price changes that producers have experienced.

A dairy farmer appearing on behalf of MCMP, whose milk is pooled on the UMW order, testified in support of Proposal 2. The witness said that their farm income was negatively impacted during May 2004 as a result of the negative $1.97 per cwt PPD. The witness added that neighboring farms that shipped milk to other handlers reported receiving a higher price for their milk. The opinion of the witness was that the practice of de-pooling has led to non-uniform prices received by farmers and that adoption of Proposal 2 would restore price equity among producers.

A witness appearing on behalf of Dean testified in opposition to Proposal 2. The witness said that the pooling standards of Proposal 2 are too liberal and that unlimited pooling in the month of August could allow handlers to again take advantage of the pooling system.

A witness appearing on behalf of Northwest Dairy Association (NDA) testified in opposition to Proposal 2. NDA is a dairy cooperative that markets 7 billion pounds of milk annually with members in the States of Washington, Oregon, Idaho, and Northern California. The witness explained that NDA engages in the practice of de-pooling in other Federal orders as a way to recover costs in their manufacturing of butter and cheese because the Class III and IV make allowances that do not adequately reflect such costs. The NDA witness was of the opinion that the practice of de-pooling should be addressed at a national hearing that would also consider other issues such as the make allowances used in the Class III and IV price formulas.

A witness appearing on behalf of Dean testified in support of Proposals 3, 4, and 5. The witness asserted that the intent of the Federal order system is to ensure a sufficient supply of milk for fluid use and provide for uniform payments to producers who stand ready, willing, and able to serve the fluid market. While some entities are of the opinion that the Federal order system should ensure a sufficient milk supply to all plants, the Dean witness was of the opinion that the Federal order system addresses only the need for ensuring a milk supply to distributing plants. The witness elaborated on this opinion by citing examples of order provisions that stress providing for a regular supply of milk to distributing plants as a priority of the Federal milk order program.

The Dean witness was of the opinion that for the Federal milk order system to ensure orderly marketing, orders need to provide adequate economic incentives that will attract milk to fluid plants and also need to properly define regulations to determine the milk of those producers who can participate in the marketwide pool. The witness argued that a major flaw in the current regulations is that they allow handlers to choose when to participate in the pool. In this regard, the witness said, the order lacks the economic incentive for pool participation by its lack of an economic disincentive to the practice of de-pooling.

The Dean witness testified that Proposals 3, 4, and 5 are designed to establish proper economic incentives for supplying the fluid market and maintain equity among handlers and producers. While each proposal offered a slightly different solution to the problem, the witness said Dean Foods supports their adoption in the following order or

preference: Proposal 3, Proposal 4, and then Proposal 5.

A second witness appearing on behalf of Dean testified in support of Proposals 3, 4, and 5. The witness argued that when handlers engage in the practice of de-pooling it creates a burden on the producers who consistently serve the Class I needs of the market. According to the witness, when the PPD is negative, there is an incentive for handlers to de-pool Class III and Class IV milk. When a handler opts to de-pool, it decreases the amount of pooled milk and makes the PPD more negative than it would have been had all milk been pooled, the witness said. When the PPD is positive, milk previously de-pooled seeks to be re-pooled which increases the volume of pooled milk valued at lower classified prices and lowers the blend price paid to all producers, the witness asserted. The major ''losers'' in this process, concluded the witness, are the producers whose milk is continuously pooled regardless of the PPD.

The second Dean witness said that Proposal 3 was designed to increase the availability of milk for fluid use and ensure that pool proceeds are only shared among producers who consistently service the fluid market. The witness said that if Proposal 3 is adopted, de-pooled milk could again become pooled as long as the producer delivered ten-day's milk production to a pool distributing plant for twelve consecutive months. Once that standard was met, the witness added, the producer's milk could then be pooled under the more flexible provisions of the UMW order.

The Dean witness asserted that there are three benefits to adoption of Proposal 3: (1) When the PPD is negative, more Class III milk would stay in the pool resulting in a less negative PPD; (2) Some Class III de-pooled milk would never be re-pooled which would result in a more positive PPD; and (3) Class III de-pooled milk would have to demonstrate regular and significant deliveries to distributing plants in order to be re-pooled.

In explaining Proposal 4 as an alternative to Proposal 3, the second Dean witness indicated that the difference in the two proposals is the number of months that the ten-day touch base provision would be applicable before de-pooled milk could again be pooled under normal circumstances. The witness was of the opinion that Proposal 4 would discourage some de-pooling, however, the harm caused by the practice of de-pooling would be better prevented by the adoption of Proposal 3.

The Dean witness also discussed Proposal 5 as a less desirable alternative to Proposals 3 and 4. According to the witness, Proposal 5 would limit the amount of milk that can be pooled to 115 percent of the handler's previous month's pooled milk volume. The witness explained that the greater the volume of de-pooled milk, the more time needed under Proposal 5 for a handler to re-pool all its milk receipts. This, the witness said, ensures that the entities that benefit the most from the practice of de-pooling would not receive an immediate benefit that would otherwise occur when re-pooling.

A third witness appearing on behalf of Dean testified in support of Proposal 3. The witness said that the current liberal pooling standards of the UMW order are one source of disorderly marketing and are preventing all producers from sharing equally in pool proceeds. The witness asserted that the Federal milk order system was designed so that through marketwide pooling all producers would share equally in pool proceeds, and that through classified pricing milk would move to the market's highest-valued use.

Relying on Market Administrator statistics for January 2000 through June 2004, the witness asserted that the volume of pooled Class III milk varied from 1.5 billion pounds in January 2004 to 11 million pounds in April 2004. Furthermore, the witness said, the blend price in April 2004 would have been $2.97 higher if all Class III milk had been pooled. The witness was of the opinion that these large swings in the volume of pooled milk results in the disorderly marketing condition of inequitable sharing of pool proceeds among producers.

A witness appearing on behalf of Oberweis Dairy testified in support of Proposals 2 and 3. Oberweis Dairy operates a distributing plant with approximately 40 dairy farmer suppliers and 32 ice cream stores in the Chicago and St. Louis area markets. The witness was of the opinion that it is inequitable to producers and Class I handlers when manufacturing handlers engage in the practice of de-pooling. The witness was of the opinion that either all handlers should be able to engage in the practice of de-pooling or de-pooling should be prohibited. While no proposal at the hearing proposed such a restriction, the witness was of the opinion that Proposal 3 would be the best option to restore equity among producers. Nevertheless, the witness said that Oberweis would support the adoption of Proposal 2 if the Department finds it to be more appropriate.

A witness appearing on behalf of the Wisconsin Farmers Union, Minnesota Farmers Union, and the North Dakota Farmers Union testified about the negative effects of de-pooling on dairy producers. These organizations represent farmers of various agricultural products in their respective States. The witness asserted that when a cooperative engages in the practice of de-pooling, dairy farmers are negatively impacted because the revenue a cooperative gains from de-pooling is not paid to producers by the cooperatives. The witness insisted that the practice of de-pooling should be curbed so that producers are adequately paid for the total value of their milk.

A witness appearing on behalf of Galloway Company (Galloway) testified in support of all proposals that would limit the practice of de-pooling. Galloway owns and operates a dairy manufacturing plant in the UMW marketing area. The witness was of the opinion that large negative PPD's are due, in part, to de-pooling and that has a negative impact on the income of Galloway. The witness was of the opinion that changes to order provisions to limit the ability to re-pool are necessary but had no opinion as to which proposal would be the best option.

A post-hearing brief submitted by Dean reiterated their opinion that the pooling standards of the order need to be amended to correct the disorderly marketing conditions arising from the practice of de-pooling. The brief argued that the practice of de-pooling is disorderly because a handler who de-pools milk avoids accounting to the pool at classified prices and is not required to pay its suppliers the minimum blend price. However, asserted Dean, a pooled handler not only accounts to the pool at classified prices and pays its suppliers the minimum blend price, the handler also finds it necessary to pay large premiums to keep its suppliers.

According to the Dean brief, negative PPD's and the resulting practice of de-pooling are not a national issue, noting that de-pooling typically occurs in markets with low Class I utilization such as the UMW. The Dean brief predicted that the practice of de-pooling would occur in the future and therefore concluded that the disorderly marketing conditions arising from the practice of de-pooling warrant emergency action from the Department by omitting a recommended decision.

A post hearing brief submitted on behalf of Lamers Dairy, Inc. (Lamers) asserted that the ability of some handlers to engage in the practice of de-

pooling when it is economically advantageous is a disorderly marketing condition. Furthermore, the brief expressed the opinion that de-pooling causes inequitable treatment among handlers because pooling handlers must account to the PSF at minimum classified prices while handlers who de-pool their milk receipts do not. The Lamers brief supported adoption of Proposal 3 as the most appropriate solution to limit the practice of de-pooling.

A witness appearing on behalf of Mid-West, et al., testified in opposition to Proposal 3. According to the witness, requiring a producer whose milk was de-pooled to deliver 10-day's milk production to a pool distributing plant is a standard that would be extremely difficult to meet. The witness stressed that finding access to a pool distributing plant for 10-day's production would not only be extremely difficult, it would also be costly. The Mid-West, et al., brief also contended that the proposals offered by Dean would require physical changes in plant operations that are not necessary to address the practice of de-pooling in the UMW market.

The Mid-West, et al., brief disagreed with others who were of the opinion that the de-pooling issue should be addressed at a national hearing. The brief explained that historical Federal milk order policy is that the pooling provisions of orders be reflective of each order's individual marketing conditions. Therefore, the brief concluded, it is appropriate to address the practice of de-pooling on an individual order basis.

A witness appearing on behalf of Associated Milk Producers, Inc. (AMPI) testified in opposition to all proposals intended to limit the practice of de-pooling as specified in Proposals 2, 3, 4, and 5. The witness' testimony was given on behalf of Alto Dairy Cooperative, Bongards' Creameries, Ellsworth Cooperative Creamery, Family Dairies USA, First District Association, Davisco Foods, Valley Queen Cheese Company and Wisconsin Cheesemakers Association (WCA). The members consist of cooperative associations and handlers who market or purchase milk in the UMW marketing area. Hereinafter, this coalition of members will be referred to collectively as ''AMPI, et al.''

The AMPI, et al., witness testified that the option to engage in the practice of de-pooling in response to price inversions has been a longstanding part of the Federal milk order system. The witness testified that as a result of timing differences in announcing classified prices, a lag between changes in the market value of milk used in manufacturing and corresponding changes in the Federal order Class I price sometimes results in price inversions. The witness explained that the occasional price inversion is caused by the announcement of the Class I price approximately two weeks prior to the month and the announcement of the price for milk used in Class II, III, and IV products occurring after the close of the month—a difference of six weeks. The witness drew attention to April 2004 where the value of Class III milk increased $6.02 per cwt during the six-week lag. This resulted in a blend price that was substantially less than the estimated Class III price, resulting in a large amount of de-pooled Class III milk because, the witness said, there was no incentive for manufacturing handlers to pool all of their milk receipts.

The AMPI, et al., witness asserted that the argument that de-pooled milk does not serve, nor is available to serve, the fluid market is false. According to the witness, milk that is de-pooled is available to the Class I market during the month it is marketed and a decision to de-pool the milk is made after the end of the month when the Class II, III and IV prices are known. Additionally, the witness asserted that fluid milk plants always receive a continuous supply of fluid milk because of their contractual supply agreements.

The AMPI, et al., witness characterized the proposals under consideration to address the practice of de-pooling as designed to penalize handlers who engage in de-pooling their Class III milk. AMPI, et al., the witness stated, is strongly opposed to this change in pooling philosophy. The witness was of the opinion that the Federal order system should continue to provide for the marketwide sharing of money derived from sales of Class I milk since it is Class I sales that historically generate additional revenue to producers. However, the witness said, the order should not force handlers to share money generated from manufactured milk products to offset a low Class I price.

The AMPI, et al., witness was of the opinion that the practice of de-pooling is a national issue that should be addressed in a national hearing. The witness believed that a better solution to the practice of de-pooling would be to eliminate the advanced pricing of Class I milk and instead announce all Class prices after the end of the month.

The AMPI, et al., witness also testified that emergency marketing conditions do not exist to warrant the omission of a recommended decision by the Department. The witness stressed that price inversions and the practice of de-pooling have occurred in the Federal order system for decades and any major change in Department policy regarding this practice should be addressed in a recommended decision where interested parties can file comments and exceptions.

A post-hearing brief submitted on behalf of AMPI, et al., reiterated their opposition to all of the proposals that seek to deter de-pooling. The brief argued that the AMAA intended for the government to only require the sharing of the revenues generated from fluid sales. According to the brief, requiring manufactured milk to remain pooled oversteps the authority of the AMAA. The brief also expressed the opinion that Proposals 3, 4, and 5 are designed to limit a producer's access to the market and should therefore be denied. Furthermore, the brief stressed that Proposals 3 through 5 would unfairly increase costs of some UMW handlers because of the increased transportation and capital investment that would be needed to comply with the proposed amendments.

A witness appearing on behalf of WCA, testified in opposition to all proposals intended to limit the practice of de-pooling as specified in Proposals 2, 3, 4, and 5. The witness testified that WCA represents dairy manufacturers and marketers with 32 of its members operating 42 pooled dairy facilities on the UMW order. According to the witness, 30 of the 42 pooled dairy facilities are small businesses and if the proposals to limit the practice of de-pooling were adopted, these small businesses would face new and significant costs to comply with the proposed new standards without benefit to their dairy farmer suppliers.

The WCA witness expressed concern that Proposal 2 addressed the practice of de-pooling without regard to the cause of negative PPD's, specifically the inversion of classified prices. The witness also said that Proposals 2, 3, 4 and 5 would put an additional administrative burden on handlers by requiring them to designate which producers would remain pooled or de-pooled. The witness asserted that access to distributing plants in the UMW market is very limited and it would be hard for a de-pooled producer to re-associate with a distributing plant in order to be eligible to again pool their milk on the order.

The WCA witness was of the opinion that Proposals 3 and 4 also would add additional transportation costs, administrative costs, and the potential need for additional silo capacity to accommodate the increased volume of milk that would be needed to meet the

10-day production delivery standard at a pool distributing plant. The witness explained that many WCA members do not have the capacity to accommodate meeting a 10-day production delivery standard for each month. The witness was also of the opinion that existing supply contracts provide ample milk supplies for the Class I market and concluded that additional deliveries to pool plants are not needed to assure an adequate supply to Class I facilities.

A witness appearing on behalf of the National Family Farm Coalition, an organization representing family farms located in 32 states including those states comprising the UMW marketing area, testified in opposition to all proposals at the hearing. The witness was of the opinion that the entire Federal order system was in need of a complete reform. The witness asserted that the proponents of the proposals being heard were entities whose past actions have lowered prices received by family farmers.

A post-hearing brief submitted on behalf of Alto Dairy (Alto), a cooperative with 580 dairy farmer members in Wisconsin and Michigan, reiterated their opposition to all proposals seeking to limit the practice of de-pooling. The brief stressed that a decision to de-pool is made separately from the decision to adequately supply the Class I needs of the market.

An Extension Dairy Marketing Specialist at the University of Wisconsin testified on the issues surrounding the practice of de-pooling but did not support or oppose any specific proposal. The witness referred to and explained a research paper which identified and explained problems arising in the UMW marketing area by pooling distant milk, the practice of de-pooling, and the resulting economic impacts to producers. The witness said that if manufacturing prices for milk rapidly increase during the month there will be a negative PPD but as prices begin to decline, the PPD will again become positive over time. The witness also explained that a negative PPD does not mean that producers lost money. Rather, the witness clarified, the PPD is a calculation of the difference between the Class III price and the blend price that producers receive. However, concluded the witness, the ability to engage in the practice of de-pooling does result in volatile PPD's and gives rise to inequities among producers and handlers.

All Federal milk marketing orders require the pooling of milk received at pool distributing plants—which is predominantly Class I milk—and all pooled producers and handlers on an order share in the additional revenue arising from higher valued Class I sales. Manufacturing handlers and cooperatives of Class II, III and IV uses of milk who meet the pooling and performance standards make all of their milk receipts eligible to be pooled and usually find it advantageous. Manufacturing handlers and cooperatives who supply a portion of their total milk receipts to Class I distributing plants receive the difference between their use-value of milk and the order's blend price. Federal milk orders, including the UMW order, establish limits on the volume of milk eligible to be pooled that is not used for fluid uses primarily through diversion limit standards. However, manufacturing handlers and cooperatives are not required, as are Class I handlers, to pool all their eligible milk receipts.

According to the record, manufacturing handlers and cooperatives have opted to not pool their milk receipts when the manufacturing class prices of milk are higher than the order's blend price—commonly referred to as being ''inverted.'' During such months, manufacturing handlers and cooperatives have elected to not pool all of their eligible milk receipts because doing so would require them to pay into the PSF of the order, the mechanism through which handler and producer prices are equalized. When prices are not inverted, handlers would pool all of their eligible receipts and receive a payment or draw from the PSF. In receiving a draw from the PSF, such handlers will have sufficient money to pay at least the order's blend price to their supplying dairy farmers.

When manufacturing handlers and cooperatives opt to not pool all of their eligible milk receipts in a month, they are essentially avoiding a payment to the PSF. This, in turn, enables them to avoid the marketwide sharing of the additional value of milk that accrues in the higher-valued uses of milk other than Class I. When the Class I price again becomes the highest valued use of milk, or when other class-price relationships become favorable, the record reveals that these same handlers opt to again pool their eligible milk receipts and draw money from the PSF. It is the ability of manufacturing handlers and cooperatives opting to not pool milk and thereby avoid the marketwide sharing of the revenue accruing from non-Class I milk sales that is viewed by proponents as giving rise to disorderly marketing conditions. According to proponents, producers and handlers who cannot escape being pooled and priced under the order are not assured of equitable prices.

The record reveals that since the implementation of Federal milk marketing order reform in January 2000, and especially in more recent years, large and rapid increases in manufactured product prices during certain months have provided the economic incentives for manufacturing handlers to opt not to pool eligible milk on the UMW order. For example, during the three-month period of February to April 2004, the Class III price increased over 65 percent from $11.89 per cwt to $19.66 per cwt. During the same time period, total producer milk pooled on the UMW order decreased by over 60 percent from 1.94 billion pounds to 608 million pounds. When milk volumes of this magnitude are not pooled the impacts on producer blend prices are significant. Producers who incur the additional costs of consistently servicing the Class I needs of the market receive a lower return than would otherwise have been received if they did not continue to service the Class I market. Prices received by dairy farmers who supplied the other milk needs of the market are not known. However, it is reasonable to conclude that prices received by dairy farmers were not equitable or uniform.

The record reveals that ''inverted'' prices of milk are generally the result of the timing of Class price announcements. Despite changes made as part of Federal milk order reform to shorten the time period of setting and announcing Class I milk prices and basing the Class I price on the higher of the Class III or Class IV price to avoid price inversions, large month-to-month price increases in Class III and Class IV product prices sometimes trumped the intent of better assuring that the Class I price for the month would be the highest-valued use of milk. In all orders, the Class I price (and the Class II skim price) is announced prior to or in advance of the month for which it will apply. The Class I price is calculated by using the National Agricultural Statistics Service (NASS) surveyed cheese, butter, nonfat dry milk and dry whey prices for the two most current weeks prior to the 24th day of the preceding month and then adding a differential value to the higher of either the advanced Class III or Class IV price.

Historically, the advance pricing of Class I milk has been used in all Federal orders because Class I handlers cannot avoid regulation and are required to pool all of their Class I milk receipts, they should know their product costs in advance of notifying their customers of price changes. However, milk receipts

for Class III and IV uses are not required to be pooled thus, Class III and IV product prices (and the Class II butterfat value) are not announced in advance. These prices are announced on or before the 5th of the following month. Of importance here is that manufacturing plant operators and cooperatives have the benefit of knowing all the classified prices of milk before making a decision to pool or not pool eligible receipts.

The record reveals that the decision of manufacturing handlers or cooperatives to pool or not pool milk is made on a month-to-month basis and is generally independent of past pooling decisions. Manufacturing handlers and cooperatives that elected to not pool their milk receipts did so to avoid making payments to the PSF and they anticipated that all other manufacturing handlers and cooperatives would do the same. However, the record indicates that normally pooled manufacturing handlers and cooperatives met the pooling standards of the order to ensure that the Class I market was adequately supplied and that they established eligibility to pool their physical receipts, including diversions to nonpool plants. Opponents to proposals to deter de-pooling are of the view that meeting the pooling standards of the order and deciding how much milk to pool are unrelated events. Proponents took the view that participation in the marketwide pool should be based on a long-term commitment to supply the market because in the long-term it is the sales of higher priced Class I milk that adds additional revenue to the pool.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Class I, II and IV milk pooled. In essence, the PPD is the residual revenue remaining after all butterfat, protein and other solids values are paid to producers. If the pooled value of Class I, II and IV milk is greater than the Class III value, dairy farmers receive a positive PPD. While the PPD is usually positive, a negative PPD can occur when class prices rise rapidly during the six-week period between the time the Class I price is announced and the time the Class II butterfat and III and IV milk prices are announced. When manufacturing prices fall, this same lag in the announcement of class prices yields a positive PPD.

As revealed by the record, when manufacturing plants and cooperatives opted to not pool milk because of inverted price relationships, PPD's were much more negative. When this milk is not pooled, a larger percentage of the milk remaining pooled will be ''lower'' priced Class I milk. When manufacturing milk is not pooled the weighted average value of milk decreases relative to the Class II, III or IV value making the PPD more negative. For example, record evidence demonstrated that in April 2004, a month when a sizeable volume of milk was not pooled, the PPD was a negative $4.11 per cwt. If all eligible milk had been pooled, the PPD would have been $2.97 per cwt higher or a negative $1.14 per cwt.

The record reveals that when manufacturing handlers and cooperatives opt to not pool milk, unequal pay prices may result to similarly located dairy farmers. For example, Dean noted that when a cooperative delivers a high percentage of their milk receipts to a distributing plant, it lessens their ability to not pool milk, making them less competitive in a marketplace relative to other producers and handlers. Other evidence in the record supports conclusions identical to Dean that when a dairy farmer or cooperative is able to receive increased returns from shipping milk to a manufacturing handler during times of price inversions, other dairy farmers or cooperatives who may have shipped more milk to a pool distributing plant are competitively disadvantaged.

The record of this proceeding reveals that the ability of manufacturing handlers and cooperatives to not pool all of their eligible milk receipts gives rise to disorderly marketing conditions and warrants the establishment of additional pooling standards to safeguard marketwide pooling. Current pooling provisions do not require or prohibit handlers and cooperatives from pooling all eligible milk receipts. However, the record reveals that when handlers and cooperatives opt to not pool milk inequities arise among producers and handlers that are contrary to the intent of the Federal milk marketing order program—maintaining orderly marketing conditions.

The record contains extensive testimony regarding the effects on the milk order program resulting from advance pricing and the priority the milk order program has placed on the Class I price being the highest valued use of milk. It remains true that the Class I use of milk is still the highest valued use of milk notwithstanding those occasional months when milk used in usually lower-valued classes may be higher. This has been demonstrated by an analysis of the effective Class I differential values—the difference in the Class I price at the base zone of Cook County, Illinois, and the higher of the Class III or Class IV price—for the 65 month period of January 2000 through May 2005 performed by USDA.[1] These computations reveal that the effective monthly Class I differential averaged $1.76 per cwt. Accordingly, it can only be concluded that in the longer-term Class I sales continue to be the source of additional revenue accruing to the pool even when, in some months, the effective differential is negative.

Price inversions occur when the wholesale price for manufactured products rises rapidly indicating a tightening of milk supplies to produce those products. It is for this reason that the Department chose the higher of the Class III or Class IV prices as the mover of the Class I price. Distributing plants must have a price high enough to attract milk away from manufacturing uses to meet Class I demands. As revealed by the record, this method has not been sufficient to provide the appropriate price signals to assure an adequate supply of milk for the Class I market. Accordingly, additional measures are needed as a means of assuring that milk remains pooled and thus available to the Class I market. Adoption of Proposal 2 is a reasonable measure to meet the objectives of orderly marketing.

This decision does find that disorderly marketing conditions are present when producers do not receive uniform prices. Handlers and cooperatives opting to not pool milk do not account to the pool at the classified use-value of those milk receipts. They do not share the higher classified use-value of their milk receipts with all other producers who are pooled on the order, primarily the producers who are pooled on the order are incurring the additional costs of servicing the Class I needs of the market. This is not a desired or reasonable outcome especially when the same handlers and cooperatives will again pool all of their eligible receipts when class-price relationships change in a subsequent month. These inequities borne by the market's producers are contrary to the intent of the Federal order program's reliance on marketwide pooling—ensuring that all producers supplying the market are paid uniform prices for their milk regardless of how the milk of any single producer is used.

It is reasonable that the order contain pooling provisions intended to deter the disorderly conditions that arise when de-pooling occurs. Such provisions maintain and enhance orderly

[1] Official notice is taken of data and information published in Market Administrator Bulletins as posted on individual Market Administrator web sites.

marketing. Accordingly, this decision finds it reasonable to recommend adoption of provisions that would limit the volume of milk a handler or cooperative may pool during the months of April through February to 125 percent of the total volume pooled by the handler or cooperative in the prior month and to 135 percent of the prior month's pooled volume during the month of March. Adoption of this standard will not prevent manufacturing handlers or cooperatives from electing to not pool milk. However, it should serve to maintain and enhance orderly marketing by encouraging participation in the marketwide pooling of all classified uses of milk.

Consideration was given on whether de-pooling should be considered at a national hearing with other, broader national issues of milk marketing. However, each marketing area has unique marketing conditions and characteristics which have area-specific pooling provisions to address those specific conditions. Because of this, pooling issues are considered unique to each order. This decision finds that it would be unreasonable to address pooling issues, including de-pooling on a national basis.

Some manufacturing handlers and cooperatives argue that their milk did perform in meeting the Class I needs during the month and this occurred before making their pooling decisions. They argue that the Class I market is therefore not harmed and that the intents and goals of the order program are satisfied. With respect to this proceeding and in response to these arguments, this decision finds that the practice of de-pooling undermines the intent of the Federal order program to assure producers uniform prices across all uses of milk normally associated with the market as a critical indicator of orderly marketing conditions. Similarly, handlers and cooperatives that de-pool purposefully do so to gain a momentary financial benefit (by avoiding making payments to the PSF) which would otherwise be equitably shared among all market participants. While the order's performance standards tend to assure that distributing plants are adequately supplied with fresh, fluid milk, the goals of marketwide pooling are undermined by the practice of de-pooling. Producers and handlers who regularly and consistently serve the Class I needs of the market will not equitably share in the additional value arising momentarily from non-fluid uses of milk. These same producers and handlers will, in turn, be required to share the additional revenue arising from higher-valued Class I sales in a subsequent month when class-price relationships change.

The four proposals considered in this proceeding to deter the practice of de-pooling in the UMW order have differences. They all seek to address the market disorder arising from the practice of de-pooling. However, this decision does not find adoption of the two ''dairy farmer for other market'' proposals—Proposals 3 and 4—reasonable because they would make it needlessly difficult for milk to be re-pooled and because their adoption may disrupt prevailing marketing channels or cause the inefficient movement of milk. Likewise, Proposal 5, to restrict pooling in a month to 115 percent of the prior month's volume pooled by the handler, is not recommended for adoption. Adoption of this proposal would disrupt current marketing conditions beyond what the record justifies. Therefore, this decision recommends adoption of Proposal 2 to limit the pooling of milk by a handler during the months of April through February to 125 percent of the total milk receipts the handler pooled in the prior month and to 135 percent of the prior month's pooled volume during the month of March because it provides the most reasonable measure to deter the practice of de-pooling.

Consideration was given to omitting a recommended decision on the issue to de-pooling. The record does not support a conclusion that adoption of measures to deter de-pooling warrant emergency action. The recommended adoption of provisions to limit the volume of milk that can be pooled during the month on the basis of what was pooled in the preceding month warrant public comments before a final decision is issued.

B. Producer Definition

A proposal published in the hearing notice as Proposal 6, seeking to specify the length of time a dairy farmer may lose Grade A status before losing producer status on the order, is not recommended for adoption. Proposal 6, offered by Dean, would amend the *Producer* definition by explicitly stating that a dairy farmer may lose Grade A status for up to 21 calendar days per year before needing to requalify as a producer on the order. The UMW order currently does not specify the specific length of time a dairy farmer may lose Grade A status before needing to requalify as a producer on the order. Currently, a dairy farmer must deliver one day's milk production to a pool plant during the first month a producer is to be pooled in order to have their milk pooled and priced under the terms of the order.

A witness appearing on behalf of Dean testified in support of Proposal 6. The witness said the UMW order currently does not specify how long a dairy farmer who temporarily loses their Grade A status can retain producer status before they must requalify as a producer on the order. Proposal 6, the witness stated, sets a reasonable limit to the number of days a producer can lose Grade A status within a calendar year.

A witness appearing on behalf of Mid-West, et al., testified in opposition to Proposal 6. The witness said that many situations could arise where a producer is unable to regain Grade A status in less than 21 days due to damages resulting from situations beyond their control. The current order language provides for waivers in pooling standards for pool plants due to such ''acts of God'' and, in the witness' opinion, is adequately provided for in the *Producer* definition of the current order language.

The *Producer* definition of the UMW order does not define the length of time a producer may lose Grade A status before needing to requalify for producer status on the order. The issue of qualifying for producer status is important since it determines which producers and which producer milk is entitled to share in the revenues arising from the marketwide pooling of milk on the UMW order.

The definition of ''temporary'' used by the Market Administrator has accommodated the Upper Midwest market by giving producers a reasonable amount of time to regain Grade A status without burdening the market with excessive touch-base shipments or recordkeeping requirements. Limiting the time period a producer can lose Grade A status would require handlers and the Market Administrator to track the producer's loss of Grade A status throughout the year to determine when the 21 day limit is reached.

This decision finds that the additional touch-base shipments that would be required for a dairy farmer to requalify for producer status on the order would cause uneconomic shipments of milk. Additionally, the increased recordkeeping requirements would burden handlers without contributing to the goals and application of the proposed amendments to the pooling standards contained in this decision. Accordingly, Proposal 6 is not recommended for adoption.

2. Administrative Assessment Rate

A proposal, published in the hearing notice as Proposal 7, seeking to increase the maximum assessment rate of the

UMW order, should be adopted. Specifically, the maximum administrative assessment rate should be increased from the current rate of 5 cents per cwt to 8 cents per cwt. At the time of the hearing, the administrative assessment rate of 5 cents per cwt applied to all milk pooled on the order and was the maximum assessment rate that could be charged. Adoption of this proposal will not increase the administrative assessment above the current rate but it will give the market administrator the ability to increase the assessment up to a maximum 8 cents per cwt, if necessary.[2]

According to the Market Administrator, Proposal 7 was offered because there is not sufficient milk volume being consistently pooled on the UMW order to generate adequate funding for the proper administration of the order. Administration of the UMW order generates substantial costs for the many services provided to UMW marketing area participants including pooling, auditing, gathering market information, and providing market services such as laboratory testing, explained the witness. The witness noted that there are also fixed expenses such as salaries and office leases and that the order must maintain a specified minimum level of operating reserves.

The Market Administrator stated that from 2000 to 2002, the amount of producer milk on the UMW order ranged from 1.7 to 1.95 billion pounds per month. According to the witness, this volume of pooled milk generated sufficient funds for the administration of the order for the 4-cent per cwt assessment rate being assessed on pooled milk during that time. However, the witness said, from July through November 2003 almost 6.2 billion pounds of producer milk was de-pooled which resulted in the loss of nearly $2.5 million in potential revenue for the administration of the order. According to the Market Administrator, this loss of revenue caused the assessment rate to be increased from 4 cents to 5 cents per cwt. The Market Administrator stressed that substantial de-pooling occurred again from March through May 2004 when nearly 4.7 billion pounds of producer milk was de-pooled.

The Market Administrator emphasized that the UMW order still services the de-pooled milk because handlers make decisions to de-pool their milk receipts after the end of the month after already utilizing many of the UMW order services. According to the Market Administrator, the UMW order must sometimes service an approximately 2 billion pound market per month while only collecting an assessment on 600 to 700 million pounds of milk. At the current assessment rate of 5 cents per cwt, noted the Market Administrator, the order needs approximately 1.5 billion pounds of pooled producer milk per month to operate and provide the services expected by market participants.

The Market Administrator said that actions to reduce operating costs have taken place but an increase in the maximum assessment rate is needed to ensure the proper administration of the order and to maintain necessary operating reserves. The Market Administrator explained that increasing the maximum administrative assessment rate to 8 cents per cwt would not necessarily be the actual rate that would be charged to pooling handlers. The Market Administrator stressed that the proposed 8-cent assessment rate is a maximum level, and the actual assessment rate charged would only be as high as needed to operate the order.

The Mid-West, et al., brief expressed support of the Proposal 7 but emphasized that the assessment rate should be viewed as a maximum. The brief speculated that if Proposal 2 is adopted, the volume of milk pooled consistently will stabilize making it unnecessary to raise the assessment rate. The brief also discussed the option of having the assessment rate vary to ensure that milk which is consistently pooled does not pay for services on milk that is de-pooled and does not pay an assessment.

A witness appearing on behalf of Dean viewed Proposal 7 as an extra tax on those producers who already pay for the administration of the order every month, unlike those producers whose milk is de-pooled. The witness contended that if Proposal 3, 4, or 5 were adopted, the amount of milk being de-pooled on the UMW order would decrease significantly, thus giving the Market Administrator a more consistent income stream. However, asserted the witness, if the Department decided to increase the administrative assessment, Dean would encourage an amended provision that would charge a higher assessment on milk not pooled in the previous month.

Dean's post-hearing brief reiterated support for increasing the maximum administrative rate while maintaining that adoption of Proposal 3 would prevent the need to actually increase the administrative assessment rate. The brief proposed that if the administrative assessment rate is increased, the Market Administrator should be granted the authority to insulate continuously pooled producers from paying the increased assessment.

A witness appearing on behalf of WCA testified in opposition to Proposal 7. The witness asserted that the Market Administrator should use other means to address what the witness characterized as short-term funding declines.

A witness representing Oberweis Dairy also opposed adoption of Proposal 7 because it would increase costs to producers.

The hearing record reveals that fluctuations in the volume of milk pooled on the UMW order attributed to de-pooling can reduce the Market Administrator revenues to a level too low for proper administration of the order. At the current assessment rate of 5 cents per cwt, 1.5 billion pounds of pooled milk is needed to generate sufficient funds for the administration of the order. However, de-pooling has resulted in pooled volumes far below that needed to generate an adequate revenue stream.

The recommended adoption of a proposal to deter the de-pooling of milk should result in a more stable revenue stream for the administration of the UMW order. Nevertheless, it is reasonable to increase the maximum administrative assessment rate to ensure that the Market Administrator has the proper funds to carry out all of the services provided by the UMW order. While the maximum administrative rate should be increased to 8 cents per cwt, the actual rate charged will only be as high as necessary to properly administer the order and provide the necessary services to market participants.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

[2] Official notice is taken of a letter from the UMW Market Administrator to UMW handlers, cooperatives and interested persons, dated September 28, 2005, that decreases the administrative assessment from 5 cents to 4 cents per cwt, effective with milk produced on or after September 1, 2005.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the UMW order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the UMW marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Part 1030

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR part 1030, is proposed to be amended as follows:

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

1. The authority citation for 7 CFR part 1030 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 1030.13 is amended by adding a new paragraph (f), to read as follows:

§ 1030.13 Producer milk.

* * * * *

(f) The quantity of milk reported by a handler pursuant to § 1030.30(a)(1) and/or § 1030.30(c)(1) for April through February may not exceed 125 percent, and March may not exceed 135 percent of the producer milk receipts pooled by the handler during the prior month. Milk diverted to nonpool plants reported in excess of this limit shall be removed from the pool. Milk in excess of this limit received at pool plants, other than pool distributing plants, shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b)(3)(v) of this title. The handler must designate, by producer pick-up, which milk is to be removed from the pool. If the handler fails to provide this information, the market administrator will make the determination. The following provisions apply:

(1) Milk shipped to and physically received at pool distributing plants shall not be subject to the 125 or 135 percent limitation;

(2) Producer milk qualified pursuant to ____.13 of any other Federal Order and continuously pooled in any Federal Order for the previous six months shall not be included in the computation of the 125 or 135 percent limitation;

(3) The market administrator may waive the 125 or 135 percent limitation:

(i) For a new handler on the order, subject to the provisions of § 1030.13(f)(3), or

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(4) A bloc of milk may be considered ineligible for pooling if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph (f).

3. Section 1030.85 is revised, to read as follows:

§ 1030.85 Assessment for order administration.

On or before the payment receipt date specified under § 1030.71, each handler shall pay to the market administrator its pro rata share of the expense of administration of the order at a rate specified by the market administrator that is no more than 8 cents per hundredweight with respect to:

(a) Receipts of producer milk (including the handler's own production) other than such receipts by a handler described in § 1000.9(c) that were delivered to pool plants of other handlers;

(b) Receipts from a handler described in § 1000.9(c) of this title;

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1000.43(d) of this title and other source milk allocated to Class I pursuant to § 1000.44(a)(3) and (8) of this title and the corresponding steps of § 1000.44(b) of this title, except other source milk that is excluded from the computations pursuant to § 1030.60(h) and (i); and

(d) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the skim milk and butterfat subtracted pursuant to § 1000.76(a)(1)(i) and (ii) of this title.

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 06–1585 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1032

[Docket No. AO–313–A48; DA–04–06]

Milk in the Central Marketing Area; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; recommended decision.

SUMMARY: This decision recommends adoption of proposals that would amend certain features of the Central Federal milk marketing order. Specifically, this decision recommends adoption of proposals that would increase supply plant performance standards, amend features of the ''touch-base'' provision, amend certain features of the ''split plant'' provision and decrease the diversion limit standards of the order. This decision also recommends adoption of a proposal that would limit the volume of milk a handler can pool in a month to 125 percent of the total volume of milk pooled in the previous month.

DATES: Comments should be submitted on or before April 24, 2006.

ADDRESSES: Comments (6 copies) should be filed with the Hearing Clerk, STOP 9200-Room 1031, United States Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–9200.

Comments may also be submitted at the Federal e-Rulemaking portal: *http://www.regulations.gov* or by submitting comments by e-mail: *amsdairycomments@usda.gov.* Reference should be made to the title of action and docket number.

FOR FURTHER INFORMATION CONTACT: Jack Rower, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231-Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 720–2357, e-mail address: *jack.rower@usda.gov.*

SUPPLEMENTARY INFORMATION: This decision recommends adoption of amendments that would: (1) Increase supply plant performance standards to 25 percent for the months of August through February and to 20 percent for the months of March through July; (2) Require the non-pool side of a split plant to maintain nonpool status for 12 months; (3) Amend the ''touch-base'' feature of the order to require that at least one day's production of the milk of a dairy farmer be received at a pool plant in each of the months of January, February, and August through November, to be eligible for diversion to non-pool plants; (4) Lower the diversion limit standards by five percentage points, from 80 percent to 75 percent, for the months of August through February, and by five percentage points, from 85 percent to 80 percent for the months of March through July; and (5) Establish provisions that would limit the volume of milk a handler may pool in a month to 125 percent of the volume of milk pooled in the prior month.

This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code, and therefore, is excluded from the requirements of Executive Order 12866. The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect. If adopted, the proposed rule would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937 (the Act), as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (Department) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees.

For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During January 2005, there were 5,778 dairy producers pooled on, and 23 handlers regulated by, the Central order. Approximately 5,365 producers, or 92.9 percent, were considered ''small businesses'' based on the above criteria. Of the 23 handlers regulated by the Central order during January 2005, 11 handlers, or 47.8 percent, were considered ''small businesses.''

The recommended amendments regarding the pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with and consistently serve the fluid needs of the Central milk marketing area. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs of the market and, by doing so, determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk.

Criteria for pooling are established without regard to the size of any dairy industry organization or entity. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, record keeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This recommended decision does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This rulemaking proceeding does not duplicate, overlap, or conflict with any existing Federal rules.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

Prior Documents in This Proceeding

Notice of Hearing: Issued September 17, 2004; published September 22, 2004 (69 FR 56725).

Notice of Hearing Delay: Issued October 18, 2004; published October 13, 2004 (69 FR 61323).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this

recommended decision with respect to the proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Central marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act (AMAA) and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, United States Department of Agriculture, Room 1031–Stop 9200, 1400 Independence Avenue, SW., Washington, DC 20250–9200, by the [insert date 60 days after publication of this decision in the **Federal Register**.] Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. Some evidence was received that specifically addressed these issues, and some of the evidence encompassed entities of various sizes.

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Central marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The proposed amendments set forth below are based on the record of a public hearing held in Kansas City, Missouri, on December 6–8, 2004, pursuant to a notice of hearing issued September 17, 2004, published September 22, 2004 (69 FR 56725), and a notice of a hearing delay issued October 13, 2004, published October 18, 2004, (69 FR 61323).

The material issues on the hearing record relate to:

1. Pooling Standards.

A. Performance standards for supply plants.

B. The ''Split plant'' provision.

C. System pooling for supply plants.

D. Elimination of the supply plant provision.

E. Standards for producer milk.

2. Establishing pooling limits.

3. Transportation and assembly credits.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Pooling Standards

A. Performance Standards for Supply Plants

A portion of a proposal, published in the hearing notice as Proposal 1, seeking to increase supply plant performance standards by five percentage points, from 20 percent to 25 percent, for the months of August through February, and from 15 percent to 20 percent for the months of March through July, is recommended for adoption. A portion of another similar proposal, published in the hearing notice as Proposal 5, seeking to increase supply plant performance standards by 20 percentage points, from 15 percent to 35 percent, for the month of July, by 15 percentage points, from 20 percent to 35 percent, for the months of August through January and by 10 percentage points, from 15 percent to 25 percent, for the month of March is not recommended for adoption. Currently, the Central order requires a supply plant to ship 20 percent of its total receipts to a distributing plant during the months of August through February, and 15 percent of its total receipts during the months of March through July, in order for the total receipts of the supply plant to be pooled.

Proposal 1 was offered jointly by Dairy Farmers of America, Inc., (DFA), and Prairie Farms Cooperative (PF), hereafter referred to as DFA/PF. DFA/PF are member-owned Capper-Volstead cooperatives that pool milk on the Central order. Proposal 1 would increase the amount of milk a supply plant would be required to ship to a distributing plant by five percentage points, from 20 percent to 25 percent, for the months of August through February, and from 15 percent to 20 percent for the months of March through July, in order to pool all of its receipts on the Central order.

The proponents are of the opinion that current supply plant performance standards enable milk that does not demonstrate a consistent and reliable service to the Class I market to be pooled on the order. The proponents contend that the pooling of this additional milk is causing an unwarranted lowering of the order's blend price.

A witness appearing on behalf of DFA/PF testified in support of Proposal 1. The DFA/PF witness stated that increasing the volume of milk a supply plant is required to ship to a pool distributing plant in order to have all the receipts of the supply plant pooled, combined with other proposed changes to the Central order pooling provisions, will better identify milk ready, willing and able to service the fluid milk needs of the Central marketing area.

The DFA/PF witness testified that the proposed increase in the performance standards for supply plants would increase the blend price received by dairy farmers whose milk is pooled and priced on the Central order. The witness was of the opinion that an increase in the blend price will serve to attract and retain milk supplies that are otherwise shipped from the Central order area to neighboring marketing areas. The witness asserted that increasing supply plant performance standards will ensure that the Class I needs of the Central marketing area are being met.

The DFA/PF witness testified that current supply plant performance standards allow far more milk to be pooled on the Central order than is necessary. Relying on market administrator data, the witness noted that the projected Class I utilization of 50.1 percent, anticipated during Federal order reform for the consolidated marketing area, was not achieved. The witness added that the average Class I utilization in the Central marketing area has ranged from a low of 26 percent in 2002 to nearly 33 percent in 2003. The witness was of the opinion that these average Class I utilization levels demonstrate that reserve supplies of milk in the marketing area of 74 and 67 percent, respectively, for 2002 and 2003, far exceed the 49–50 percent reserve levels projected during Federal order reform. In addition, the witness noted that increased supply plant performance standards implemented in 2001 have not been effective in reducing the excess reserve supply of milk in the marketing area. The witness concluded that this data confirms that the current performance standards of the Central order provide opportunities for milk not regularly and consistently serving the Class I market to be pooled on the order.

The DFA/PF witness described concerns regarding the geography of the Central marketing area and explained that higher prices are received for milk in the bordering Southeast and Appalachian marketing areas. According to the witness, higher milk prices in the Appalachian and Southeast orders tend to attract milk from the Central marketing area and create localized supply imbalances within the eastern portion of the marketing area. The witness testified that increasing supply plant performance standards would deter milk originating from

within the Central order boundaries from pooling on the Appalachian and Southeast orders. According to the witness this would tend to increase the blend price paid to dairy farmers whose milk is pooled on the Central order.

A number of DFA member dairy farmers whose milk is pooled on the Central order testified in support of the portion of Proposal 1 that would increase supply plant performance standards. The dairy farmer witnesses were of the opinion that increasing supply plant performance standards will raise the level of Class I utilization and in turn, increase the blend price.

A witness from National All-Jersey (NAJ) representing AMPI, et al., (Associated Milk Producers Inc., Central Equity Cooperative, Land O'' Lakes, Inc., First District Association, Foremost Farms USA, joined by Wells Dairy, Inc., Milnot Holdings and National All-Jersey), testified in opposition to the portion of Proposal 1 that would increase supply plant performance standards. NAJ is a national organization whose mission is to promote milk pricing equity and increase the value and demand for the milk produced by the Jersey breed. The NAJ witness was of the opinion that increasing supply plant performance standards would result in inefficient movements of milk and pass the costs of regulatory inefficiencies to consumers.

In their post hearing brief, DFA/PF reiterated their support for Proposal 1. The brief asserted that adoption of the portion of Proposal 1 that would increase supply plant performance standards would more accurately identify the milk of producers servicing the fluid needs of the market. According to the brief, increasing supply plant performance standards will increase the blend price for the producers who provide regular and consistent service to the Class I market. The DFA/PF brief reiterated support for not pooling milk which does not provide regular and consistent service to the fluid milk needs of the Central marketing area.

A brief from Select Milk Producers, Inc. (Select) and Continental Dairy Products, Inc. (Continental) supported adoption of the higher performance standard features of Proposal 1. Select and Continental are member-owned Capper-Volstead cooperatives whose milk is pooled on the Central order. The brief noted that adoption of higher performance standards would deter the pooling of milk on the order not servicing the fluid needs of the market.

A portion of Proposal 5, advanced by Dean Foods (Dean) (who described themselves as the largest processor and distributor of fluid milk in the United States, owning and operating nine distributing plants regulated by the Central order,) would increase supply plant performance standards by 20 percentage points, from 15 percent to 35 percent, for the month of July, by 15 percentage points, from 20 percent to 35 percent, for the months of August through January and by 10 percentage points, from 15 percent to 25 percent, for the month of March. These proposed changes to supply plant performance standards are not recommended for adoption.

Two witnesses appeared on behalf of Dean in support of increasing supply plant performance standards. The witnesses were of the opinion that current supply plant performance standards are inadequate to assure a reasonable supply of fluid milk to the order's distributing plants. The witnesses were of the opinion that increasing supply plant performance standards as they proposed to the levels advanced would better attract an adequate milk supply for Class I use to the marketing area.

The first Dean witness testified that marketwide pooling and classified pricing are built on the assumption that Class I milk is the highest priced class and that pool revenues generated from Class I sales will attract a regular and consistent milk supply. The witness was of the opinion that current supply plant performance standards allow handlers to pool milk on the Central order that does not regularly and consistently serve the Class I market. According to the witness, low supply plant performance standards reduce the blend price paid to producers who consistently serve the needs of the Central order fluid market by allowing lower-valued milk to be pooled on the order.

The first Dean witness was of the opinion that adoption of higher performance standards would increase the volume of milk available to the Class I market. The witness further testified that if the USDA adopted higher performance standards for supply plants, adoption of Proposals 9 and 10, or Proposals 11, 12, and 13 would also be necessary. (Proposals 9, 10, 11, 12, and 13 are discussed later in this decision.)

The second Dean witness also was of the opinion that increasing supply plant performance standards would help to ensure that the fluid milk needs of the marketing area are being met. According to the witness, increasing supply plant performance standards would decrease the volumes of milk in lower-valued uses pooled on the order, thereby increasing the order's blend price. The witness testified that increasing supply plant performance standards would assist fluid milk handlers located in St. Louis and southern Illinois, who compete with handlers located in the Appalachian and Southeast orders, obtain needed milk supplies.

A brief submitted on behalf of DFA/PF opposed adoption of the level of performance standards for supply plants offered by Dean. DFA/PF noted that increasing supply plant performance standards to the levels advanced in Proposal 5 are unnecessarily high and are more restrictive than current market conditions could reasonably justify.

A brief submitted by AMPI, et. al., reiterated the group's opposition to increased performance standards for supply plants as advanced by both Dean and DFA/PF. The brief highlighted the contention that increased performance standards for supply plants would unfairly penalize reserve suppliers of the marketing area by restricting their ability to share in the benefits of the marketwide pool.

B. The ''Split Plant'' Provision

A proposal from Dean, published in the hearing notice as Proposal 10, seeking to require the nonpool side of a split plant to maintain nonpool status for 12 months, is recommended for adoption. Another Dean proposal, published in the hearing notice as Proposal 9, seeking to eliminate the split plant provision is not recommended for adoption.

The current split plant provision provides for designating a portion of a pool plant as a nonpool plant provided that the nonpool portion of the plant is physically separate and operated separately from the regulated or ''pool'' side of the plant. Current provisions afford handlers operating a split plant the option of maintaining nonpool status or qualifying the nonpool side of the plant for pooling on a monthly basis.

The Dean witness testified that the nonpool side of a split plant can facilitate the pooling of milk that does not demonstrate a regular and consistent service to the fluid milk needs of the Central marketing area. The witness stated that if Proposal 10 was adopted, then Proposal 4, a proposal to eliminate all supply plant provisions, and Proposal 9, a proposal to eliminate split plants, would not be needed.

The Dean witness testified that Proposal 10 would require the nonpool side of a split plant to maintain nonpool status for a 12-month interval. According to the witness, adoption of this provision would deter pooling milk that does not regularly and consistently

serve the Class I market. The witness added that Proposal 10 was advanced as an alternative to Proposal 9. The witness testified that as advanced in Proposal 9, a split plant plant could either be a pool plant or a nonpool plant but not both. The witness stated that if USDA did not eliminate split plants then Dean would seek the adoption of Proposal 10.

In a post hearing brief, Select and Continental supported adoption of Proposal 10. The brief stated that Proposal 10 would deter the pooling of milk that does not regularly and consistently serve the Class I market. According to the brief, split plants should be prohibited from using milk receipts in the nonpool side of the plant from being pooled without demonstrating actual service to the Class I market. The brief expressed the opinion that reducing the volume of milk that a split plant could pool on the order from its nonpool side would tend to increase the Central order blend price.

The Select and Continental brief however, opposed the elimination of split plants as advanced in Proposal 9. The brief stated that requiring a split plant to elect non-pool status for 12 months for its nonpool side would provide sufficient incentive to prevent the pooling of excess milk through split plants.

DFA/PF commented on brief that Dean's Proposals 4–13 in general ''go too far, too fast'' given the current market conditions of the Central marketing area. According to the brief, DFA/PF contend that the adoption of the Dean proposals would not serve the needs of small dairy farms. The brief noted that some small producers may not have alternative markets for their milk if Dean's proposal to eliminate the split plant provision was adopted.

The AMPI, et al., brief opposed elimination of the split plant provision or requiring a 12 month pooling commitment from operators of split plants. Their opposition was based on the view that elimination of split plants, or imposing a 12 month pooling commitment for split plant operators, would unfairly restrict their ability to pool milk on the order.

C. System Pooling for Supply Plants

Three proposals presented by Dean, published in the hearing notice as Proposals 11, 12 and 13, and modified at the hearing, are not recommended for adoption. Proposal 11 would eliminate providing for supply plant systems. Proposal 12 would require a supply plant system to be operated by only one handler. Proposal 13 would require that every plant participating in a system be required to ship 40 percent of the system's qualifying shipment as if they had been operating as separate plants. Proposal 13 also would prohibit using milk shipped directly from producer farms as qualifying shipments. Current Central order provisions provide the ability for 2 or more supply plants (subject to certain additional conditions) to operate as a ''system'' in meeting the qualifications for pooling in the same manner as a single plant.

The Dean witness testified that system pooling affords handlers the ability to link several supply plants together in an effort to qualify producer milk for pooling on the order. According to the witness, current system pooling provisions allow plants and farms close to distributing plants to deliver producer milk on behalf of more distant plants, thereby providing for the pooling of milk that does not regularly and consistently serve the Class I market. According to the witness, adoption of Proposal 11 would require plants to transfer milk to obtain and maintain eligibility for pool qualification. The witness stated that Proposal 11 would require every handler to pool their producers on the basis of actual deliveries to distributing plants.

The Dean witness testified in support of Proposal 12 in the event supply plant systems were not eliminated as advanced in Proposal 11. According to the witness, Proposal 12 would limit the use of supply plant systems to a single handler rather than multiple handlers as currently provided in the order. The witness testified that allowing only a single handler to qualify pool supply plants through system pooling provisions would ensure that each handler is willing and able to demonstrate regular and consistent service to the fluid milk needs of the Central marketing area.

The Dean witness testified that Proposal 13 would require each plant in a supply plant system to meet at least 40 percent of the total performance standard required for pooling. According to the witness, Proposal 13 is similar to Proposal 11 in that it would prohibit the use of milk shipped directly from producer farms to qualify a supply plant system. However, the witness stated that Proposal 13 also would require every supply plant in a supply plant system to ship a significant volume of milk to the fluid market. The witness noted that qualification of distant milk would be discouraged by adoption of Proposals 12 and 13 since the use of milk shipped directly from producer farms for qualification purposes would be prohibited. The Dean witness expressed preferences for the adoption of Proposal 11 over Proposal 12, and adoption of Proposal 12 over Proposal 13.

A witness from DFA/PF expressed opposition to Proposals 11, 12, and 13, because their adoption would eliminate or overly restrict the operation of supply plant systems. On brief, DFA/PF noted that, as with elimination of the split plant provision, some small producers may not have alternative markets for their milk if supply plant systems are eliminated or are made overly restrictive.

In a post hearing brief, AMPI, et al., reiterated opposition to Proposals 11, 12, and 13. The AMPI, et al., brief opposed restrictions on pooling milk of producers ready, willing, and able to serve the Class I needs of the Central marketing area. The brief opposed elimination or restriction of supply plant systems contending such action would eliminate markets for the milk of small dairy farmers without alternative markets available.

Select and Continental also opposed adoption of Proposals 11, 12 and 13 in their post-hearing brief. The brief opposed eliminating or restricting supply plant systems on the basis that no verifiable evidence was presented demonstrating that supply plant systems do not provide consistent and reliable service to the Class I market.

D. Elimination of the Supply Plant Provision

A proposal by Dean, published in the hearing notice as Proposal 4, seeking to eliminate the supply plant provision, is not recommended for adoption.

A Dean witness characterized Proposal 4 as a preferred alternative to increasing supply plant performance standards sought in Proposals 1 and 5. The witness explained that if Proposal 4 is adopted, then Proposals 9–13, seeking to increase performance standards for supply plants and supply plant systems would not be needed. The witness testified that while the role of supply plants in the milk order system is to supply the needs of distributing plants, the milk supply of plants for the Central marketing area is only of residual concern because it provides an outlet for reserve producers when their milk is not needed for fluid use.

The Dean witness testified that supply plants no longer represent the most efficient means for supplying distributing plants. According to the witness, supply plants play a minor role in the Central marketing area, representing less than 5 percent of the milk shipped to distributing plants. According to the witness, milk assembled from farms must be received

at a supply plant, cooled and stored, and reloaded and delivered to distributing plants. The witness stated that the increased handling of milk through supply plants reduces its quality compared with milk that is direct delivered from farms. The witness said that direct delivery from farms to distributing plants is a superior method for ensuring that milk pooled on the order serves the Class I needs of the market. The witness was of the opinion that supply plants inappropriately facilitate pooling milk that does not regularly and consistently serve the Class I market.

A witness representing NAJ testified in opposition to the elimination of supply plants. According to the witness, elimination of the supply plant provision also would reduce the ability of dairy farmers to pool milk on the Central order. The witness was of the opinion that eliminating the supply plant provision would have a negative impact on the income of the cooperatives represented by NAJ. The witness stated that supply plants provide a legitimate means by which producers continue to serve the Class I market of the Central marketing area.

A witness for DFA/PF testified in opposition to the elimination of supply plants. According to the witness, provisions for supply plants should be provided because they continue to play a role in supplying milk to distributing plants. DFA/PF reiterated this opposition to Proposal 4 in their post-hearing brief. AMPI, et al., joined DFA/PF in opposing this proposal.

E. Standards for Producer Milk

Several amendments to the *Producer milk* provision of the Central order are recommended for adoption. The amendments were largely contained in Proposal 1. Changes to the producer milk provision are necessary to more accurately identify the milk of those dairy farmers that are regularly and consistently serving the Class I needs of the market. The recommended amendments for adoption include: (1) Increasing the touch-base standard so that one day's milk production of a dairy farmer must be delivered to a pool plant in each of the months of January, February and August through November for the milk of the dairy farmer to be eligible for diversion to a nonpool plant; and (2) Decreasing the diversion limit standards to not more than 75 percent of receipts during August through February, and not more than 80 percent of receipts for March through July.

The feature of Proposal 1 to geographically limit the location of nonpool plants eligible to receive diverted milk to those plants in States located in the marketing area and New Mexico is not recommended for adoption.

Proposal 1 would increase the touch-base standard to require the equivalent of at least one days' milk production of a dairy farmer be physically received at a pool plant in each of the months of January, February and August through November. If the touch-base standard is not met, the milk would have to be physically received at a pool plant in each of the months of March through July and December. The current touch-base standard of the Central order specifies a one-time only delivery standard.

The DFA/PF witness explained that the current one-time touch-base standard of the Central order should be replaced by the strengthened touch-base feature of Proposal 1. The witness continued that the months of January, February, and August through November, were added to the proposed touch-base standard to correspond with periods of higher Class I demands. The DFA witness explained that requiring one day's milk production of a producer to be delivered to a pool plant in each of these six months should increase milk available for Class I use. The DFA/PF witness was opposed to any touch-base standard of more than one day per month for the six months advanced by the proposal, as being overly restrictive.

The DFA/PF witness testified that increasing the touch-base standard and lowering the diversion limit standards of the Central order will help to ensure that milk that could not consistently and reliably demonstrate service to the Class I market is not pooled on the order. The witness testified that the pooling of such milk on the order reduces the blend price paid to producers who consistently and reliably serve the Class I needs of the Central marketing area.

The DFA/PF witness acknowledged that amendments to the pooling provisions of the Central order implemented in 2003 reduced the volume of milk pooled that was not serving the Class I needs of the market. However, the witness noted that those changes did not contemplate that milk from the Mountain States might seek to be pooled on the Central order. The witness was of the opinion that the current touch-base and diversion limit standards were inadequate to prevent the sharing of Class I revenue with the milk of producers that could not possibly serve the Class I market of the Central marketing area. The witness was of the opinion that if milk located far from the Upper Midwest marketing area [1] and currently pooled on the Upper Midwest order were to seek an alternative order on which to pool, the current pooling standards of the Central order make it the most likely candidate among Federal milk orders. The witness testified that the current pooling standards of the Central order can not adequately prevent such milk from pooling because the pooling standards are too liberal. According to the witness, this milk can not demonstrate regular and reliable service to the Class I market.

The DFA/PF witness illustrated that milk produced in Idaho, for example, cannot profitably be delivered to distributing plants located in the Central marketing area. According to the witness, milk produced in this region would need to travel more than 680 miles for delivery at the nearest distributing plant of the order located in Denver. The witness asserted that the current one-time touch-base standard combined with the existing diversion limit standards of the order provide the incentive for milk located far from the marketing area to be profitably pooled on the order which otherwise would not be economically feasible.

The witness provided a scenario where a single 50,000-pound load of milk delivered once to Denver could cause one million pounds of milk to be pooled on the Central order through the diversion process but delivered to plants far from the marketing area. According to the witness' calculations, a 50,000-pound load of milk delivered once to a pool plant located in Denver would incur a loss $4,640. However, the witness explained that each additional load of milk, up to one million pounds now qualified for diversion to nonpool plants located near producers farms, would return an additional $7,081. The witness emphasized that the milk portrayed in this example would rely solely on the liberal pooling standards of the order. The milk would never consistently and reliably supply the Central marketing area.

In another scenario, the DFA/PF witness illustrated the impact of 25 million pounds of milk a month shipped from southern Idaho that would be pooled on the Central order through the diversion process by meeting the one-time touch-base standard during the months of November 2003–January 2004. The witness explained that pooling this volume of milk would have

[1] Interim amendments to the pooling provision of the Upper Midwest order were implemented on July 1, 2005. See Tentative Partial Decision published in the **Federal Register**, April 4, 2005 (70 FR 19709).

reduced the Central order's blend price by $0.25 per cwt.

In a third scenario, the DFA/PF witness demonstrated how milk located in southern Idaho can be pooled every month through the diversion process by meeting the one-time touch-base standard of the Central order. The witness said that this scenario was based on the 58-month period of January 2000 to October 2004. The witness explained that this scenario assumes that a single 50,000-pound load of milk was shipped to a distributing plant located in the Central marketing area and all other milk diverted to nonpool plants are located in Idaho. The witness testified that the shipping handler would receive a positive return averaging $0.348 per cwt per month ($201,000 over the 58-month period) on the total volume of milk pooled. The DFA/PF witness concluded that from their scenarios, the current Central order diversion limit and touch-base standards encourage pooling of milk that can not and does not regularly and consistently supply the Class I needs of the market.

A brief submitted by Select and Continental supported the producer milk amendments called for in Proposal 1, except for limiting diversions to nonpool plants that are located in the States comprising the Central marketing area. The brief noted that the goal of the Federal order program should be to ensure that milk pooled on the order actually serves the Class I market.

Features of Proposal 5, offered by Dean, regarding diversion limits and touch-base standards should not be adopted. Proposal 5 seeks to raise the touch-base standard to 4 days in each month of the year and decrease diversion limits to 65 percent for the months of July through January, and 75 percent during the months of February through June. A Dean witness stated that increasing the touch base requirement would ensure the increased availability of milk to serve the needs of the fluid market. The witness testified that adopting higher touch-base and lower diversion limit standards would ensure that pool plants would keep their facilities operating at a higher level of output than would be the case if more milk were diverted.

The diversion limit standard feature of Proposal 5 was modified by Dean on brief. The modification specified that milk would not be eligible for diversion ''unless'' (instead of ''until'') milk has been physically received as producer milk at a pool plant, and the exception for a loss of Grade A status was changed to a period not to exceed 21 rather than 10 days in a calendar year.

The witness from NAJ, on behalf of AMPI, et al., testified in opposition to increasing the touch-base and lowering the diversion limit standards as advanced. The witness stated that the proposed lowering of diversion limits together with increasing supply plant performance standards as called for in Proposal 5 would have negative consequences for dairy farmer income, if adopted. The NAJ witness was of the opinion that the aim of Proposal 5 was to deter milk from being pooled on the order. It was the witness' opinion that the adoption of Proposal 5 would create marketing inefficiencies and additional costs for members of NAJ. The witness also was of the opinion that the adoption of Proposal 5 would discourage available milk supplies in the milkshed from pooling on the Central order.

The record reveals that the current pooling provisions of the Central order suggest that distributing plants in certain areas of the marketing area are having difficulty obtaining reliable milk supplies. Because this decision does not recommend the adoption of transportation credits (discussed later in this decision) for the movement of milk to distributing plants, increasing the performance standards for supply plants is a reasonable measure to better assure that all distributing plants of the order are adequately supplied. Additionally, other measures should be taken to prevent the pooling of milk which can not demonstrate regular and consistent service in supplying the Class I needs of the marketing area. The pooling of such milk would result in an unwarranted lowering of the blend price returned to those producers who demonstrate regular and consistent service in supplying the Class I needs of the market.

The pooling standards of all Federal milk marketing orders, including the Central order, are intended to ensure that an adequate supply of milk is available to meet the Class I needs of the market and provide the criteria for determining the producer milk that has demonstrated service in meeting the Class I needs of the market and thereby receive the order's blend price. The pooling standards of the Central order are represented in the *Pool plant, Producer,* and the *Producer milk* provisions of the order and are based on performance, specifying standards that if met, qualify a producer, the milk of a producer, or a plant to share in the benefits arising from the classified pricing of milk.

Pooling standards that are performance-based provide the only viable method for determining those producers eligible to share in the marketwide pool. It is usually the additional revenue generated from the higher-valued Class I use of milk that adds additional income to producers, and it is reasonable to expect that only those producers who consistently bear the costs of supplying the market's fluid needs should share in the returns arising from higher-valued Class I sales. An important objective of pooling standards is identifying the milk that serves the fluid milk needs of the market, a feature which if ineffective can result in pooling milk that is not providing such service. Record evidence supports finding that certain features of pooling standards of the Central order relating to performance standards for supply plants, diversion limits, touch-base, and split plants need to be amended given the pooling of milk that does not regularly and consistently serve the Class I needs of the Central marketing area.

The most recent amendments to the Central order (published in the August 27, 2003, Final Decision (68 FR 51640)) intended to correct similar inadequacies of the supply plant pooling provisions and diversion limit standards for the consolidated Central order. However, the record reveals that the combination and features adopted for pool plants in 2003, have not been as effective as intended to reasonably assure that only milk of producers who regularly and consistently serve the Class I market is pooled on the order.

Record evidence reveals that the performance and pooling standards of the Central order are inadequate to ensure that the benefits of consistently and reliably servicing the Class I market are shared equitably among those producers who actually bear the costs of serving that market. The record evidence demonstrates that milk distant from the Central marketing area does not provide reasonable service to the Class I market but can be pooled on the order because of current pooling standards. This evidence shows that pooling large volumes of milk at lower class-use values has lowered the order's blend price. Specifically, the record shows that the current one-time touch-base standard and the diversion limit standard of the order does not properly identify the milk of producers who reliably and consistently serve the Class I market.

The record demonstrates that current pooling standards of the Central order make it the most logical order for distant milk—such as in Southern Idaho—to be pooled. The record shows that the current performance standards of the Central order are insufficient to prevent

milk from qualifying for pooling while not performing service to the Class I market.

In addition, the record provides evidence that milk produced in areas distant from the marketing area cannot profitably be delivered to distributing plants in the Central marketing area. However, the current liberal touch-base and diversion limit standards make pooling on the Central order attractive while reducing the blend price of the order for those producers who actually provide service to the Class I market.

Record evidence reveals the continued importance of supply plants for producers whose milk provides consistent and reliable service to the Class I market. According to the record, opposition to restrictive supply plant standards beyond those advanced in Proposals 1 and 10 was based on the continued need for supply plant service to distributing plants in the marketing area. Similarly, the record reveals a consensus among producers concerning their continued support for supply plant systems as an integral part of milk supply networks in the Central marketing area. Opposition to the elimination or additional restriction of supply plants and supply plant systems in Proposals 4, 11, 12, and 13, is revealed by the record to be based on the continued importance of supply plant systems to supplying the Class I market.

Record evidence from proponents and opponents of limiting diversions to supply plants located in the marketing area or New Mexico supports concluding that dairy farmers in some regions of the Central marketing area rely on supply plants to market their milk. In addition, the record contains evidence that supply plants and supply plant systems continue to provide necessary service to the Class I market without regard to the location of those plants or plant systems. According to the record, distant milk may use the pooling standards of the Central order as a means to pool milk that will never perform service to the Class I market. However, the record does not show clearly that milk diverted to supply plants outside the marketing area or New Mexico cannot be part of the legitimate reserve of the market which may require additional pooling safeguards. Performance rather than plant location continues to be the standard for identifying the milk of producers who should share in the benefits of pooling. In that regard, this decision finds agreement with the opponents of limiting diversions to supply plants located within the marketing area or New Mexico, as sought in Proposal 1, to serve the legitimate needs of the market.

This decision finds that several of the performance standards advanced in Proposal 1 are reasonable in light of other recommended changes to the order's pooling provisions. The combination of amendments increasing supply plant performance standards, modifying the split plant provision, reducing diversion limit standards and increasing the touch-base standard are appropriate in light of denying proposals to establish transportation and assembly credits. The recommended amendments should more accurately identify the milk of those producers that provide a consistent and reliable supply of milk to the Class I needs of the Central marketing area and assure that distributing plants are adequately supplied.

The record indicates that milk located either inside or outside the marketing area can be reported as diverted milk by a pooled handler. This milk is eligible to receive the order's blend price. Under the current pooling provisions, this can occur after a one-time delivery to a Central marketing area pool plant. After the initial delivery, however, such milk need never again be physically delivered to a Central marketing area pool plant. The record evidence confirms that usually this milk is delivered to a nonpool plant located nearer the farms of producers located far from the marketing area who cannot serve the Class I market. It is therefore appropriate to amend the order's diversion provisions to ensure that milk pooled through the diversion process is part of the legitimate reserve supply of the pool plant from which it was diverted. It is necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process to prevent the unwarranted reduction of the order's blend price.

However, the record does not support finding that diversions to plants not located within the marketing area or New Mexico cannot be part of the legitimate reserve supply for the marketing area. In this regard, the proposed limitation on diversions based on plant location is not reasonable. Based on the record, the proposed increase in the touch-base standard and lowering of the diversion limitation standard should be adequate to ensure that milk consistently and reliably serving the Class I market is properly identified. Accordingly, the portion of Proposal 1 seeking to limit diversions to plants located in the marketing area or New Mexico is not recommended for adoption.

This decision finds that the touch-base standard should be amended so that at least one days' milk production of a dairy farmer is physically received at a pool plant during January, February, and August through November for the milk of the dairy farmer to be eligible for diversion to a nonpool plant. Amending the touch-base standard should reduce the ability of milk not performing a consistent and reliable service to the Class I market from being pooled. The months of January, February, and August through November are, according to the record, the high demand months for fluid milk. Adoption of the one-day touch base standard for each of these three months would tend to more properly identify the milk of those producers serving the market's Class I needs. Accordingly, the proposal is recommended for adoption.

Record evidence does not support finding that the 4-day touch base standard advanced by Dean would improve the identification of dairy farmers whose milk serves beyond what a 1-day standard would provide within the context of current marketing conditions. This will be reinforced by the other amendments to the order's pooling standards recommended for adoption.

The proposal requiring a handler to make a 12-month commitment if opting to create a split plant would ensure that the milk shipped from the pool side of a split-plant serves the Class I market. This proposal (Proposal 10, advanced by Dean) is a reasonable modification of the split plant feature for supply plants to provide for orderly marketing and maintain the integrity and intent of the order's performance standards. The proposal retains the principle that milk regularly and consistently demonstrating service to the Class I needs of the market should benefit from being pooled on the order. Accordingly, Proposal 10 is recommended for adoption.

The Federal milk order system recognizes that there are costs incurred by producers in servicing an order's Class I market. The primary reward to producers for performing such service is receiving the order's blend price. Taken as a whole, the amended pooling provisions will ensure that milk seeking to be pooled consistently demonstrates service in meeting the marketing area's Class I needs. Consequently, adoption of these amended pooling provisions will provide for more equitable sharing of revenue generated from Class I sales among those producers who bear those

costs and assure Class I handlers of a regular and reliable supply for fluid use.

2. Establishing Pooling Limits

Preliminary Statement

Federal milk marketing orders rely on the tools of classified pricing and marketwide pooling to assure an adequate supply of milk for fluid (Class I) use and to provide for the equitable sharing of the revenues arising from the classified pricing of milk. Classified pricing assigns a value to milk according to how the milk is used. Regulated handlers who buy milk from dairy farmers are charged class prices according to how they use the farmer's milk. Dairy farmers are then paid a weighted average or ''blend'' price. The blend price that dairy farmers are paid for their milk is derived through the marketwide pooling of all class uses of milk in a marketing area. Thus each producer receives an equal share of each use class of milk and is indifferent as to the actual Class for which the milk was used. The Class I price is usually the highest class price for milk. Historically, the Class I use of milk provides the additional revenue to a marketing area's total classified use value of milk.

The series of Class prices that are applicable for any given month are not announced simultaneously. The Class I price and the Class II skim milk price are announced prior to the beginning of the month for which they will be effective. Class prices for milk in all other uses for the month are not determined until on or before the 5th day of the following month. The Class I price is determined by adding a differential value to the higher of either an advanced Class III or Class IV value. These values are calculated based on formula using National Agricultural Statistics Service (NASS) survey prices of cheese, butter, and nonfat dried milk powder for the first two weeks of the prior month. For example, the Class I price for August is announced in late July and is based on the higher of the Class III or IV value computed using NASS commodity price surveys for the first two weeks of July.

The Class III and IV prices for the month are determined and announced after the end of the month based on the NASS survey prices for the selected dairy commodities during the month. For example, the Class III and IV prices for August are based on NASS survey commodity prices during August. A large increase in the NASS survey price for the selected dairy commodities from one month to the next can result in the Class III or IV price exceeding the Class I price. This occurrence is commonly referred to by the dairy industry as a ''Class price inversion.'' A producer price inversion generally refers to when the Class III or IV price exceeds the average classified use value, or blend price, of milk for the month. Price inversions have occurred with increasing frequency in Federal milk orders since the current pricing plan was implemented on January 1, 2000, despite efforts made during Federal Order Reform to reduce such occurrences. Price inversions can create an incentive for dairy farmers and manufacturing handlers who voluntarily participate in the marketwide pooling of milk to elect not to pool their milk on the order. Class I handlers do not have this option; their participation in the marketwide pool is mandatory.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Classes. In essence, the PPD is the dairy farmer's share of the additional/reduced revenues associated with the Class I, II and IV milk pooled in the market. If the value of Class I, II and IV milk in the pool is greater than the Class III value, dairy farmers receive a positive PPD. However, a negative PPD can occur if the value of the Class III milk in the pool exceeds the value of the remaining classes of milk in the pool. This can occur as a result of the price inversions discussed above.

The Central Federal order operates a marketwide pool. The Order contains pooling provisions which specify criteria that, if met, allow dairy farmers to share in the benefits that arise from classified pricing through pooling. The equalization of all class prices among handlers regulated by an order is accomplished through a mechanism known as the producer settlement fund (PSF). Typically, Class I handlers pay the difference between the blend price and their use-value of milk into the PSF. Manufacturing handlers typically receive a draw from the PSF, usually the difference between the Class II, III or IV price and the blend price. In this way, all handlers pay the Class value for milk and all dairy farmer suppliers receive at least the order's blend price.

When manufacturing class prices of milk are high enough to result in a use-value of milk for a handler that is higher than the blend price, handlers of manufacturing milk may choose to not pool their milk receipts. Opting to not pool their milk receipts allows these handlers to avoid the obligation of paying into the PSF. The choice by a manufacturing handler to not pool their milk receipts is commonly referred to as ''de-pooling''. When the blend price rises above the manufacturing class use-values of milk these same handlers again opt to pool their milk receipts. This is often referred to as ''re-pooling''. The ability of manufacturing handlers to de-pool and re-pool manufacturing milk is viewed by some market participants as being inequitable to both producers and handlers.

The ''De-Pooling'' Proposals

Proponents are in agreement that milk marketing orders should contain provisions that will tend to deter the practice of de-pooling. Four proposals intending to deter the de-pooling of milk were considered in this proceeding. The proposals offered different degrees of deterrence against de-pooling by establishing limits on the amount of milk that can be re-pooled. The proponents of these four proposals are generally of the opinion that de-pooling erodes equity among producers and handlers, undermines the orderly marketing of milk and is detrimental to the Federal order system.

Two different approaches to deter de-pooling are represented by these four proposals. The first approach, published in the hearing notice as Proposals 2 and 8, addresses de-pooling by limiting the volume of milk a handler can pool in a month to a specified percentage of what the handler pooled in the prior month. The second approach, published in the hearing notice as Proposals 6 and 7, addresses de-pooling by establishing what is commonly referred to as a ''dairy farmer for other markets'' provision. These proposals would require milk of a producer that was de-pooled to not be able to be re-pooled by that producer for a defined time period. All proponents agreed that while none of the proposals would completely eliminate de-pooling, they would likely deter the practice.

Of the four proposals received that would limit de-pooling, this decision recommends Proposal 2, offered by DFA/PF, for adoption. Specifically, adoption of the proposal would limit the volume of milk a handler could pool in a month to no more than 125 percent of the volume of milk pooled in the prior month. Milk diverted to nonpool plants in excess of this limit would not be pooled, and milk shipped to pool distributing plants would not be subject to the 125 percent limitation. The 125 percent limitation may be waived at the discretion of the Market Administrator for a new handler on the order or for an existing handler whose milk supply changes due to unusual circumstances.

As published in the hearing notice, Proposal 8, offered by Dean Foods, addresses de-pooling in a similar manner as Proposal 2, but would

establish a limit on the total volume of milk a handler could pool in a given month to 115 percent of the volume that was pooled in the prior month. This proposal was modified at the hearing to allow for pooling the milk receipts of a new handler on the order without volume restrictions.

As published in the hearing notice, Proposals 6 and 7, also offered by Dean Foods would address de-pooling by establishing defined time periods during which de-pooled milk could not be pooled. Proposal 6 essentially would require an annual pooling commitment by handler to the market. Under Proposal 6, if the milk of a producer is de-pooled in a month, then the milk of the producer could not re-establish eligibility for pooling on the order during the following eleven months unless ten days milk production was delivered to a pool distributing plant. Under Proposal 6, handlers that de-pool milk have limited options to return milk to the pool, either shipping ten days milk production of a producer to a pool distributing plant or waiting eleven months for eligibility to re-pool.

Under Dean's Proposal 7, a handler that de-pools milk cannot re-pool for a 2 to 4 month time period, depending on the month in which de-pooling occurred. Proposal 7 also provides the option to return milk to the pool by shipping ten days milk production of a producer to a pool distributing plant. Proposals 6 and 7 were modified at the hearing.

A witness appearing on behalf of DFA/PF testified in support of Proposal 2 and in general opposition to the practice of de-pooling. The witness testified that adoption of Proposal 2 would minimize the practice of de-pooling since not all the milk that was de-pooled could immediately return to the pool in the following month. The witness noted that both DFA and Prairie Farms de-pool milk when advantageous but stressed that the practice of de-pooling and re-pooling is detrimental to the Federal order system.

The DFA/PF witness testified that restricting the pooling of milk on the basis of prior performance is not a new concept in Federal milk marketing order provisions. The witness referenced the ''dairy farmer for other markets'' provision currently in place in the Northeast order as an example of pooling provisions based on prior performance. The witness noted that Proposal 2 is similar to a ''dairy farmer for other markets'' provision as it limits pooling based on the handler's previous month's pooled volume. The DFA/PF witness speculated that the manner in which Proposal 2 attempts to reduce the practice of de-pooling is too drastic for some and not strong enough for others. Nevertheless, adoption of Proposal 2, the witness stressed, would provide an appropriate economic consequence to discourage those entities that might otherwise choose to de-pool.

The DFA/PF witness was of the opinion that since the purpose of Federal milk marketing orders are to ensure an adequate supply of milk for the fluid market, equitably share pool proceeds, and promote orderly marketing, milk order provisions should attract milk to its highest valued use when needed and provide for milk to clear the market when not needed in higher-class uses. Since Class I milk cannot be de-pooled, the witness noted, Class I handlers can be at a disadvantage to handlers who can de-pool during periods of price inversions. Class I handlers are unable to maintain a competitive pay price for their milk supply, the witness explained, since Class II, III or IV handlers who de-pool may pay dairy farmers a higher price for their milk. The witness stressed that when the Class I price is not high enough to attract milk from other uses, disorderly conditions arise in the marketplace.

The DFA/PF witness asserted that when a Class II, III or IV handler de-pools milk, inequities arise for the dairy farmers who supplied the de-pooling handler. In the absence of provisions to discourage de-pooling, the witness explained, de-pooling becomes a rational economic practice since only Class I milk is required to be pooled and its value shared through the order's blend price.

The DFA/PF witness testified that the combination of de-pooling with recent increasingly volatile milk prices requires immediate regulatory measures to mitigate the disorderly effects that de-pooling has on market participants. The witness cited market administrator data showing that since implementation of Federal order reform in 2000 there have been 43 months when opportunities to de-pool existed for the Central order.

Relying on statistics provided by the market administrator, the witness illustrated that in April 2004 a handler in the Central order choosing to de-pool was able to pay over $4.00 per hundredweight (cwt) more for milk than a Class I handler unable to de-pool because the Class III price was $19.66 and the uniform price was $15.64. The witness characterized pricing differences of this magnitude as disruptive, disorderly and a competitive disadvantage for any Class I handler. When similarly situated handlers face disparate costs in procuring a supply of milk, the witness added, producers in common procurement areas are negatively affected. The witness asserted that this is a disorderly marketing condition.

Two DFA member dairy farmers from Nebraska testified in support of Proposal 2. Both witnesses maintained that they received smaller milk checks than they otherwise would have received if milk had not been de-pooled. The witnesses added that when fluid milk bottlers experience difficulties in obtaining a milk supply, the costs to supply that milk should be passed on to consumers, not dairy farmers. The witnesses also stated that in order to equalize returns from all classified uses of milk, there needs to be a commitment to have all milk pooled every month of the year.

Two DFA member dairy farmers from Missouri also testified in support of Proposal 2. The witnesses noted that de-pooling amplifies the problem of negative PPD's. The witnesses were of the opinion that de-pooling creates differences in pay prices among similarly located dairy farmers whose milk is pooled in the Central market, and that different pay prices represent a disorderly marketing condition. The witnesses stated that in order to enjoy the additional funds usually generated by the Class I market, handlers should be required to demonstrate that their milk is available for the Class I market by not de-pooling.

A dairy farmer from Kansas testified in opposition to the practice of de-pooling. The witness was of the opinion that a commitment to serve the Class I market should be required in order to share in the blend price. The witness stressed that in order to share in the returns generated from the marketwide pool handlers and cooperatives should participate in the pool every day not only when it may be profitable.

A witness testified on behalf of Dean in support of Proposal 8. The witness explained that Proposal 8 addresses the practice of de-pooling in a similar manner as Proposal 2 but would limit the pooling of milk to 115 percent of the volume that was pooled in the prior month. The witness was of the opinion that a monthly pooling limit would discourage the de-pooling of milk since the greater the proportion of a handler's milk that is de-pooled, the longer it will take to re-pool that milk. Accordingly, the witness concluded, those who benefit the most from de-pooling also would have the most difficulty in attempting to regain pool status.

A witness for Dean also testified in support of Proposals 6 and 7 which would establish defined time periods

during which de-pooled milk could not be re-pooled. The witness testified that Dean prefers adoption of Proposal 6 over Proposal 7. Proposal 6 would impose a 12-month period during which de-pooled milk could not again be pooled while Proposal 7 would establish a 2 to 4 month period during which de-pooled milk could not again be pooled. Under Proposal 6, the witness explained, if the milk of a producer were de-pooled, the milk could only reassociate before the annual commitment period if ten days production of the milk of the producer was delivered to a pool distributing plant. According to the witness, Proposal 7 would provide an option for milk that had been de-pooled to return to the pool during certain specified months of the year depending on when the milk was de-pooled or by shipping ten days production of the milk of a producer to a pool distributing plant.

The Dean witness testified that a similar provision to those contained in Proposals 6 and 7 is currently in place in the Northeast order. The witness was of the opinion that defined time periods during which de-pooled milk cannot again become pooled causes handlers to behave differently by taking a longer term view of pooling. The witness explained that handlers in the Northeast order need to evaluate more than the current month's economic impacts of pooling or not pooling milk, along with possible future missed opportunities.

The Dean witness further contrasted the current ''dairy farmer for other markets'' provision effective in the Northeast to the standards proposed in Proposals 6 and 7. The witness testified that in the Northeast order, July is a month when de-pooled milk can return to the pool regardless of when the milk had been de-pooled during the previous year. Relying on market administrator data, the witness related that during the months of February through July 2004, large volumes of milk were de-pooled from the Northeast order. Because of the ''dairy farmer for other markets'' provision, the witness explained, milk that was de-pooled during the months of February through June could not return to the pool until July. During this period, noted the Dean witness, a large volume of milk usually pooled on the Northeast order was pooled on the Mideast order.

The Dean witness testified that Proposal 6 would require a handler that de-pooled milk in a month to remain off the pool for eleven additional months or ship 10 days milk production of a producer to a pool distributing plant in order for all milk of a producer to return to the pool, while Proposal 7 would provide the option to either return during designated months depending on the month in which milk was de-pooled, or ship 10 days milk production of a producer to a pool distributing plant in order for all milk of a producer to return to the pool.

A second Dean witness offered additional testimony in support of Proposal 6. The witness testified that Proposal 6 would exclude from the pool the milk of any dairy farmer not continuously pooled under a Federal milk order during the previous twelve months. The only exception to this exclusion would be a dairy farmer who temporarily lost Grade A status but was reinstated as a Grade A producer within 21 days, noted the additional Dean witness. The witness emphasized that the portion of Proposal 6 that would require delivery of 10 days milk production of a dairy farmer to a pool distributing plant in order for all milk of a producer to re-join the pool would discourage de-pooling. The 10 day delivery requirement would insure that participation in the pool was open to any dairy farmer for whom it was technically and economically feasible to supply milk for fluid use. According to the witness, Proposals 6 and 7 also would make more milk readily available to service the fluid needs of the market.

The additional Dean witness also stressed that adoption of Proposal 6 would not totally eliminate de-pooling but would make it more difficult to re-pool milk after it had been de-pooled. The Dean witness testified that producer milk continuously pooled on the Central, or any other Federal milk order, which shares in both the costs and benefits of pool participation on a continuous basis would not be affected by adoption of Proposal 6.

The second Dean witness added that adoption of Proposal 6 would increase returns to producers and provide for more orderly marketing conditions. The witness was of the opinion that adoption of Proposal 6 would cause Class II, III or IV milk to remain pooled during times when the blend price was lower than the respective class price. This would increase the PPD, by making it less negative, and raise the blend price received by all producers, the witness concluded. Adoption of Proposal 6 also would cause some Class III milk that is de-pooled to never return to the pool, the witness noted, since it would no longer be financially advantageous.

A Kansas dairy farmer testified in support of Proposal 6. The witness stated that de-pooling cost Kansas dairymen who supplied the needs of the fluid market $6.2 million between March 2004 and October 2004. The witness spoke in favor of any proposal that would require greater commitment to servicing the Class I needs of the Central marketing area.

A DFA member dairy farmer from Missouri testified that de-pooling hurts dairy farmers and was in favor of any proposal that would limit the ability for milk to return to the pool the immediate month after de-pooling. The witness stated that there should be a waiting period of at least 2 or 3 months to pool milk after the milk had been de-pooled or a limit on the milk volume that could return to the pool the month after de-pooling.

A witness appearing on behalf of Dean testified in opposition to Proposal 2. The witness was of the opinion that limiting pooling to 125 percent of receipts pooled during the previous month was too loose of a standard and urged the adoption of Proposal 6 or Proposal 8.

A witness appearing on behalf of AMPI, et al., testified in opposition to Proposals 2, 6, 7, and 8. The witness was of the opinion that de-pooling was an issue that was national in scope, and should be addressed in a national hearing. The witness testified that the voluntary option of pooling or not pooling milk delivered to a nonpool plant has been a mainstay of the Federal order system and should not be amended. The witness was of the opinion that Proposals 2, 6, 7, and 8 do not address the root cause of price inversions—advance Class I pricing—but rather only treats the symptom of the problem. Class I prices are announced by the USDA in advance, noted the witness, while milk prices for manufactured uses are announced after the month has passed. This can cause a lag between changes in the value of milk and changes in the advanced Class I price, added the witness, sometimes resulting in a Class III price that exceeds the uniform and Class I price, otherwise known as a price inversion. The witness added that it would be appropriate to reconsider whether advanced pricing remains sound regulatory policy.

The AMPI, et al., witness was also of the opinion that Federal order Class I price differentials are artificially high. Milk used to produce cheese, the witness noted, is priced entirely through the marketplace and receives benefit from the Federal order system only when the uniform price is higher than the Class III price. Adoption of Proposals 2, 6, 7 or 8, the witness noted, would penalize milk used in the production of cheese by limiting the amount of milk that could be pooled and was a radical change in Federal

order pooling philosophy. The witness added that adoption of these proposals would require cheese manufacturers to estimate Federal order blend prices and PPDs in an effort to decide whether it was more profitable to de-pool, remain pooled or a combination of both.

The AMPI, et al., witness testified that the de-pooling of milk does not cause any reduction to the amount of milk available to serve the fluid market. The witness was of the opinion that when milk was de-pooled there was not a reduction in the amount of milk made available to service the fluid market since the de-pooled milk may rejoin the pool the next month. The AMPI, et al., witness added that the Federal order system should be sharing money derived from Class I handlers, not taking money from dairy farmers whose milk is used in the production of cheese simply to offset a low Class I price created by the timing of announcing Class prices.

The AMPI, et al., witness was also of the opinion that the Department should not consider Proposals 2, 6, 7 and 8 on an emergency basis. The witness testified that the proposed shift in regulatory policy as contained within these proposals should require the issuance of a recommended decision with opportunity for public comment.

A witness representing NAJ testified that the problems arising from de-pooling are a result of the timing of price announcements. The witness also stated that the de-pooling issue would best be addressed at a national hearing.

In a post hearing brief, DFA/PF reiterated the position that the pooling of milk in any month should not exceed 125 percent of the milk volume pooled in the previous month. The brief indicated that the pooling proposals (Proposals 6, 7, and 8) advanced by Dean are too restrictive for the current marketing conditions in the Central marketing area. According to the brief, Proposal 2 represents the least restrictive pooling proposal that could be supported by current marketing conditions while providing a reasonable deterrent to de-pooling.

A brief on behalf of AMPI, et al., reiterated the view that de-pooling and re-pooling should be addressed on a national basis and that pooling decisions should continue to be based on immediate market conditions. The brief expressed the view that the ability to de-pool continues to be unrelated to the willingness to serve the needs of the Class I market.

A brief by Select/Continental supported Proposal 6 as advanced by Dean. The brief noted that this ''dairy farmer for other markets'' proposal offered the most comprehensive means to eliminate the inequities of de-pooling while maintaining the strongest possible support for producers continuously and reliably serving the needs of the Class I market. The brief noted that Proposals 2 and 8, seeking to restrict the ability to pool to 125 percent and 115 percent of the previous month's volume respectively, was an improvement over current conditions but was not as robust as Proposal 6 which would require a 12-month pooling commitment by handlers. The brief found agreement with AMPI, et al., that de-pooling is an issue that should be addressed on a national basis.

The brief by Dean reiterated support for Proposals 6, 7 or 8, in order of preference, seeking to restrict the ability of handlers to de-pool and re-pool milk in the Central marketing area. The brief expressed the view that Class I handlers who are required to pool their milk receipts are at a constant financial disadvantage to those handlers who may opt to pool or not pool.

All Federal milk marketing orders require the pooling of milk received at pool distributing plants—which is predominantly Class I milk—and all pooled producers and handlers on an order share in the additional revenue arising from higher valued Class I sales. Manufacturing handlers and cooperatives of Class II, III and IV uses of milk who meet the pooling and performance standards make all of their milk receipts eligible to be pooled and usually find it advantageous. Manufacturing handlers and cooperatives who supply a portion of their total milk receipts to Class I distributing plants receive the difference between their use-value of milk and the order's blend price. Federal milk orders, including the Central order, establish limits on the volume of milk eligible to be pooled that is not used for fluid uses primarily through diversion limit standards. However, manufacturing handlers and cooperatives are not required, as are Class I handlers, to pool all their eligible milk receipts.

According to the record, manufacturing handlers and cooperatives have opted to not pool their milk receipts when the manufacturing class prices of milk are higher than the order's blend price—commonly referred to as being ''inverted.'' During such months, manufacturing handlers and cooperatives have elected to not pool all of their eligible milk receipts because doing so would require them to pay into the PSF of the order, the mechanism through which handler and producer prices are equalized. When prices are not inverted, handlers would pool all of their eligible receipts and receive a payment or draw from the PSF. In receiving a draw from the PSF, such handlers will have sufficient money to pay at least the order's blend price to their supplying dairy farmers.

When manufacturing handlers and cooperatives opt to not pool all of their eligible milk receipts in a month, they are essentially avoiding a payment to the PSF. This, in turn, enables them to avoid the marketwide sharing of the additional value of milk that accrues in the higher-valued uses of milk other than Class I. When the Class I price again becomes the highest valued use of milk, or when other class-price relationships become favorable, the record reveals that these same handlers opt to again pool their eligible milk receipts and draw money from the PSF. It is the ability of manufacturing handlers and cooperatives opting to not pool milk and thereby avoid the marketwide sharing of the revenue accruing from non-Class I milk sales that is viewed by proponents as giving rise to disorderly marketing conditions. According to proponents, producers and handlers who cannot escape being pooled and priced under the order are not assured of equitable prices.

The record reveals that since the implementation of Federal milk marketing order reform in January 2000, and especially in more recent years, large and rapid increases in manufactured product prices during certain months have provided the economic incentives for manufacturing handlers to opt not to pool eligible milk on the Central order. For example, during the three month period of February to April 2004, the Class III price increased over 65 percent from $11.89 per cwt to $19.66 per cwt. During the same time period, total producer milk pooled on the Central order decreased by nearly 50 percent from 1.16 billion pounds to 612 million pounds. When milk volumes of this magnitude are not pooled the impacts on producer blend prices are significant. Producers who incur the additional costs of consistently servicing the Class I needs of the market receive a lower return than would otherwise have been received if they did not continue to service the Class I market. Prices received by dairy farmers who supplied the other milk needs of the market are not known. However, it is reasonable to conclude that prices received by dairy farmers were not equitable or uniform.

The record reveals that ''inverted'' prices of milk are generally the result of the timing of Class price announcements. Despite changes made as part of Federal milk order reform to

shorten the time period of setting and announcing Class I milk prices and basing the Class I price on the higher of the Class III or Class IV price to avoid price inversions, large month-to-month price increases in Class III and Class IV product prices sometimes trumped the intent of better assuring that the Class I price for the month would be the highest-valued use of milk. In all orders, the Class I price (and the Class II skim price) is announced prior to or in advance of the month for which it will apply. The Class I price is calculated by using the National Agricultural Statistics Service (NASS) surveyed cheese, butter, nonfat dry milk and dry whey prices for the two most current weeks prior to the 24th day of the preceding month and then adding a differential value to the higher of either the advanced Class III or Class IV price.

Historically, the advance pricing of Class I milk has been used in all Federal orders because Class I handlers cannot avoid regulation and are required to pool all of their Class I milk receipts, they should know their product costs in advance of notifying their customers of price. However, milk receipts for Class III and IV uses are not required to be pooled; thus, Class III and IV product prices (and the Class II butterfat value) are not announced in advance. These prices are announced on or before the 5th of the following month. Of importance here is that manufacturing plant operators and cooperatives have the benefit of knowing all the classified prices of milk before making a decision to pool or not pool eligible receipts.

The record reveals that the decision of manufacturing handlers or cooperatives to pool or not pool milk is made on a month-to-month basis and is generally independent of past pooling decisions. Manufacturing handlers and cooperatives that elected to not pool their milk receipts did so to avoid making payments to the PSF and they anticipated that all other manufacturing handlers and cooperatives would do the same. However, the record indicates that normally pooled manufacturing handlers and cooperatives met the pooling standards of the order to ensure that the Class I market was adequately supplied and that they established eligibility to pool their physical receipts, including diversions to nonpool plants. Opponents to proposals to deter de-pooling are of the view that meeting the pooling standards of the order and deciding how much milk to pool are unrelated events. Proponents took the view that participation in the marketwide pool should be based on a long-term commitment to supply the market because in the long-term it is the sales of higher priced Class I milk that adds additional revenue to the pool.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Class I, II and IV milk pooled. In essence, the PPD is the residual revenue remaining after all butterfat, protein and other solids values are paid to producers. If the pooled value of Class I, II and IV milk is greater than the Class III value, dairy farmers receive a positive PPD. While the PPD is usually positive, a negative PPD can occur when class prices rise rapidly during the six-week period between the time the Class I price is announced and the time the Class II butterfat and III and IV milk prices are announced. When manufacturing prices fall, this same lag in the announcement of class prices yields a positive PPD.

As revealed by the record, when manufacturing plants and cooperatives opted to not pool milk because of inverted price relationships, PPD's were much more negative. When this milk is not pooled, a larger percentage of the milk remaining pooled will be ''lower'' priced Class I milk. When manufacturing milk is not pooled, the weighted average value of milk decreases relative to the Class II, III or IV value making the PPD more negative. For example, record evidence demonstrated that in April 2004, a month when a sizeable volume of milk was not pooled, the PPD was a negative $3.97 per cwt. If all eligible milk had been pooled, the PPD would have been $.87 per cwt higher or a negative $3.10 per cwt.

The record reveals that when manufacturing handlers and cooperatives opt to not pool milk, unequal pay prices may result to similarly located dairy farmers. For example, Dean noted that when a cooperative delivers a high percentage of their milk receipts to a distributing plant, it lessens their ability to not pool milk, making them less competitive in a marketplace relative to other producers and handlers. Other evidence in the record supports conclusions identical to Dean that when a dairy farmer or cooperative is able to receive increased returns from shipping milk to a manufacturing handler during times of price inversions, other dairy farmers or cooperatives who may have shipped more milk to a pool distributing plant are competitively disadvantaged.

The record of this proceeding reveals that the ability of manufacturing handlers and cooperatives to not pool all of their eligible milk receipts gives rise to disorderly marketing conditions and warrants the establishment of additional pooling standards to safeguard marketwide pooling. Current pooling provisions do not require or prohibit handlers and cooperatives from pooling all eligible milk receipts. However, the record reveals that when handlers and cooperatives opt to not pool milk inequities arise among producers and handlers that are contrary to the intent of the Federal milk marketing order program—maintaining orderly marketing conditions.

The record contains extensive testimony regarding the effects on the milk order program resulting from advance pricing and the priority the milk order program has placed on the Class I price being the highest valued use of milk. It remains true that the Class I use of milk is still the highest valued use of milk notwithstanding those occasional months when milk used in usually lower-valued classes may be higher. This has been demonstrated by an analysis of the effective Class I differential values—the difference in the Class I price at the base zone of Jackson County, Missouri, and the higher of the Class III or Class IV price—for the 65 month period of January 2000 through May 2005 performed by USDA.[2] These computations reveal that the effective monthly Class I differential averaged $1.97 per cwt. Accordingly, it can only be concluded that in the longer-term Class I sales continue to be the source of additional revenue accruing to the pool even when, in some months, the effective differential is negative.

Price inversions occur when the wholesale price for manufactured products rises rapidly indicating a tightening of milk supplies to produce those products. It is for this reason that the Department chose the higher of the Class III and Class IV prices as the mover of the Class I price. Distributing plants must have a price high enough to attract milk away from manufacturing uses to meet Class I demands. As revealed by the record, this method has not been sufficient to provide the appropriate price signals to assure an adequate supply of milk for the Class I market. Accordingly, additional measures are needed as a means of assuring that milk remains pooled and thus available to the Class I market. Adoption of Proposal 2 is a reasonable measure to meet the objectives of orderly marketing.

[2] Official notice is taken of data and information published in Market Administrator Bulletins as posted on individual Market Administrator Web sites.

This decision does find that disorderly marketing conditions are present when producers do not receive uniform prices. Handlers and cooperatives opting to not pool milk do not account to the pool at the classified use-values of those milk receipts. They do not share the higher classified use-value of their milk receipts with all other producers who are pooled on the order are incurring the additional costs of servicing the Class I needs of the market. This is not a desired or reasonable outcome especially when the same handlers and cooperatives will again pool all of their eligible receipts when class-price relationships change in a subsequent month. These inequities borne by the market's producers are contrary to the intent of the Federal order program's reliance on marketwide pooling—ensuring that all producers supplying the market are paid uniform prices for their milk regardless of how the milk of any single producer is used.

It is reasonable that the order contain pooling provisions intended to deter the disorderly conditions that arise when de-pooling occurs. Such provisions maintain and enhance orderly marketing. Accordingly, this decision finds it reasonable to recommend adoption of provisions that would limit the volume of milk a handler or cooperative may pool in a month to 125 percent of the total volume pooled by the handler or cooperative in the prior month. Adoption of this standard will not prevent manufacturing handlers or cooperatives from electing to not pool milk. However, it should serve to maintain and enhance orderly marketing by encouraging participation in the marketwide pooling of all classified uses of milk.

Consideration was given on whether de-pooling should be considered at a national hearing with other, broader national issues of milk marketing. However each marketing area has unique marketing conditions and characteristics which have area-specific pooling provisions to address those specific conditions. Because of this, pooling issues are considered unique to each order. This decision finds that it would be unreasonable to address pooling issues, including de-pooling, on a national basis.

Some manufacturing handlers and cooperatives argue that their milk did perform in meeting the Class I needs during the month and this occurred before making their pooling decisions. They argue that the Class I market is therefore not harmed and that the intents and goals of the order program are satisfied. With respect to his preceding and in response to these arguments, this decision finds that the practice of de-pooling undermines the intent of the Federal order program to assure producers uniform prices across all uses of milk normally associated with the market as a critical indicator of orderly marketing conditions. Similarly, handlers and cooperatives who de-pool purposefully do so to gain a momentary financial benefit (by avoiding making payments to the PSF) which would otherwise be equitably shared among all market participants. While the order's performance standards tend to assure that distributing plants are adequately supplied with fresh, fluid milk, the goals of marketwide pooling are undermined by the practice of de-pooling. Producers and handlers who regularly and consistently serve the Class I needs of the market will not equitably share in the additional value arising momentarily from non-fluid uses of milk. These same producers and handlers will, in turn, be required to share the additional revenue arising from higher-valued Class I sales in a subsequent month when class-price relationships change.

The four proposals considered in this proceeding to deter the practice of de-pooling in the Central order have differences. They all seek to address market disorder arising from the practice of de-pooling. However, this decision does not find adoption of the two ''dairy farmer for other markets'' proposals—Proposals 6 and 7—reasonable because they would make it needlessly difficult for milk to be re-pooled and because their adoption may disrupt prevailing marketing channels or cause the inefficient movement of milk. Likewise, Proposal 8, to restrict pooling in a month to 115 percent of the prior month's volume pooled by the handler, is not recommended for adoption. Adoption of this proposal would disrupt current marketing conditions beyond what the record justifies. Therefore, this decision recommends adoption of Proposal 2 to limit the pooling of milk in any month by a handler to 125 percent of the handler's pooled receipts in the prior month because it provides the most reasonable measure to deter the practice of de-pooling.

Consideration was given to omitting a recommended decision on the issue of de-pooling. The record does not support a conclusion that adoption of measures to deter de-pooling warrant emergency action. The recommended adoption of provisions to limit the volume of milk that can be pooled during the month on the basis of what was pooled in the preceding month warrants public comments before a final decision is issued.

3. Transportation and Assembly Credits

A proposal, published in the hearing notice as Proposal 3 and modified at the hearing, seeking establishment of transportation and assembly credits in the Central Order is not recommended for adoption. The published proposal seeks to provide a credit for the shipment of milk from supply plants to distributing plants. The proposal was modified at the hearing to expand the transportation credit to include milk shipped directly from dairy farms to distributing plants. In addition, the modified proposal would provide an assembly credit for milk shipped directly from dairy farms to distributing plants.

The proposal would provide a credit for the shipment of milk from supply plants and dairy farms to distributing plants at a rate of $0.003 per cwt per mile, excluding the first 25 miles of shipment and all shipments farther than 500 miles. In addition, the proposal would provide for a credit of $0.10 per cwt for the assembly of milk from dairy farms to distributing plants. The Central order does not currently have transportation or assembly credit provisions.

As published in the hearing notice, Proposal 3 was advanced by AMPI, et al. The modification to Proposal 3, presented at the hearing to include transportation credits for shipments from dairy farms directly to distributing plants was advanced by DFA/PF.

On behalf of all proponents of Proposal 3, the Foremost, et al., witness requested that the proposal be modified to remove all references to ''milk reload stations'' as originally offered in the proposal. Accordingly, no additional references will be made concerning re-load stations in this decision.

A witness appearing on behalf of AMPI, et al., testified that transportation and assembly credits are needed in the Central marketing area to allow transporting handlers to recover costs of assembling and transporting milk to serve the Class I needs of the market.

The AMPI, et al., witness was of the opinion that the rates and distance limitations proposed for the transportation and assembly credits would compensate handlers for approximately 75 percent of the cost of moving milk from supply plants to distributing plants within the marketing area. The witness asserted that this was reasonable because it would keep transportation and assembly cost recovery at less than full cost. According to the witness, the proposed

rates and distance limitations would tend to discourage inefficient movements of milk by handlers from seeking transportation and assembly credits.

The AMPI, et al., witness expressed the opinion that all producers receiving the benefits of marketwide pooling should contribute to the recovery of costs associated with moving milk within the marketing area to serve the Class I needs of the market. The witness provided examples of milk movements where supply plant handlers moving milk to distributing plants were unable to recover the full costs of assembling and transporting milk at Federal order minimum prices. The witness testified that because handlers transporting milk directly from dairy farms to distributing plants incur costs similar to the overhead costs incurred by handlers transporting milk from supply plants, the proponents seek an assembly credit for all milk that serves the Class I market. The AMPI, et al., witness testified that even though dairy farmers currently are charged for the cost of assembling their milk into loads and transporting the milk to distributing plants, the charges are insufficient to completely recoup the costs incurred by handlers.

A witness representing DFA/PF testified in support of Proposal 3 and modified the proposal to include the transportation and assembly credits for milk shipped directly from farms to distributing plants. The witness asserted that the costs of assembly and transportation of milk in the Central marketing area are not fully recouped in the market by handlers. The witness noted that the $0.003 per mile transportation credit rate would apply to milk shipped to a distributing plant.

The DFA/PF witness testified that additional compensation for the transportation and assembly of milk for fluid use is needed in particular areas of the Central marketing area because the order's blend price is insufficient to keep milk produced in the marketing area within the marketing area. The witness noted this was specifically apparent in the southeastern portion of the marketing area that borders portions of the Southeast and Appalachian orders. In addition, the witness testified that the location values of milk for markets within the Central marketing area, for example in St. Louis, Missouri, and areas of southern Illinois, are similarly insufficient to attract milk. According to the witness, this causes milk procurement problems for some distributing plants in this localized portion of the Central marketing area.

The DFA/PF witness testified that marketwide service payments are authorized in the legislation that provides for Federal milk orders. The witness explained that payments for services not elsewhere compensated can be taken from producer revenue to compensate providers of services that are of marketwide benefit. The witness asserted that transportation and assembly operations performed in the Central marketing area meet the general objectives of providing marketwide service for marketwide benefit. According to the witness, Proposal 3, as modified, describes a set of services that benefit the entire market. The witness was of the opinion that the marketwide services include: marketing of milk, farm pick-up of milk, off-load and re-load of milk, procurement of milk, selling milking equipment, disseminating information and prices to producers, milk testing, delivery to distributing plants, and other field services.

According to the DFA/PF witness, inclusion of milk shipped directly from dairy farms to distributing plants for transportation and assembly credits would be more representative of how the majority of milk is transported to distributing plants regulated by the order. The witness noted that in the Central marketing area distributing plants receive only about 4.5 percent of their milk from supply plants. The witness testified that the modification of Proposal 3 to include milk shipped from farms to distributing plants would more accurately represent the transportation compensation requirements needed to ensure delivery of milk for fluid use.

According to the DFA/PF witness, the inclusion of farm to distributing plant shipments would require the Market Administrator of the Central order to verify handler claims for receiving credits. The witness indicated that least-distance routes for delivery from each point of origin to the destination distributing plants would need to be determined. According to the witness, the additional cost that would be borne by the Market Administrator in administering transportation and assembly provisions would be negligible and should not require a higher administrative assessment. However, the witness acknowledged that proponents had not consulted the Market Administrator's office for an estimate of additional administrative costs that may be borne in operating a transportation and assembly credit provision.

The DFA/PF witness testified that the St. Louis area market is unable to consistently and successfully attract milk from the Central order's milkshed because the order's Class I price and the blend price are lower than those in the nearby Appalachian and Southeast marketing areas. According to the witness, marketwide service payments for transportation and assembly of milk to serve markets such as St. Louis would provide sufficient financial incentive to offset the higher blend prices of these bordering Federal milk marketing areas. Additionally, it would ensure a consistent and reliable supply of milk to meet the needs of that portion of the Central marketing area's Class I market, the witness said.

A witness for Prairie Farms (PF) testified in support of the adoption of Proposal 3 as modified at the hearing. The witness was of the opinion that without expansion of transportation and assembly credits that included direct shipped milk, the ability to serve the Class I needs of all locations in the Central marketing area would not be achieved because milk would seek the higher blend prices available in the nearby markets of the Appalachian and Southeast orders. The witness from Prairie Farms provided example scenarios of actual and hypothetical net returns possible for handlers shipping milk to distributing plants in the Central, Appalachian, and Southeast marketing areas. The witness compared these returns to net returns available from shipping to distributing plants in Illinois and St. Louis within the Central marketing area. According to the witness, these example scenarios reinforced the assertion that milk is attracted by higher Class I prices in localized areas of the Appalachian and Southeast marketing areas.

The PF witness was of the opinion that inappropriate Class I differential levels, as in the St. Louis area example, were the root cause of the market's inability to attract sufficient fluid milk; however, modifications to the Class I price surface are not currently feasible. In light of this, the witness stated that obtaining the needed financial incentives to ensure delivery of milk to this deficit portion of the marketing area by the use of transportation and assembly credits is a reasonable alternative to changing the Class I differentials.

The DFA/PF witness estimated that providing credits for milk transported from farms to distributing plants would reduce the Central order's blend price to dairy farmers by $0.045 per cwt per month. The Foremost, et al., witness testified that the impact of providing credits for assembly would reduce the Central order's blend price by $0.036–$0.040 per cwt per month. The DFA/PF

witness testified that the combined impact of transportation credits for the supply plant to distributing plant movements, direct delivery from farms to distributing plants, and assembly credits would reduce the Central marketing area's blend price by a total of $0.081–$0.085 per cwt per month.

A witness for Dean testified in support of Proposal 3 as modified by DFA/PF. The Dean witness expressed a preference for the DFA/PF modification to include direct farm milk shipments to distributing plants but did not support adoption of assembly credits. The witness noted that Dean would consider the entire Proposal 3, including the DFA/PF modification, if the assembly credit feature were retained. The witness was of the opinion that adopting the proposal would increase equity among handlers and producers who supply the Class I market. However, the witness was unable to identify distributing plants in the St. Louis and southern Illinois portions of the marketing area that did not or could not receive sufficient milk supplies. In addition, the witness was unable to recall if handlers had asked or relied on the Central marketing area's Market Administrator to increase the Central order's performance standards to bring forth milk to meet the market's Class I needs.

In a post hearing brief, Select/Continental indicated general opposition to adopting transportation and assembly credits for milk movements from supply plants to distributing plants. The brief expressed support for a transportation and assembly credit provision that would be limited to milk shipped directly from dairy farms to distributing plants. According to the brief, milk should be attracted to markets for specific use through classified pricing. Fluid milk, according to the brief, should be attracted to distributing plants by appropriate location values. According to the brief, implementing transportation and assembly credits in the Central marketing area would be an admission that the Class I price surface was no longer successful in meeting the Class I needs of the marketing area.

In a post hearing brief, DFA/PF reiterated their support for transportation and assembly credits as modified. The brief reiterated support and reinforcement of the testimony offered to expand the scope for transportation and assembly credits to include direct farm-to-plant milk movements. Likewise, Dean Foods reiterated its support in a post-hearing brief for expanding transportation and assembly credits to include direct farm-to-plant milk movements as a means to improve the available milk supply for its distributing plant operations in the southeastern portion of the Central order.

Geographically, the Central marketing area is the largest Federal milk marketing area, spanning the distance from eastern Illinois to western Colorado. It is bordered by the Upper Midwest, Mideast, Appalachian, Southeast, and Southwest marketing areas. The marketing area also is bordered by unregulated areas on the west including Utah, portions of western South Dakota, western portions of Nebraska, and all of Wyoming. In addition the Central marketing area completely surrounds a large unregulated area in central Missouri.

Proposal 3 as advanced by AMPI, et al., seeks to establish a marketwide service payment in the form of a transportation credit for the movement of milk from supply plants to distributing plants at a rate of $0.003 per cwt per mile. The proposal provides for a distance limit for receipt of the credit for milk movements between 25 to 500 miles from the supply plants to distributing plants. The proposal also seeks the establishment of an assembly credit feature for which handlers would collect $0.10 per cwt for the assembly of loads of milk within the marketing area.

The modification to Proposal 3, advanced by DFA/PF, seeks expansion of the transportation credit to include milk shipped directly from dairy farms to distributing plants. The modification would establish a transportation credit rate of $0.003 per cwt per mile for milk shipped directly from dairy farms to distributing plants. The combination of the two proposals effectively seeks transportation and assembly credits for all Class I milk pooled on the Central order. The rationale for the modification to Proposal 3 is that milk shipped directly from farms to distributing plants represents more than 95 percent of all milk shipped to distributing plants. Milk shipped from supply plants represents about 5 percent of all milk shipped to distributing plants.

Proponents estimate that the Central order blend price would be lowered in the range of $0.036–$0.040 per cwt per month by the assembly credit feature for all Class I milk, if adopted. The proponents estimate that the impact of the transportation credit for all Class I milk pooled on the Central order would be a blend price reduction of approximately $0.045 per cwt, if adopted. The combined reduction to the Central order blend price per month would be $0.081–$0.085 per cwt.

The transportation and assembly credits advanced by the proponents are similar to the transportation and assembly credits implemented in the Chicago Regional order, a predecessor order of the current Upper Midwest order. The transportation and assembly credit provisions of the Chicago Regional order were carried forward into the provisions of the current Upper Midwest order as a part of Federal milk order reform. These provisions were first implemented in 1987 to ensure that the costs of serving the Class I market of the Chicago Regional marketing area were shared by all market participants that benefited from the revenue generated from Class I sales. The impact on producer revenue was expected to be minimal according to the Final Decision published October 15, 1987, (7 CFR 10130).

The transportation credit and assembly credit provisions of the Upper Midwest order provide an assembly credit of $0.08 per cwt and a transportation credit for the transportation of milk transferred from pool plants to distributing plants of $0.028 cents per cwt per mile. Transportation or assembly credits are not applied to milk shipments to distributing plants directly from producer farms. The credits are computed by the Market Administrator and are deducted from the marketwide value of milk before calculation of the order's blend price. The impact of these credits on the Upper Midwest blend price ($0.02–$0.03 per cwt) are one fourth to one third the magnitude of impact that proponents expect the proposed transportation and assembly credits would have on the Central order blend price, if adopted.

The transportation and assembly credit features of the current Upper Midwest order and the pre-reform Chicago Regional order are similar in the magnitudes of their costs per mile and per hundredweight of milk handled. The transportation and assembly credit provisions of the Chicago Regional order applied to a geographically compact milkshed with the emphasis on encouraging milk movements to the single urban market of Chicago. The Chicago Regional marketing area (and the Chicago metropolitan area of the current Upper Midwest marketing area) was supplied with milk primarily from southern and central Wisconsin. The transportation and assembly credit feature of the current Upper Midwest marketing order provides pool plants that serve the Class I market with some recovery of assembly and transportation costs

incurred in transferring milk to distributing plants.

In contrast, the Central marketing area is geographically much larger and handlers with Class I route disposition serve multiple urban centers in a variety of States located from Illinois to Colorado. The record reveals that the area of concern to the proponents is a relatively limited area of St. Louis and portions of southern Illinois. The record does not reveal that there are other portions of the marketing area where problems have been identified in procuring milk supplies for Class I use. Accordingly, it is reasonable to conclude that marketwide service payments in the form of transportation and assembly credits on all Class I milk may only solve a localized problem while all dairy farmers would receive a lower blend price for their milk.

The impact of transportation and assembly credits on dairy farmer income is far lower in the Upper Midwest marketing area than that proposed for the Central order. For example, according to Market Administrator data, the reduction to the Upper Midwest blend price in October 2004 was $ 0.015 per cwt and $0.0125 per cwt for the assembly and transportation credits, respectively. This represents an overall reduction of $0.0275 per cwt to the Upper Midwest blend price in that month. Market Administrator data shows that during May 2005 the reduction to the Upper Midwest blend price attributable to the combined impact of the transportation and assembly credit features was $0.020 per cwt.

The record reveals that the impact anticipated by proponents of transportation and assembly credits on the Central order blend price would be a reduction of as much as $0.081–$0.085 per cwt. The reduction in blend prices and dairy farmer income that would result from the adoption of a transportation and assembly credit of this magnitude would be 3–4 times the magnitude of the blend price reduction that dairy farmers experience in the Upper Midwest. According to Market Administrator information, the average sized producer in the Central marketing area produces and markets about 200,000 pounds of milk per month. The average reduction in income for such an average producer per month would be $160–$170 per month, or about $2000 per year. A similar sized producer in the Upper Midwest marketing area would experience a reduction in income of $40–$57 per month or about $500–$680 per year. The differences in magnitudes are interesting but germane only to the extent that transportation and assembly credits are justified.

The proposed transportation and assembly credits are justified by proponents on the basis that the movement of milk to serve the Class I market is a marketwide service of marketwide benefit and credits for providing marketwide services are authorized in the Agricultural Marketing Agreement Act of 1937, (AMAA) as amended. However, the focus of the record evidence is on the marketing conditions in the southern Illinois and St. Louis regions of the Central marketing area. However, the record, does not indicate that price differences as noted in proponent testimony concerning the eastern portion of the marketing area occur elsewhere in the Central marketing area. The record does not support concluding that handlers serving major urban areas in other regions of the marketing area (such as, Denver, Oklahoma City, or Tulsa) experience difficulty in attracting milk supplies. This supports concluding that the issues raised by the proponents are at best localized in nature rather than marketwide.

In addition, the record reveals in the testimony of the AMPI, et al., witness that some transportation and assembly costs incurred by handlers for milk delivered to distributing plants are recovered by the marketplace. While proponents have asserted that the recovery of costs for assembly by handlers is incomplete, the record contains insufficient information upon which to judge if lowering producer blend prices by as much as $.08 per cwt is reasonable. The size of the likely blend price reduction is important but not the critical factor in determining whether transportation and assembly credits are reasonable for the Central marketing area. The most important factor in that regard is whether the marketwide costs would provide marketwide rather than local benefits.

Record evidence supplied by a Class I handler located in St. Louis indicates that the firm is able to continue receiving, bottling, and selling milk in the St Louis area. This evidence suggests that milk movements to handlers in the St. Louis area are occurring and meet the order's Class I needs. This evidence provides a basis to conclude that the order provisions attract sufficient milk for fluid use. In this regard, the need for additional government intervention beyond what the order currently provides in meeting the market's fluid demands is not warranted.

The record evidence concerning challenges faced by handlers in moving milk within the Central marketing area to distributing plants in St. Louis and Illinois indicates that there may be, at best, localized problems in supplying the Class I needs of these plants. The proponents for transportation and assembly credits attribute these difficulties to the higher location values and blend prices of nearby or bordering portions of the Southeast and Appalachian orders. However, the record reveals that handlers have not sought alternative actions to bring forth additional milk supplies to meet Class I demands. For example, there is no record evidence illustrating that the Market Administrator has been called upon to change performance standards or diversion limits which would better ensure that the Class I needs of any of the Central marketing area's distributing plants would be met.

This recommended decision finds that adoption of the proposed transportation and assembly credit provision is not supported by record evidence. Accordingly, this recommended decision does not find agreement with the rationale advanced by proponents that marketwide service payments in the form of transportation and assembly credits for milk are needed to overcome deficiencies of the Central order. At best, record evidence demonstrates that if there are difficulties in procuring milk for Class I use, they are isolated to a fraction of the marketing area. Adopting transportation and assembly credits would unreasonably lower the returns to all dairy farmers pooled on the order to address a localized issue.

Withdrawn Proposal

A proposal published as Proposal 14, seeking to require payments from the producer settlement fund to be made no later than the next business day after the due date for payments into the producer settlement fund, was advanced by the Market Administrator. The proposal was withdrawn and was not considered in this decision.

Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the

reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Central order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the aforesaid marketing agreement and order:

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to Section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, ensure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

Recommended Marketing Agreement and Order Amending the Orders

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the Central marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Part 1032

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR Part 1032 is proposed to be amended as follows:

PART 1032—MILK IN THE CENTRAL MARKETING AREA

1. The authority citation for 7 CFR Part 1032 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 1032.7 is amended by revising paragraph (c) introductory text and paragraph (h)(7) to read as follows:

§ 1032.7 Pool plant.

* * * * *

(c) A supply plant from which the quantity of bulk fluid milk products shipped to (and physically unloaded into) plants described in paragraph (c)(1) of this section is not less than 25 percent during the months of August through February and 20 percent in all other months of the Grade A milk received from dairy farmers (except dairy farmers described in § 1032.12(b)) and from handlers described in § 1000.9(c), including milk diverted pursuant to § 1032.13, subject to the following conditions:

* * * * *

(h) * * *

(7) That portion of a regulated plant designated as a nonpool plant that is physically separate and operated separately from the pool portion of such plant. The designation of a portion of a plant must be requested in advance and in writing by the handler and must be approved by the market administrator. Such nonpool status shall be effective on the first day of the month following approval of the request by the market administrator and thereafter for the longer of twelve (12) consecutive months or until notification of the desire to requalify as a pool plant, in writing, is received by the market administrator. Requalification will require deliveries to a pool distributing plant(s) as provided for in § 1032.7(c). For requalification, handlers may not use milk delivered directly from producer's farms pursuant to § 1000.9(c) or § 1032.13(c) for the first month.

3. Section 1032.13 is amended by revising paragraph (d)(1), redesignating paragraphs (d)(2) through (6) as paragraphs (d)(4) through (8), adding new paragraphs (d)(2) and (d)(3), revising redesignated paragraph (d)(4), and adding a new paragraph (f), to read as follows:

§ 1032.13 Producer milk.

* * * * *

(d) * * *

(1) Milk of a dairy farmer shall not be eligible for diversion until milk of such dairy farmer has been physically received as producer milk at a pool plant and the dairy farmer has continuously retained producer status since that time. If a dairy farmer loses producer status under the order in this part (except as a result of a temporary loss of Grade A approval), the dairy farmer's milk shall not be eligible for diversion until milk of the dairy farmer has been physically received as producer milk at a pool plant;

(2) The equivalent of at least one day's milk production is caused by the handler to be physically received at a pool plant in each of the months of January and February, and August through November;

(3) The equivalent of at least one days' milk production is caused by the handler to be physically received at a pool plant in each of the months of March through July and December if the requirement of paragraph (d)(2) of this section (§ 1032.13) in each of the prior months of August through November and January through February are not met, except in the case of a dairy farmer who marketed no Grade A milk during each of the prior months of August through November or January through February.

(4) Of the quantity of producer milk received during the month (including diversions, but excluding the quantity of producer milk received from a handler described in § 1000.9(c)) the handler diverts to nonpool plants not more than 75 percent during the months of August through February, and not more than 80 percent during the months of March through July, provided that not less than 25 percent of such receipts in the months of August through February and 20 percent of the remaining months' receipts are delivered to plants described in § 1032.7(a) and (b);

* * * * *

(f) The quantity of milk reported by a handler pursuant to § 1032.30(a)(1) and/or § 1032.30(c)(1) for the current month may not exceed 125 percent of the producer milk receipts pooled by the handler during the prior month. Milk diverted to nonpool plants reported in excess of this limit shall be removed from the pool. Milk received at pool plants in excess of the 125 percent limit, other than pool distributing plants, shall be classified pursuant to § 1000.44(a)(3)(v). The handler must designate, by producer pick-up, which milk is to be removed from the pool. If the handler fails to provide this information the provisions of paragraph (d)(5) of this section shall apply. The following provisions apply:

(1) Milk shipped to and physically received at pool distributing plants shall not be subject to the 125 percent limitation;

(2) Producer milk qualified pursuant to any other Federal Order in the previous month shall not be included in the computation of the 125 percent limitation; provided that the producers comprising the milk supply have been

continuously pooled on any Federal Order for the entirety of the most recent three consecutive months.

(3) The market administrator may waive the 125 percent limitation:

(i) For a new handler on the order, subject to the provisions of paragraph (f)(3) of this section, or

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(4) A bloc of milk may be considered ineligible for pooling if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph (f).

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 06–1584 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1033

[Docket No. AO–166–A72; DA–05–01–B]

Milk in the Mideast Marketing Area; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; Recommended Decision.

SUMMARY: This decision recommends adoption of a proposal that would amend certain features of the Mideast Federal milk marketing order to deter the de-pooling of milk.

DATES: Comments must be submitted on or before April 24, 2006.

ADDRESSES: Comments (six copies) should be filed with the Hearing Clerk, United States Department of Agriculture, STOP 9200—Room 1031, 1400 Independence Avenue, SW., Washington, DC 20250–9200. Comments may also be submitted at the Federal eRulemaking portal: *http://www.regulations.gov* or by e-mail: *amsdairycomments@usda.gov*. Reference should be made to the title of action and docket number.

FOR FURTHER INFORMATION CONTACT: Gino Tosi, Associate Deputy Administrator, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231—Room 2968, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202)690–1366, e-mail: *gino.tosi@usda.gov*.

SUPPLEMENTARY INFORMATION: This decision recommends adoption of amendments that would: (1) Establish a limit on the volume of milk a handler may pool during the months of April through February to 115 percent of the volume of milk pooled in the prior month; and (2) Establish a limit on the volume of milk a handler may pool during the month of March to 120 percent of the volume of milk pooled in the prior month.

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Deparment's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees.

For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During March 2005, the month during which the hearing occurred, there were 9,767 dairy producers pooled on, and 36 handlers regulated by, the Mideast order. Approximately 9,212 producers, or 94.3 percent, were considered small businesses based on the above criteria. Of the 36 handlers regulated by the Mideast during March 2005, 26 handlers, or 72.2 percent, were considered small businesses.

The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with and consistently serve the fluid needs of the Mideast milk marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the Class I fluid needs of the market and, by doing so, to determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk.

Criteria for pooling are established without regard to the size of any dairy industry organization or entity. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This recommended decision does not require additional information collection that requires clearance by the

Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the approved forms are routinely used in most business transactions. The forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This rulemaking proceeding does not duplicate, overlap, or conflict with any existing Federal rules.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

Prior Documents in This Proceeding

Notice of Hearing: Issued February 14, 2005; published February 17, 2005 (70 FR 8043).

Amended Notice of Hearing: Issued March 1, 2005; published March 3, 2005 (70 FR 10337).

Tentative Partial Decision: Issued July 21, 2005; published July 27, 2005 (70 FR 43335).

Interim Final Rule: Issued September 20, 2005; published September 26, 2005 (70 FR 56111).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Mideast marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act (AMAA) and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, STOP 9200—Room 1031, 1400 Independence Avenue, SW., Washington DC 20250–9200, by the 60th day after publication of this decision in the **Federal Register**. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. Some evidence was received that specifically addressed these issues, and some of the evidence encompassed entities of various sizes.

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Mideast marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

The proposed amendments set forth below are based on the record of a public hearing held at Wooster, Ohio, on March 7–10, 2005, pursuant to a notice of hearing issued February 14, 2005, published February 17, 2005, (70 FR 8043) and a amended notice of hearing issued March 1, 2005, and published March 3, 2005 (70 FR 10337).

The material issues on the record of hearing relate to:

1. Pooling standards
A. Establish pooling limits.
B. Producer definition.
2. Transportation Credits.

Findings and Conclusions

This recommended decision specifically addresses proposals published in the hearing notice as Proposals 4, 5, 6, 7, and 8 which seek to establish a limit on the volume of milk that can be pooled on the order; Proposal 9 which seeks to establish transportations credits; and features of Proposal 3 intended to clarify the *Producer* definition by providing a definition of ''temporary loss of Grade A approval.'' Proposals which sought to change the performance standards of the order, Proposals 1 and 2, were addressed in a tentative partial decision published on July 27, 2005 (70 FR 43335). The portion of Proposal 3 that sought to amend the number of days a producer needs to deliver milk to a distributing plant before the milk of the producer is eligible for diversion was abandoned by the proponents at the hearing. No further reference to that portion of Proposal 3 will be made.

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Pooling Standards

A. Establishing Pooling Limits

Preliminary Statement

Federal milk marketing orders rely on the tools of classified pricing and marketwide pooling to assure an adequate supply of milk for fluid (Class I) use and to provide for the equitable sharing of the revenues arising from the classified pricing of milk. Classified pricing assigns a value to milk according to how the milk is used. Regulated handlers who buy milk from dairy farmers are charged class prices according to how they use the farmer's milk. Dairy farmers are then paid a weighted average or ''blend'' price. The blend price that dairy farmers are paid for their milk is derived through the marketwide pooling of all class uses of milk in a marketing area. Thus each producer receives an equal share of each use class of milk and is indifferent as to the actual Class for which the milk was used. The Class I price is usually the highest class price for milk. Historically, the Class I use of milk provides the additional revenue to a marketing area's total classified use value of milk.

The series of Class prices that are applicable for any given month are not announced simultaneously. The Class I price and the Class II skim milk price are announced prior to the beginning of the month for which they will be effective. Class prices for milk in all other uses are not determined until on or before the 5th day of the following month. The Class I price is determined by adding a differential value to the higher of either an advanced Class III or Class IV value. These values are calculated based on formula using the National Agricultural Statistics Service (NASS) survey prices of cheese, butter, and nonfat dried milk powder for the first two weeks of the prior month. For example, the Class I price for August is announced in late July and is based on the higher of the Class III or IV value computed using NASS commodity price surveys for the first two weeks of July.

The Class III and IV prices for the month are determined and announced after the end of the month based on the NASS survey prices for the selected dairy commodities during the month. For example, the Class III and IV prices for August are based on NASS survey commodity prices during August. A large increase in the NASS survey price for the selected dairy commodities from one month to the next can result in the Class III or IV price exceeding the Class I price. This occurrence is commonly

referred to by the dairy industry as a ''Class price inversion.'' A producer price inversion generally refers to when the Class III or IV price exceeds the average classified use value, or blend price, of milk for the month. Price inversions have occurred with increasing frequency in Federal milk orders since the current pricing plan was implemented on January 1, 2000, despite efforts made during Federal Order Reform to reduce such occurrences. Price inversions can create an incentive for dairy farmers and manufacturing handlers who voluntarily participate in the marketwide pooling of milk to elect not to pool their milk on the order. Class I handlers do not have this option; their participation in the marketwide pool is mandatory.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Classes. In essence, the PPD is the dairy farmer's share of the additional/reduced revenues associated with the Class I, II, and IV milk pooled in the market. If the value of Class I, II, and IV milk in the pool is greater than the Class III value, dairy farmers receive a positive PPD. However, a negative PPD can occur if the value of the Class III milk in the pool exceeds the value of the remaining classes of milk in the pool. This can occur as a result of the price inversions discussed above.

The Mideast Federal order operates a marketwide pool. The Order contains pooling provisions which specify criteria that, if met, allow dairy farmers to share in the benefits that arise from classified pricing through pooling. The equalization of all class prices among handlers regulated by an order is accomplished through a mechanism known as the producer settlement fund (PSF). Typically, Class I handlers pay the difference between the blend price and their use-value of milk into the PSF. Manufacturing handlers typically receive a draw from the PSF, usually the difference between the Class II, III or IV price and the blend price. In this way, all handlers pay the Class value for milk and all dairy farmer suppliers receive at least the order's blend price.

When manufacturing class prices of milk are high enough to result in a use-value of milk for a handler that is higher than the blend price, handlers of manufacturing milk may choose to not pool their milk receipts. Opting to not pool their milk receipts allows these handlers to avoid the obligation of paying into the PSF. The choice by a manufacturing handler to not pool their milk receipts is commonly referred to in the dairy industry as ''de-pooling.'' When the blend price rises above the manufacturing class use-values of milk these same handlers again opt to pool their milk receipts. This is often referred to as ''re-pooling.'' The ability of manufacturing handlers to de-pool and re-pool manufacturing milk is viewed by some market participants as being inequitable to both producers and handlers.

The ''De-Pooling'' Proposals

Proponents are in agreement that milk marketing orders should contain provisions that will tend to limit the practice of de-pooling. Five proposals intending to limit the de-pooling of milk were considered in this proceeding. The proposals offered different degrees of deterrence against de-pooling by establishing limits on the amount of milk that can be re-pooled. The proponents of these five proposals are generally of the opinion that de-pooling erodes equity among producers and handlers, undermines the orderly marketing of milk and is detrimental to the Federal order system.

Two different approaches on how to best limit de-pooling are represented by these five proposals. The first approach, published in the hearing notice as Proposals 6 and 7, addresses de-pooling by limiting the volume of milk a handler can pool in a month to a specified percentage of what the handler pooled in the prior month. The second approach, published in the hearing notice as Proposals 4, 5 and 8, addresses de-pooling by establishing what is commonly referred to as a ''dairy farmer for other markets'' provision. These proposals would require milk of a producer that was de-pooled to not be able to be re-pooled by that producer for a defined time period. All proponents agreed that none of the proposals would completely eliminate de-pooling, but would likely deter the practice.

Of the five proposals received that would limit de-pooling, this decision recommends adoption of Proposal 7 as modified in post-hearing briefs, offered by Dairy Farmers of America and Michigan Milk Producers Association (DFA/MMPA). DFA/MMPA are Capper-Volstead cooperatives who pool milk on the Mideast market. Specifically, adoption of Proposal 7 will limit the volume of milk a handler could pool during the months of April through February to no more than 115 percent of the volume of milk pooled in the prior month, and limit the volume of milk a handler could pool in the month of March to 120 percent of the volume of milk pooled in the month prior. Milk diverted to nonpool plants in excess of these limits will not be pooled. Milk shipped to pool distributing plants will not be subject to the 115 or 120 percent limitation. Milk pooled on another Federal Order during the previous three consecutive months would not be subject to the 115 or 120 percent limitation. The 115 or 120 percent limitation may be waived at the discretion of the Market Administrator for a new handler on the order or for an existing handler whose milk supply changes due to unusual circumstances.

As published in the hearing notice, Proposal 6, offered by Ohio Dairy Producers (ODP) and Ohio Farmers Union (OFU), was virtually identical to Proposal 7. ODP is an organization of independent Ohio dairy farmers and agriculture businesses that work to increase the productivity and profitability of dairy farmers. OFU is an organization whose members include dairy farmers pooled on the Mideast order. Proposal 6 would limit the volume of milk a handler could pool in a month to 115 percent of the volume of milk pooled in the prior month. The proposal does not contain a separate pooling standard for the month of March. Milk shipped to pool distributing plants, or milk pooled on another Federal order during the preceding six months, would not be subject to the 115 percent standard. The proposal would grant authority to the Market Administrator to increase or decrease the 115 percent standard.

As published in the hearing notice, Proposals 4, 5 and 8 address de-pooling by establishing defined time periods during which de-pooled milk could not be pooled. Proposal 4, also offered by ODP and OFU, would require an annual pooling commitment by a handler to the market. The proposal specified that if the milk of a producer was not pooled during a month, or any of the preceding eleven months, the equivalent of at least 10 day's milk production of the dairy farmer would need to be delivered to a pool distributing plant during the month in order for all the milk of the dairy farmer for that month to be pooled. Proposal 4 is not recommended for adoption.

Proposal 5, offered by Continental Dairy Products (Continental), would limit the ability to pool the milk of a producer if such milk had not been pooled during the previous 12 months. Continental is a Capper-Volstead cooperative whose member's milk is pooled on the Mideast order. Proposal 5 is not recommended for adoption.

Proposal 8, offered by Dean Foods Company (Dean), would not permit re-pooling for a 2 to 7 month period for milk that had been de-pooled. Dean is a handler that distributes fluid milk products within the Mideast marketing

area. Under Proposal 8, if a producer's milk were de-pooled in any of the months of February through June, or during any of the preceding three months, or during any of the preceding months of July through January, the equivalent of at least 10 day's milk production would need to be physically received at a pool distributing plant in the order to pool all of the dairy farmer's production for the month. Additionally, if the milk of a dairy farmer is de-pooled in any of the months of July through January, or in a preceding month, at least 10 day's milk production of the dairy farmer would need to be delivered to a pool distributing plant to have all the milk of the dairy farmer pooled for the month. Proposal 8 is not recommended for adoption.

While Proposals 4, 5 or 8 are not recommended for adoption, to the extent that these proposals offered alternative methods to deter the practice of de-pooling, adoption of Proposals 6 and 7 essentially accomplishes this objective.

The proponents of Proposals 4, 5, 6, 7 and 8 are all of the opinion that current inadequate pooling standards enable manufacturing handlers to de-pool milk and immediately re-pool milk the following month and are in need of revision. According to the proponents, the Mideast blend price is lowered when large volumes of higher valued milk used for manufacturing is de-pooled as well as when the large volumes of de-pooled milk returns to the pool. Furthermore, the witnesses argued that de-pooling handlers do not have to account to the Mideast pool at classified prices and therefore face different costs than their similarly situated pooling competitors. While all proponents insisted that the pooling standards of the order need to be amended to ensure producer and handler equity, their opinions differed only on how to best meet this end.

The current *Producer milk* provision of the Mideast order considers the milk of a dairy farmer to be producer milk when it has been received at a pool plant of the order. A producer must deliver 2 day's milk production to a pool plant during each of the months of August through November so that all the milk of a producer will be eligible to be pooled throughout the year. Once the standard has been met, the milk of a producer is eligible to be diverted to nonpool plants and continue to be priced under the terms of the order. A pool plant cannot divert more than 50 percent of its total producer milk receipts to nonpool plants during each of the months of August through February and 60 percent during each of the months of March through July. Milk that is subject to inclusion in another marketwide equalization program operated by another government entity is not considered producer milk. The order currently does not limit a handler's ability to de-pool manufacturing uses of milk.

A witness appearing on behalf of Continental testified in support of Proposal 5. The witness was of the opinion that pooling provisions should limit a handler's ability to de-pool their milk receipts at will and with little consequence. The witness testified that Proposal 5 would prohibit a handler from pooling the milk of a producer that had been de-pooled during the previous 11 months. The witness characterized Proposal 5 as an adequate deterrent to handlers de-pooling large volumes of milk for short term financial gain. The witness added that adoption of Proposal 5 would provide adequate safeguards for new producers on the order or producers who may temporarily lose Grade A status to pool their milk without penalty.

A post-hearing brief submitted on behalf of Continental reiterated their support for the adoption of Proposal 5. The brief stressed that de-pooling leads to the inequitable sharing of revenues amongst producers and therefore should be dealt with in the most stringent manner. Continental argued that adoption of any proposal that would allow handlers to continue to de-pool any percentage of their milk receipts supports the concept that de-pooling is an acceptable practice. Continental vigorously opposed any level of de-pooling and insisted that adoption of Proposal 5 was the only appropriate proposal to re-establish equity in the marketplace.

A witness appearing on behalf of ODP testified in support of Proposals 4 and 6. According to the witness, over 1.3 billion pounds of milk was de-pooled during April and May 2004 reducing the value of the marketwide pool by $21.3 million. The ODP witness insisted that pooling standards should ensure that producer milk which regularly supplies the needs of the fluid market does not receive a lower blend price when manufacturing handlers opt to not pool their milk receipts. The witness noted that Federal order hearings have been held in the Central and Upper Midwest markets to address de-pooling. The witness stressed that if the ability of manufacturing handlers to not pool their milk receipts is eliminated in the Central and Upper Midwest markets, it may add to the volume of de-pooled milk in the Mideast market. The witness was of the opinion that adoption of either Proposal 4 or Proposal 6 would best solve the inequities created from de-pooling.

A witness appearing on behalf of Dean testified in support of Proposal 4. The witness asserted that the intent of the Federal order system is to ensure a sufficient supply of milk for fluid use and provide for uniform payments to producers who stand ready, willing, and able to serve the fluid market regardless of how the milk of any individual is utilized. The Dean witness testified that provisions allowing manufacturing handlers the option to participate or not participate in the pool causes inequities between handlers.

The Dean witness was of the opinion that de-pooling causes inequities between handlers and undermines the order's ability to provide for a stable milk supply to meet Class I demand. The inequity, the witness said, is that all handlers do not have the same ability to pool and de-pool; fluid handlers are required to pool their milk receipts while manufacturing handlers have the option of pooling their milk receipts. The witness was of the opinion that this difference in pooling options creates cost inequities between handlers since a fluid handler must always account to the pool at classified use values while manufacturing handlers may not.

The Dean witness also explained how de-pooling leads to inequities between producers. The witness used a hypothetical example of two cooperatives—Cooperative A that delivers 50 percent of its milk receipts to distributing plants and Cooperative B who delivers 30 percent of its milk receipts to distributing plants. Cooperative A, the witness said, is always at a disadvantage when a price inversion occurs because they can only de-pool 50 percent of their milk receipts because the milk delivered to distributing plants must be pooled. However, the witness said, Cooperative B can de-pool 70 percent of their milk receipts because only 30 percent is delivered to distributing plants. Therefore, the witness concluded, Cooperative B is able to pay a higher price to its dairy farmer suppliers since it is able to de-pool an additional 20 percent of its total milk receipts that Cooperative A cannot.

The Dean witness stressed that hearings have been held in other Federal orders to consider proposals seeking to deter de-pooling and urged the Department to adopt provisions to prevent milk from opportunistically pooling on the Mideast order. In the opinion of the Dean witness, Proposal 4 is the most appropriate solution to deter the de-pooling of milk because it creates

large and long-term consequences to handlers who opt to de-pool. The Dean witness believed that should the Department determine that Proposal 4 is not appropriate, Proposal 8 would be the best alternative.

A post-hearing brief submitted on behalf of Dean reiterated support for the adoption of Proposal 4 with a modification. Dean proposed granting the Market Administrator the ability to waive a producer's de-pooled status if the producer was de-pooled after informing its pooling handler that it intended to deliver its milk to another handler. The brief stressed that the intention of Proposal 4 is not to prevent a producer from being pooled because of circumstances out of their control and believed their modification would remedy this potential situation. Dean's brief reiterated that de-pooling results in inequities between both handlers and producers. The brief noted that a provision similar to Proposal 4 is in place in the Northeast order and asserted that it has been very effective in limiting de-pooling.

A witness appearing on behalf of Superior Dairy (Superior) testified in support of Proposal 4. Superior is a pool distributing plant regulated by the Mideast order. The witness said that Proposal 4 should be adopted because the de-pooling actions of some handlers are reducing the blend price paid to producers who regularly and consistently service the needs of the Class I market.

A witness appearing on behalf of OFU testified in support of Proposal 6. The witness said that current regulations allow handlers to take advantage of the Federal order program and not share income generated in the market with pooled producers. The witness supported adoption of Proposal 6 and stressed that adoption of the proposal would discourage manufacturing handlers from not pooling their milk receipts when it is to their financial advantage.

A second witness appearing on behalf of Dean testified in support of Proposals 4, 6, 7, and 8. The witness testified that Proposal 4 would encourage handlers to pool their milk receipts in times of a price inversion since the decision to de-pool would result in a 12-month penalty. The witness said that adoption of Proposal 4 would also ensure that the de-pooled producer provided service to the Class I market by making substantial and consistent service to fluid distributing plants.

The second Dean witness characterized Proposal 8 as a less desirable alternative to Proposal 4. The difference in the two proposals, the witness said, is the number of months a producer must meet the 10-day touch base standard to be re-pooled—it is fewer under Proposal 8 and varies depending on the month in which the milk was de-pooled. In general, emphasized the witness, the effects of both proposals would be the same except that if Proposal 8 were adopted, the cost to a de-pooling handler and the benefit to continuously pooled producers would be less.

The second Dean witness testified that Proposal 7 and Proposal 6 are less desirable options to Proposals 4 and 8. According to the witness, if a 115 percent re-pooling standard were adopted it would take a handler who opted to de-pool 90 percent of its milk 17 months to re-pool all the handler's milk receipts. If a handler opted to de-pool 30 percent of its milk receipts, the witness added, it would only take 3 months to again pool all of its milk receipts. The witness emphasized that the larger the volume of milk a handler opted to de-pool, the longer the length of time a handler would need to requalify all its milk receipts and the more money it would cost the de-pooling handler. The witness concluded that Proposals 6 and 7 offered a different method for limiting de-pooling that would not be as effective as the method contained in Proposals 4 and 8.

A dairy farmer whose milk is pooled on the Mideast order testified in support of Proposals 4, 5, and 6. The witness testified that in April 2004 their farm lost $9,000 because of the reduced PPD that resulted from de-pooling. The witness urged the Department to adopt either Proposal 4, 5, or 6 to remedy de-pooling and to do so on an emergency basis.

A witness appearing on behalf of DFA/MMPA testified in support of Proposal 7. The witness said that Proposal 7 was designed to limit de-pooling by creating financial consequences for manufacturing handlers who de-pool their milk receipts. The witness testified that members of DFA/MMPA currently de-pool milk when it is to their advantage but emphasized that de-pooling causes market disorder and should be prohibited.

The DFA/MMPA witness said that de-pooling is not a new occurrence; however, the volatility of milk prices in recent years has caused more frequent price inversions and subsequent opportunities to de-pool. The witness referenced data presented at a similar proceeding held in the Central order that during the 84 month period from 1993 to 1999, there were 16 months with negative PPD's, 6 of which were in excess of a negative 50 cents per cwt. However, the witness noted that during the 60 month period from January 2000 through December 2004 the opportunity to de-pool had occurred 51 times.

The DFA/MMPA witness contended that de-pooling causes inequities because similarly situated handlers face different costs in procuring a milk supply. Class I milk is required to be pooled, the witness said, and distributing plants always have to share the additional value of their Class I milk sales with all pooled producers. However, the witness said, a manufacturing handler is not required to account to the pool at classified prices and can therefore retain the revenue generated from not pooling milk when price inversions occur. The witness asserted that manufacturing handlers use the additional revenue generated from de-pooling to pay a higher price to their producers while fluid handlers must use money from their profit margins to pay a competitive price. In this regard, the witness said, Class I handlers are at a disadvantage in competing with manufacturing handlers for a producer milk supply.

Relying on Market Administrator statistics, the DFA/MMPA witness illustrated that in April 2004 manufacturing handlers that may have chosen to not pool their milk receipts were able to keep $3.78 more per hundredweight than a fluid handler on all their de-pooled milk and could use the proceeds to pay dairy farmers. The witness showed how a supplying handler that delivered one load of milk a day for a month to a Class I plant, would have received $56,700 less than a manufacturing handler who could opt to de-pool their milk receipts. Relying on Market Administrator statistics, the witness testified that 649.3 million pounds of milk was de-pooled in April 2004. According to the witness, if that milk had been pooled the PPD paid to all producers would have been $1.66 per cwt higher.

The DFA/MMPA witness testified that Proposal 7 would limit the amount of milk a handler could pool to 115 percent of the handlers prior month pooled milk volume. The witness insisted that the 115 percent standard would create the economic incentive necessary to keep an adequate reserve supply of milk pooled on the order while accommodating reasonable levels of growth in a handler's month-to-month production and other seasonal production fluctuations. The witness noted that the Market Administrator should be given the discretion to disqualify de-pooled milk from pooling if the Market Administrator believes

that the handler was trying to circumvent the pooling standards.

The DFA/MMPA witness testified that emergency marketing conditions exist without a deterrent to de-pooling that warrant the omission of a recommended decision. The witness was of the opinion that the volatile dairy product markets that gave rise to rapid price increases and price inversions will continue and therefore, should be addressed in an expedited manner.

A post-hearing brief submitted on behalf of DFA/MMPA reiterated their support of Proposal 7. The brief stressed that adoption of Proposal 7, while not completely eliminating a handler's ability to de-pool, would reduce the total volume of de-pooled milk. DFA/MMPA suggested a modification to Proposal 7 in their post-hearing brief to establish a limit on the volume of milk a handler could pool in March to 120 percent of the their total volume of milk pooled during the prior month. DFA/MMPA believed that this modification would better accommodate and account for the fewer number of days in the month of February.

The DFA/MMPA brief argued that Proposals 4 and 5 are not appropriate for the Mideast order because they call for stringent and unnecessary changes in the order's pooling provisions. The brief stressed that the intention of Proposal 7 was to improve the pooling standards of the order but not in a manner that would necessitate a change to a handler's business operations.

A witness appearing on behalf of Ohio Farm Bureau Federation testified in support of Proposal 7. The witness was of the opinion that if the current pooling provisions are not amended to deter the practice of de-pooling, prices received by farmers who reliably service the Class I market would decrease. The witness claimed that handlers who de-pool milk do not share the revenues generated from de-pooling with all pooled producers which lowers returns to producers who are consistently serving the Class I market. The witness added that Federal order hearings concerning de-pooling have been held in other Federal orders. The witness claimed that if de-pooling is not addressed in the Mideast order, milk from other Federal orders may seek to be pooled on the Mideast order. In this regard, the witness said that adoption of Proposal 7 is necessary to ensure that blend prices received by producers who are consistently pooled are not further eroded.

A witness appearing on behalf Prairie Farms Dairy (Prairie Farms) testified in support of Proposal 7. Prairie Farms is a member owned Capper-Volstead cooperative that pools milk on the Mideast order. The witness testified that since Prairie Farms is required to pool all milk utilized at their distributing plants, all revenues generated from their Class I sales are shared with all pooled producers. The witness noted that Prairie Farms does de-pool its manufacturing milk when it is advantageous but emphasized that this practice is detrimental to producers who are consistently serving the Class I market. The witness urged adoption of Proposal 7 but also offered support for Proposal 6.

Seven dairy farmers whose milk is pooled on the Mideast order testified in support of Proposal 7. The dairy farmers testified that the purpose of the Federal order system is to ensure that pooled producers receive an equitable share of the revenue generated from all classes of milk. The witnesses were of the opinion that the practice of de-pooling caused them to lose a substantial amount of potential income. These witnesses stressed that if a manufacturing handler chooses to pool their milk receipts in months when the PPD is positive, it is only equitable for them to pool their milk receipts when the PPD is negative. The witnesses believed that de-pooling results in producers who consistently service the Class I needs of the market receiving a lower blend price than they otherwise would have if all milk had been pooled. The witnesses maintained that because de-pooling erodes revenues received by pooled producers, the Department should addressed de-pooling on an emergency basis.

Another dairy farmer witness whose milk is pooled on the Mideast order testified in support of limiting de-pooling but did not offer support for any specific proposal. The witness said that as a result of de-pooling in the months of April and May 2004, their farm lost over $6,000. The witness was of the opinion that the Department should act on an emergency basis since the ability for manufacturing handlers to de-pool milk will continue to lower the proceeds received by producers that service the needs of the Class I market.

A witness appearing on behalf of Smith Dairy Products Company testified in support of proposals limiting de-pooling. Smith operates two distributing plants located in the Mideast marketing area. The witness said that the practice of de-pooling manipulates the intent of the Federal milk order system and results in the lowering of the blend prices paid to producers that service the needs of the Class I market. The witness did not offer support for a specific proposal but urged the Department to eliminate the ability to de-pool milk on the Mideast order on an emergency basis.

A witness appearing on behalf of Continental testified in opposition to Proposals 4, 6, 7, and 8. The witness opposed adoption of these proposals because they would allow milk delivered to a distributing plant to be immediately re-pooled and maintained that Proposal 5 would be a better option for the marketing area.

A witness appearing on behalf of White Eagle Cooperative Federation (White Eagle) testified neither in support of or opposition to Proposal 7. White Eagle is a federation of cooperatives and independent producers that markets approximately 150 million pounds of milk per month on the Mideast order. The witness asserted that adoption of the 115 percent pooling standard could limit smaller cooperatives from increasing their dairy farmer membership. The witness testified that adoption of Proposal 7 would allow for an increase in the volume of milk pooled above 115 percent if a producer who was pooled on another Federal order sought to become pooled on the Mideast order but would not make the same exception for a producer continually pooled on the Mideast order who increases production. The witness said that if de-pooling were limited on the Mideast order, de-pooled milk would seek to be pooled on other Federal orders where there are no de-pooling restrictions. The witness was of the opinion that the de-pooling issue should be handled on a national basis and with a recommended decision where the public could submit comments. These positions were reiterated in their post-hearing brief filed on behalf of White Eagle, Superior Dairy, United Dairy, Guggisberg Cheese, Brewster Dairy, and Dairy Support, Inc.

A post-hearing reply brief submitted on behalf of Dean expressed opposition to Proposal 5. Dean argued that Proposal 5 was too restrictive because it contained no provision to enable de-pooled milk to become immediately re-pooled if it was truly needed to service the fluid market later in the month.

All Federal milk marketing orders require the pooling of milk received at pooled distributing plants—which is predominately Class I milk—and all pooled producers and handlers on an order share in the additional revenue arising from higher valued Class I sales. Manufacturing handlers and cooperatives of Class II, III and IV uses of milk who meet the pooling and performance standards make all of their milk receipts eligible to be pooled and usually find it advantageous. Manufacturing handlers and

cooperatives who supply a portion of their total milk receipts to Class I distributing plants receive the difference between their use-value of milk and the order's blend price. Federal milk orders, including the Mideast order, establish limits on the volume of milk eligible to be pooled that is not used for fluid uses primarily through diversion limit standards. However, manufacturing handlers and cooperatives are not required, as are Class I handlers, to pool all their eligible milk receipts.

According to the record, manufacturing handlers and cooperatives have opted to not pool their milk receipts when the manufacturing class prices of milk are higher than the order's blend price—commonly referred to as being ''inverted.'' During such months, manufacturing handlers and cooperatives have elected to not pool all of their eligible milk receipts because doing so would require them to pay into the PSF of the order, the mechanism through which handler and producer prices are equalized. When prices are not inverted, these handlers would pool all of their eligible receipts and receive a payment or draw from the PSF. In receiving a draw from the PSF, such handlers have sufficient money to pay at least the order's blend price to their supplying dairy farmers.

When manufacturing handlers and cooperatives opt to not pool all of their eligible milk receipts in a month, they are essentially avoiding a payment to the PSF. This, in turn, enables them to avoid the marketwide sharing of the additional value of milk that accrues in the higher-valued uses of milk other than Class I. When the Class I price again becomes the highest valued use of milk, or when other class-price relationships become favorable, the record reveals that these same handlers opt to again pool their eligible milk receipts and draw money from the PSF. It is the ability of manufacturing handlers and cooperatives opting to not pool milk and thereby avoid the marketwide sharing of the revenue accruing from non-Class I milk sales that is viewed by proponents as giving rise to disorderly marketing conditions. According to proponents, producers and handlers who cannot escape being pooled and priced under the order are not assured of equitable prices.

The record reveals that since the implementation of Federal milk marketing order reform in January 2000, and especially in more recent years, large and rapid increases in manufactured product prices during certain months have provided the economic incentives for manufacturing handlers to opt not to pool eligible milk on the Mideast order. For example, during the 3-month period of February to April 2004, the Class III price increased over 65 percent from $11.89 cwt to $19.66 cwt. During the same time period, total producer milk pooled on the Mideast order decreased by nearly 40 percent from 1.4 billion pounds to 873 million pounds. When milk volumes of this magnitude are not pooled the impacts on producer blend prices are significant. Producers who incur the additional costs of consistently servicing the Class I needs of the market receive a lower return than would otherwise have been received if they did not continue to service the Class I market. Prices received by dairy farmers who supplied the other milk needs of the market are not known. However, it is reasonable to conclude that prices received by dairy farmers were not equitable or uniform.

The record reveals that ''inverted'' prices of milk are generally the result of the timing of Class price announcements. Despite changes made as part of Federal milk order reform to shorten the time period of setting and announcing Class I milk prices and basing the Class I price on the higher of the Class III or Class IV price to avoid price inversions, large month-to-month price increases in Class III and Class IV product prices sometimes trumped the intent of better assuring that the Class I price for the month would be the highest-valued use of milk. In all orders, the Class I price (and the Class II skim price) is announced prior to or in advance of the month for which it will apply. The Class I price is calculated by using the National Agricultural Statistics Service (NASS) surveyed cheese, butter, nonfat dry milk and dry whey prices for the two most current weeks prior to the 24th day of the preceding month and then adding a differential value to the higher of either the advanced Class III or Class IV price.

Historically, the advance pricing of Class I milk has been used in all Federal orders because Class I handlers cannot avoid regulation and are required to pool all of their Class I milk receipts they should know their product costs in advance of notifying their customers of price changes. However, milk receipts for Class III and IV uses are not required to be pooled; thus, Class III and IV product prices (and the Class II butterfat value) are not announced in advance. These prices are announced on or before the 5th of the following month. Of importance here is that manufacturing plant operators and cooperatives have the benefit of knowing all the classified prices of milk before making a decision to pool or not pool eligible receipts.

The record reveals that the decision of manufacturing handlers or cooperatives to pool or not pool milk is made on a month-to-month basis and is generally independent of past pooling decisions. Manufacturing handlers and cooperatives that elected to not pool their milk receipts did so to avoid making payments to the PSF and they anticipated that all other manufacturing handlers and cooperatives would do the same. However, the record indicates that normally pooled manufacturing handlers and cooperatives met the pooling standards of the order to ensure that the Class I market was adequately supplied and that they established eligibility to pool their physical receipts including diversions to nonpool plants. Opponents to proposals to deter de-pooling are of the view that meeting the pooling standards of the order and deciding how much milk to pool are unrelated events. Proponents took the view that participation in the marketwide pool should be based on a long-term commitment to supply the market because in the long-term it is the sales of higher priced Class I milk that adds additional revenue to the pool.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Class I, II and IV milk pooled. In essence, the PPD is the residual revenue remaining after all butterfat, protein and other solids values are paid to producers. If the pooled value of Class I, II and IV milk is greater than the Class III value, dairy farmers receive a positive PPD. While the PPD is usually positive, a negative PPD can occur when class prices rise rapidly during the six-week period between the time the Class I price is announced and the time the Class II butterfat and III and IV milk prices are announced. When manufacturing prices fall, this same lag in the announcement of class prices yields a positive PPD.

As revealed by the record, when manufacturing plants and cooperatives opted to not pool milk because of inverted price relationships, PPD's were much more negative. When this milk is not pooled, a larger percentage of the milk remaining pooled will be the ''lower'' priced Class I milk. When manufacturing milk is not pooled the weighted average value of milk decreases relative to the Class II, III or IV value making the PPD more negative. For example, record evidence demonstrated that in April 2004, a month when a sizeable volume of milk was not pooled, the PPD was a negative $3.78 per cwt. If all eligible milk had

been, the PPD would have been $1.66 per cwt higher or a negative $2.12 per cwt.

The record reveals that when manufacturing handlers and cooperatives opt to not pool milk, unequal pay prices may result to similarly located dairy farmers. For example, Dean noted that when a cooperative delivers a high percentage of their milk receipts to a distributing plant, it lessens their ability to not pool milk and makes them less competitive in the marketplace relative to other producers and handlers. Other evidence in the record supports conclusions identical to Dean that when a dairy farmer or cooperative is able to receive increased returns from shipping milk to a manufacturing handler during times of price inversions, other dairy farmers or cooperatives who may have shipped more milk to a pool distributing plant are competitively disadvantaged.

The record of this proceeding reveals that the ability of manufacturing handlers and cooperatives to not pool all of their eligible milk receipts gives rise to disorderly marketing conditions and warrants the establishment of additional pooling standards to safeguard marketwide pooling. Current pooling provisions do not require or prohibit handlers and cooperatives from pooling all eligible milk receipts. However, the record reveals that when handlers and cooperatives opt to not pool milk, inequities arise among producers and handlers that are contrary to the intent of the Federal milk marketing order program—maintaining orderly marketing conditions.

The record contains extensive testimony regarding the effects on the milk order program resulting from advance pricing and the priority the milk order program has placed on the Class I price being the highest valued use of milk. It remains true that the Class I use of milk is still the highest valued use of milk notwithstanding those occasional months when milk used in usually lower-valued classes may be higher. This has been demonstrated by an analysis of the effective Class I differential values—the difference in the Class I price at the base zone of Cuyahoga County, Ohio, and the higher of the Class III or Class IV price—for the 65-month period of January 2000 through May 2005 performed by USDA.[1] These computations reveal that the effective monthly Class I differential averaged $1.97 per cwt. Accordingly, it can only be concluded that in the longer-term Class I sales continue to be the source of additional revenue accruing to the pool even when, in some months, the effective differential is negative.

Price inversions occur when the wholesale price for manufactured products rises rapidly indicating a tightening of milk supplies to produce those products. It is for this reason that the Department chose the higher of the Class III or Class IV prices as the mover of the Class I price. Distributing plants must have a price high enough to attract milk away from manufacturing uses to meet Class I demands. As revealed by the record, this method has not been sufficient to provide the appropriate price signals to assure an adequate supply of milk for the Class I market. Accordingly, additional measures are needed as a means of assuring that milk remains pooled and thus available to the Class I market. Adoption of Proposal 7 is a reasonable measure to meet the objectives of orderly marketing.

This decision does find that disorderly marketing conditions are present when producers do not receive uniform prices. Handlers and cooperatives opting to not pool milk do not account to the pool at the classified use value of those milk receipts. They do not share the higher classified use—value of their milk receipts with all other producers who are pooled on the order are incurring the additional costs of servicing the Class I needs of the market. This is not a desired or reasonable outcome especially when the same handlers and cooperatives will again pool all of their eligible receipts when class-price relationships change in a subsequent month. These inequities borne by the market's producers are contrary to the intent of the Federal order program's reliance on marketwide pooling—ensuring that all producers supplying the market are paid uniform prices for their milk regardless of how the milk of any single producer is used.

It is reasonable that the order contain pooling provisions intended to deter the disorderly conditions that arise when de-pooling occurs. Such provisions maintain and enhance orderly marketing. Accordingly, this decision finds it reasonable to recommend adoption of provisions that would limit the volume of milk a handler or cooperative may pool during the months of April through February to 115 percent of the total volume pooled by the handler or cooperative in the prior month and to 120 percent of the prior month's pooled volume during March. Adoption of this standard will not prevent manufacturing handlers or cooperatives from electing to not pool milk. However, it should serve to maintain and enhance orderly marketing by encouraging participation in the marketwide pooling of all classified uses of milk.

Consideration was given on whether de-pooling should be considered at a national hearing with other, broader national issued of milk marketing. However, each marketing area has unique marketing conditions and characteristics which have area-specific pooling provisions to address those specific conditions. Because of this, pooling issues are considered unique to each order. This decision finds that it would be unreasonable to address pooling issues, including de-pooling, on a national basis.

Some manufacturing handlers and cooperatives argue that their milk did perform in meeting the Class I needs during the month and this occurred before making their pooling decisions. They argue that the Class I market is therefore not harmed and that the intents and goals of the order program are satisfied. In response to these arguments, this decision finds that the practice of de-pooling undermines the intent of the Federal order program to assure producers uniform prices across all uses of milk normally associated with the market as a critical indicator of orderly marketing conditions. Similarly, handlers and cooperatives who de-pool purposefully do so to gain a momentary financial benefit (by avoiding making payments to the PSF) which would otherwise be equitably shared among all market participants. While the order's performance standards tend to assure that distributing plants are adequately supplied with fresh, fluid milk, the goals of marketwide pooling are undermined by the practice of de-pooling. Producers and handlers who regularly and consistently serve the Class I needs of the market will not equitably share in the additional value arising momentarily from non-fluid uses of milk. These same producers and handlers will, in turn, be required to share the additional revenue arising from higher-valued Class I sales in a subsequent month when class-price relationships change.

The five proposals considered in this proceeding to deter the practice of de-pooling in the Mideast order have differences. They all seek to address market disorder arising from the practice of de-pooling. However, this decision does not find adoption of the three ''dairy farmer for other market'' proposals—Proposals 4, 5 and 8—reasonable because they would make it

[1] Official notice is taken of data and information published in Market Administrator Bulletins as posted on individual Market Administrator Web sites.

needlessly difficult for milk to be re-pooled and because their adoption may disrupt prevailing marketing channels or cause the inefficient movement of milk. Likewise, Proposal 6, which suggests restricting pooling in a month to 115 percent of the prior month's volume pooled by the handler, is not recommended for adoption. Adoption of this proposal would disrupt current marketing conditions beyond what the record justifies. Therefore, this decision recommends adoption of Proposal 7 to limit the pooling of milk by a handler during the months of April through February to 115 percent of the total milk receipts the handler pooled in the prior month and to 120 percent of the prior month's pooled volume during March because it provides the most reasonable measure to deter the practice of de-pooling.

Consideration was given to omitting a recommended decision on the issue of de-pooling. The record does not support a conclusion that adoption of measures to deter de-pooling warrant emergency action. The recommended adoption of provisions to limit the volume of milk that can be pooled during the month on the basis of what was pooled in the preceding month warrants public comments before a final decision is issued.

B. Producer Definition

A proposal published in the hearing notice as Proposal 3, seeking to specify the length of time a dairy farmer may lose Grade A status before losing producer status on the order, is not recommended for adoption. Proposal 3, offered by Dean, seeks to amend the *Producer milk* definition by explicitly stating that a dairy farmer may lose Grade A status for up to 21 calendar days per year before needing to requalify as a producer on the order. The Mideast order does not specify the length of time a dairy farmer may lose Grade A status before needing to requalify as a producer on the order.

Two witnesses appearing on behalf of Dean testified in support of Proposal 3. The Dean witnesses supported adoption of Proposal 3 to provide for 21 days in a year that a producer could lose Grade A approval before needing to reassociate with the Mideast order by making a delivering to a Mideast pool plant. By providing for an exact number of days, the witnesses emphasized, a loss of Grade A status could not be used as a method to de-pool or to circumvent the pooling standards. The witnesses believed that the Market Administrator should be granted the authority to extend the length of time a producer could lose Grade A status before they would have to requalify if the loss of status was due to circumstances beyond the producers control. A post-hearing brief submitted on behalf of Dean reiterated their belief that this change was necessary to ensure that the re-pooling standards would not be circumvented.

The *Producer* definition of the Mideast order currently does not define the length of time a producer may lose Grade A status before needing to requalify for producer status on the order. The issue of qualifying for producer status is important since it determines which producers and which producer milk is entitled to share in the revenues arising from the marketwide pooling of milk on the Mideast order.

The definition of ''temporary'' used by the Market Administrator has accommodated the Mideast market by giving producers a reasonable amount of time to regain Grade A status without burdening the market with excessive touch-base shipments or recordkeeping requirements. Limiting the time period a producer can lose Grade A status would require handlers and the Market Administrator to track the producer's loss of Grade A status throughout the year to determine when the 21 day limit is reached.

This decision finds that the additional touch-base shipments that would be required for a dairy farmer to requalify for producer status on the order would cause uneconomic shipments of milk. Additionally, the increased recordkeeping requirements would burden not only the handlers but also the Market Administrator's office without contributing to the goals and application of the proposed amendments to the pooling standards contained in this decision. Accordingly, Proposal 3 is not recommended for adoption.

2. Transportation Credits

A proposal offered by DFA and published in the hearing notice as Proposal 9 and as modified at the hearing, seeking to establish a transportation credit provision is not recommended for adoption. Proposal 9 seeks to establish a year-round transportation credit on shipments of milk from farms to distributing plants at a rate of $0.0031 per cwt per mile. A separate rate of $0.0024 per cwt per mile for eligible milk movements in the State of Michigan was offered as a modification by MMPA. The credit would not be applicable on the first 75 miles of movement and would be limited to 350 miles. The Mideast order does not currently provide for transportation credits.

A witness appearing on behalf of DFA/MMPA testified that the establishment of a transportation credit in the Mideast order is warranted because the cost of supplying the Class I market is not being equitably borne by all pooled producers. The witness testified that all producers benefit from Class I sales because the revenue generated is distributed through the marketwide pool. In particular, the witness said that all pooled producers were not equitably sharing in the costs of transporting supplemental supplies to meet Class I demand. The witness was of the opinion that Federal order prices should reimburse producers for the cost of transporting milk supplies to Class I plants when needed. The witness emphasized that Proposal 9 is designed to equitably distribute some the cost of transporting those Class I milk supplies with all pooled producers.

The DFA/MMPA witness explained that the proposed exemption of the first 75 miles of eligible milk movement recognizes the producer's responsibility to deliver their milk to the market. The 75 mile exclusion was appropriate, the witness contended, because in the two northern reserve supply regions of Michigan and northern Ohio, the average distance milk travels to a distributing plant is 71 and 74 miles, respectively. The witness also said that a maximum applicable milk movement of 350 miles is a reasonable safeguard to prevent milk from traveling from great distances solely to receive the transportation credit. The DFA/MMPA witness also noted that the Market Administrator should be given the discretion to adjust the transportation credit rate if market conditions warrant. The witness asserted that the market's blend price would be reduced by approximately $0.0297 per cwt per month if Proposal 9 was adopted. The witness maintained that a small reduction in the blend price received by farmers to cover a transportation credit was justified because of the benefit they would receive from having Class I plants fully supplied.

The DFA/MMPA witness contended that the northern region of the Mideast marketing area is a milk surplus region while the southern portion of the marketing area is usually a milk deficit region. The witness said that often surplus milk from the northern region of the marketing area must be transported long distances to supply the southern region for Class I use. Before Federal order reform, the witness asserted, the pricing structure of the Federal order program provided location adjustments that encouraged milk to move to Class I plants because the difference in the

Class I differentials between the surplus and deficit areas provided producers sufficient reimbursement for the transportation costs incurred. However, the witness stressed, the Mideast order's current Class I differential values between surplus and deficit areas do not provide sufficient incentive to encourage this north to south movement of milk.

According to the DFA/MMPA witness, the cost to move a load of milk within the Mideast marketing area from a $1.80 Class I differential zone to a $2.20 Class I differential zone is $0.66 per cwt. However, the order's Class I differential's only provided a $0.40 per cwt incentive to transport that milk. The result, said the witness, is that Class I handlers have to pay additional money to fulfill their Class I needs although all pooled producers benefit from the higher returns generated from those Class I sales. The witness maintained that Federal order prices should cover all transportation costs for supplemental milk supplies and stressed that the proposed transportation credit only seeks to recoup 66 percent of that cost.

The DFA/MMPA witness provided over-order premium and cost information experienced by DFA when delivering supplemental milk supplies. The witness said that the average over-order premium charged for supplemental milk in 2004 was $1.72 per cwt. The witness explained that after subtracting out various customer credits, transportation costs, zone adjustments and give up charges, the net return, on average, was $0.71 per cwt to pay producers and cover the operating costs of the cooperative. The witness discussed the marketing decisions of DFA for October 2004, a month when supplemental supplies are historically needed. The witness said that in October 2004 DFA purchased over 21 million pounds of supplemental milk for delivery to distributing plants in the Mideast marketing area. After subtracting costs from the over-order premium, there was an average of $0.45 per cwt to pay producers and cover operating costs. The witness estimated that if Proposal 9 had been in place during October 2004, DFA would have received an $0.08 per cwt transportation credit on its supplemental supplies of Class I milk.

A post-hearing brief submitted on behalf of DFA/MMPA reiterated their position that transportation credits for the Mideast order are appropriate to ensure that all pooled producers will more equitably bear some costs in servicing the Class I market. The brief also argued that Proposal 9, as modified at the hearing, contained appropriate mileage limits to safeguard against handlers seeking to pool milk on the order solely for the purpose of receiving the credit.

The DFA/MMPA brief contended that the Mideast marketing area lacks sufficient supplemental supplies within the marketing area to service the Class I needs of the market. The brief reiterated that DFA/MMPA members are currently bearing a disproportionate share of the cost of supplying the Class I market because they have to transport milk long distances but are not reimbursed for the additional transportation costs incurred. The brief reiterated that while there are reserve supplies of milk in northern regions of the marketing area that could be delivered to the deficit southern regions, the Class I differential does not sufficiently reimburse the additional transportation cost.

A witness appearing on behalf of Foremost Farms USA Cooperative (Foremost) and Alto Dairy Cooperative (Alto) testified in support of establishing a transportation credit provision. Hereinafter, this decision will refer to these entities as ''Foremost, *et al.*'' Foremost, *et al.*, are dairy farmer owned cooperatives that market milk and supply distributing plants in the Mideast marketing area. The witness was of the opinion that a transportation credit on producer milk delivered to distributing plants was warranted because of the high cost of servicing Class I plants in the Mideast marketing area. The witness explained that on average, the distance from farms to distributing plants in the Mideast marketing area is longer than the distance between farms and manufacturing plants. Therefore, the witness was of the opinion that since producers pay the transportation cost for their milk, a producer delivering to a distributing plant will always receive a lower price for their milk because their transportation costs will be greater.

The Foremost, *et al.*, witness also offered a modification to Proposal 9 that the proposed transportation credit should apply to milk transfers from pool supply plants to pool distributing plants. The witness testified that from 2002 through 2004, Foremost delivered approximately 20 million pounds of milk from their pool supply plants to pool distributing plants during the months of August through November. However, the witness said, under the provision as proposed by DFA/MMPA, these milk transfers would not have received the transportation credit. The witness noted that the Upper Midwest order provides for transportation and assembly credits for milk transferred from supply plants to distributing plants and that a transportation credit provision for the Mideast order should also be applicable for plant-to-plant milk movements.

The Foremost, *et al.*, witness explained that the Mideast Milk Marketing Agency (MEMMA), of which Foremost is a member, markets the milk of is members and charges Class I handlers an over-order premium for milk delivered to their plants. The premium charges are negotiated between MEMMA and the individual distributing plants, the witness explained. The witness was of the opinion that to remain competitive with other suppliers and for their customers to remain competitive in the market, MEMMA cannot increase their over-order premiums to a rate that would compensate the costs of moving milk as would a transportation credit.

A post-hearing brief submitted on behalf of Foremost, *et al.,* maintained their support of Proposal 9 with their modification to include plant-to-plant milk movements as eligible for a transportation credit. The brief contended including credits for plant-to-plant transfers is appropriate because, in their opinion, all Class I milk shipments to distributing plants should be eligible for a transportation credit.

A witness appearing on behalf of Michigan Milk Producers Association (MMPA) testified in support of establishing a transportation credit for Class I milk with a modification. The witness proposed that a lower rate be applicable for milk movements within the State of Michigan.

According to the MMPA witness, trucks used to haul milk within the State of Michigan are often larger because of higher gross weight limits allowed by the State. Typically, a trailer that can hold up to 90,000 pounds of milk, results in transportation costs of approximately $0.0036 per loaded mile, the witness noted. However, in keeping with testimony offered by DFA/MMPA for partial reimbursement of transportation cost, the witness said, Michigan distributing plants receiving milk from Michigan farms should receive a lower credit rate of $0.0024 per loaded mile. Otherwise, the witness said, Michigan handlers would recoup more than 67 percent of their actual transportation cost. The witness was of the opinion that the gain to producers from having all Class I needs satisfied outweighed the small reduction that a transportation credit would have on the blend price.

The MMPA witness testified that the Producer Equalization Committee (PEC), which was identified as the over-order

pricing agency in Michigan, charges an over-order premium for Class I and II milk. According to the witness, these premiums over the previous 2 years have ranged from $1.40 to $1.65 per cwt. The witness explained that PEC pools its over-order revenue and equitably distributes it among participating producers. According to the witness, individual producers who incurred higher transportation costs for shipping milk a long distance will sometimes receive a larger share of the over-order revenue.

The MMPA witness testified in opposition to the Foremost, *et al.,* modification to provide transportation credits on plant-to-plant milk movements. The witness argued that transportation credits should be used to promote efficient movements of milk and that shipping milk directly from farms to distributing plants in the Mideast marketing area is the most efficient movement. The witness was of the opinion that data provided by the Market Administrator demonstrated that there are adequate reserve supplies located within reasonable distances for farm-to-distributing plant deliveries. The witness asserted that providing a transportation credit on milk transfers between plants would encourage milk to be pooled from plant locations far from the marketing area and would inappropriately qualify producers—who would not be reliable suppliers of milk for the Class I needs of the Mideast market—to be pooled on the order. A post-hearing brief submitted on behalf of MMPA reiterated their support for establishing a transportation credit for Class I milk as they modified it during the hearing and opposition to including milk delivered from pool supply plants to pool distributing plants.

A brief submitted on behalf of Dean expressed support for adopting a transportation credit provision with a modification. The brief said that providing a transportation credit to reimburse the cost of supplying the Class I market is appropriate, but expressed concern with exempting the proposed first 75 miles of milk movement from receiving the credit. Dean believed that such an exemption discriminates against local farmers that supply Class I plants.

The Dean brief also asserted that if producer milk receives a transportation credit for supplying the Class I market, milk from that same farm should not be permitted to divert to a plant that is located outside the Mideast marketing area. The brief explained that milk diverted to plants outside the marketing area should be viewed as ''dairy farmer for other markets'' milk. While Dean acknowledged that such treatment of out-of-area diverted milk is a major change to Proposal 9, their brief nevertheless proposed that for milk diverted to out-of-area plants from the same farm that milk receives a transportation credit, such milk should not count as shipments for the purpose of meeting the order's touch-base standard.

Seven dairy farmers whose milk is pooled on the Mideast order testified in support of establishing a transportation credit for Class I milk. Five of the dairy farmers were members of cooperatives and two were independent dairy farmers. The dairy farmers were of the opinion that the entire market should bear the costs associated with serving the Mideast Class I market, not solely the cooperatives that provide supplemental supplies to the order's distributing plants.

A witness appearing on behalf of OFU testified in opposition to adopting transportation credits. The witness said that a transportation credit would discourage the use of local milk to supply Mideast order pool plants.

A witness appearing on behalf of Prairie Farms testified in opposition to adopting transportation credits for Class I milk. The witness said that the modified transportation credit proposals would provide no benefit to Prairie Farms members who supply distributing plants because most of their producers are located less than 75 miles from the plant. The witness contended that transportation credits in the Mideast order would lead to inefficient milk movements for the sole purpose of receiving a credit.

A witness appearing on behalf of Smith Dairies testified in opposition to adopting transportation credits for Class I milk. The witness was of the opinion that providing a transportation credit would reduce the blend price paid to pooled producers who consistently supply distributing plants. The witness stressed that handlers who have supply agreements with distributing plants should account for their transportation costs of supplemental supplies and not ask the government for regulatory relief. The witness also asserted that the handler's business model should account for all transportation costs of milk from the farm to the retail customer. The witness was of the opinion that transportation credits could give a competitive advantage to those handlers that receive the credit. The witness said that when Smith Dairies purchases supplemental supplies, the price negotiated for the supplemental supplies does cover transportation costs and a transportation credit would be additional reimbursement.

A brief submitted on behalf of Continental expressed opposition to the transportation credit provision. Continental believed that adopting Proposal 9 would only benefit the proponents of the proposal and would reduce the blend price paid to close-in producers who supply a distributing plant. The brief stated that Continental's major concern was that the credit would be paid by the handlers with no guarantee that the credit would be transferred to a non-cooperative producer who incurred hauling costs. Continental was of the opinion that adoption of the proposal could pressure non-members into joining a cooperative and thereby limit producer choices as to where they can market their milk.

The Agricultural Marketing Agreement Act of 1937 (AMAA), as amended, provides authority for milk marketing orders to contain provisions for making payments to handlers for performing services that are of marketwide benefit. In this context, a marketwide service payment is a charge to all producers whose milk is pooled on the order, regardless of the use classification of such milk. The payment, in the form of a credit, is deducted from the total value of all milk pooled before computing the order's blend price. The AMAA identifies services that may be of marketwide benefit to include, but are not limited to: (1) Providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers; (2) handling on specific days quantities of milk that exceed quantities needed by handlers; and (3) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

Proposal 9, as proposed and modified by DFA/MMPA seeks to establish a transportation credit as a marketwide service payment for milk shipped directly from dairy farms to distributing plants. The credit would only be applicable to milk classified as Class I and would be paid at a rate of $0.0031 per cwt per mile. The credit would not apply to the first 75 miles of applicable milk movements because this is the typical distance milk moves from farm to distributing plants in the marketing area. Receipt of the credit would be limited to not more than 350 miles because the Class I needs of the marketing area are satisfied without the need to reach further for a supply. In

light of testimony that higher gross vehicle weight limits are provided in the State of Michigan, MMPA proposed a modification to establish a separate and lower transportation credit rate of $0.0024 per cwt per mile for intra-state milk movements from farms to distributing plants in the State of Michigan. Foremost, *et al.,* sought to expand the adoption of transportation credits for milk transfers between supply plants and distributing plants because milk transferred from supply plants, like direct-shipped milk, also serves the Class I market and should therefore be eligible for a transportation credit. This modification was not supported by DFA or MMPA, the proponents of Proposal 9.

An example of a Federal milk marketing order that currently provides for a marketwide service payment is the transportation and assembly credits employed in the Upper Midwest milk marketing order. The transportation and assembly credit provisions of the Chicago Regional order were carried into the provisions of the current Upper Midwest order as part of Federal order reform. The transportation credit feature of the provision provides transporting handlers with a credit of $0.028 per cwt per mile for milk transfers from pool supply plants to pool distributing plants. The credit is deducted from the total value of all milk pooled on the order. Because the transportation credit reduces the total dollar value of the milk pooled, it results in a lower blend price paid to all producers.

These provisions were first implemented in 1987 to ensure that the costs of serving the Class I market of the Chicago Regional marketing area were more equitably shared among all market participants that benefited from the additional revenue generated from Class I sales. Because of the very liberal pooling standards of the Upper Midwest order, much of the milk is pooled through the diversion process by having delivered one day's production to a pool plant. Since such milk is then pooled on a continuing basis, it is considered equitable that such milk bears some of the cost of supplying the Class I market on a continual basis. The credit was maintained in the larger consolidated Upper Midwest order for the same reasons. The transportation credit, as proposed and modified by proponents in this proceeding, differs from the transportation credit provision of the Upper Midwest order. The principal difference is that as proposed, the credit would be paid to the receiving handler for milk delivered direct from farms to distributing plants.

The dairy-farmer cooperative proponents argue that in their capacity as producers they are bearing an inequitable share of the cost of supplying the supplemental needs of the marketing area's Class I market. In this regard, they assert that while all pooled producers are benefiting from Class I sales in the market, cooperative member producers supply a greater percentage of supplemental milk to Class I plants, and thus conclude that they are inequitably bearing the cost of providing supplemental supplies during certain times of the year.

The cooperative witnesses contend that when independently supplied distributing plants need supplemental supplies, such supplemental supplies are acquired from cooperatives. However, the cooperatives over-order premiums have been determined well before the start of the months when supplemental milk supplies are needed without adjusting for the generally farther distance any given particular load of milk must be transported. Even though proponents seek transportation credits year-round, the evidence reveals that it is the additional cost burden they bear providing supplemental milk supplies in the fall months, using October 2004 as a representative month, which Proposal 9 seeks to address. The basis of the argument advanced by the proponents was that without a transportation credit, meaningful cost recovery is not otherwise obtainable from receiving handlers. The record evidence does not support concluding that this burden is experienced in every month of the year.

The proponent cooperatives also asserted that the Class I differentials of the Mideast marketing area do not offer sufficient incentive to attract Class I milk to distributing plants in certain portions of the Mideast area. This failure, the proponent cooperatives say, places them as Class I suppliers at a competitive disadvantage relative to other Class I suppliers who are not supplying supplemental needs. The cooperatives proposed the establishment of a transportation credit provision as a means of offsetting a portion of the total additional cost of supplying Class I plants that the Class I differentials do not adequately compensate.

The proponents noted that the structure of the Mideast market, namely plant consolidation, diminished milk supplies in certain areas and transportation costs have increased since the Class I differentials were implemented in 2000. Amending the Class I differentials to more equitably reimburse Class I suppliers for transportation costs was another option considered but rejected by the proponents. They were of the opinion that changing the Class I price surface would have been very difficult and concluded that providing for transportation credits would be a satisfactory alternative to pricing problems. Proponents estimated that the impact of the proposed transportation credit on the Mideast order blend price per month, if adopted, would be a reduction of approximately $0.0297 per cwt.

This decision finds that the record of this proceeding does not support the adoption of a transportation credit provision in the Mideast marketing area. The proponents requested a year-round transportation credit for Class I milk deliveries but did not offer sufficient evidence to justify establishment of the credit. Evidence presented at the hearing for the volume and cost of milk deliveries was limited to the fall month of October 2004. Testimony offered in support of the establishment of a transportation credit spoke primarily of the need for partial cost recovery for the transportation of supplemental supplies in the fall months. Because the record contains no data for other months it is difficult to determine to what extent distant milk is moving to the Mideast market as supplemental supplies. Additionally, it is not possible to determine what portion of the distant supplies revealed in the October data are displacing local milk at distributing plants for producer qualification purposes only.

The proponents did provide average cost and revenue data regarding supplemental milk supplies for 2004. The DFA witness testimony compared average milk procurement costs for October 2004 with average annual procurement costs. The two largest changes in procurement costs during the month of October, when compared to the annual average, were for ''give-up charges'' and for ''supplemental hauling costs.'' If the annual average procurement costs are adjusted to remove the impact of supplemental procurement costs calculated for August through November, it is estimated that supplemental hauling costs increased $0.27 and give-up charges increased $0.22 on average in the fall when compared to the average cost as extrapolated for the remainder of the year. This analysis concludes that the give-up charges are a major portion of the costs associated with the supplemental supply. This may indicate that the performance standards for the order are too low. It should be noted that the diversion limits were reduced

and the supply plant shipping standards were increased on an interim emergency basis as a result of this proceeding.

Due to the lack of data detailing the total cost of procuring supplemental supplies of milk and an estimate of the annual revenue generated by the transportation credit, no finding can be made that Proposal 9 should be adopted. Of particular concern is the possibility that the credit could be applicable to current and customary supply arrangements. This would result in a producer financed hauling subsidy on a year-round basis that is not related to any supplemental supplies or marketwide services.

Additionally, it is unclear why government intervention is needed to essentially require producers to supplement the milk procurement costs of handlers located in milk deficit sections of the marketing area. Such a transportation credit would disadvantage handlers located in non-deficit regions of the marketing area that wish to distribute packaged milk products in the deficit regions. The full cost of transporting packaged Class I milk into the deficit regions would be borne by the distributing handler but the cost of transporting bulk milk into the deficit region for subsequent processing would be partially funded by all producers through the transportation credit. The proponent's testimony throughout the proceeding stressed that they are unable to recoup their transportation costs from the marketplace. However, the evidence does not support these assertions. Both DFA and MMPA witnesses revealed that they are able to charge Class I handlers adequate over-order premiums to cover their transportation costs. The proponents asserted that these transportation costs should instead be recouped through marketwide pooling so that they can return a greater portion of the over-order premium to their members. The additional transportation cost of supplemental milk supplies is recovered from handlers who benefit by having such milk made available to satisfy demands.

Cooperatives who deliver supplemental supplies to distributing plants are providing those handlers with the benefit of a supply to meet their demands. However, in return the cooperative receives the benefit of an over-order premium to cover any additional costs it may incur and, if possible, return a higher price to its members. The cooperative also benefits in that these supplemental deliveries are used to satisfy the cooperative's long-term performance standards. It is not reasonable to lower the blend prices received by all dairy farmers when transportation costs are adequately recovered from the Class I handler who needs the milk to meet demands.

This recommended decision finds that government intervention through the adoption of the proposed year-round transportation credit provision is not warranted. The record of this proceeding does not reveal that there are additional costs that cannot be recouped in the marketplace without such intervention.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Mideast order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the Mideast marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Part 1033

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR part 1033, is proposed to be amended as follows:

PART 1033—MILK IN THE MIDEAST MARKETING AREA

1. The authority citation for 7 CFR part 1033 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 1033.13 is amended by revising paragraph (e), to read as follows:

§ 1033.13 Producer milk.

* * * * *

(e) Producer milk of a handler shall not exceed the limits as established in § 1033.13(e)(1) through § 1033.13(e)(3).

(1) Producer milk for the months of April through February may not exceed 115 percent of the producer milk receipts of the prior month. Producer milk for March may not exceed 120 percent of producer receipts of the prior month; plus

(2) Milk shipped to and physically received at pool distributing plants and allocated to Class I use in excess of the volume allocated to Class I in the prior month; plus

(3) If a producer did not have any milk delivered to any plant as other than producer milk as defined under the order in this part or any other Federal milk order for the preceding three months; and the producer had milk qualified as producer milk on any other Federal order in the previous month, add the lesser of the following:

(i) Any positive difference of the volume of milk qualified as producer milk on any other Federal order in the previous month, less the volume of milk qualified as producer milk on any other Federal order in the current month, or

(ii) Any positive difference of the volume of milk qualified as producer milk under the order in this part in the current month less the volume of milk qualified as producer milk under the order in this part in the previous month.

(4) Milk received at pool plants in excess of these limits shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b). Milk diverted to nonpool plants reported in excess of this limit shall not be producer milk. The handler must designate, by producer pick-up, which milk shall not be producer milk. If the handler fails to provide this information the provisions of § 1033.13(d)(6) shall apply.

(5) The market administrator may waive these limitations:

(i) For a new handler on the order, subject to the provisions of § 1033.13(e)(6), or

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(6) Milk may not be considered producer milk if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph.

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 06–1586 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23948; Directorate Identifier 2005–NM–246–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319–100 and A320–200 Series Airplanes; and A320–111 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Model A319–100 and A320–200 series airplanes; and A320–111 airplanes. This proposed AD would require modifying the wiring to the fuel pump control of the center fuel tank. This proposed AD results from reports that the low-pressure warning for the fuel pumps of the center fuel tank has come on in flight. We are proposing this AD to ensure that the fuel pumps do not run while dry, which could result in a potential ignition source inside the center fuel tank which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by March 24, 2006.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''FAA–2006–23948; Directorate Identifier 2005–NM–246–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (67 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (*i.e.,* type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The

percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with another latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) has issued a regulation that is similar to SFAR 88. (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States who have agreed to co-operate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition may exist on certain Airbus Model A319–100 and A320–200 series airplanes; and A320–111 airplanes. The DGAC advises that operators have reported that the low-pressure warning for the fuel pumps of the center fuel tank has come on in flight. The probable cause is re-wetting of the low-level sensors for the center tank pumps when the airplane is maneuvered, and when the altitude changes. The warning also may come on when the airplane experiences turbulence. This condition, if not corrected, could cause the fuel pumps to run while dry, which could result in a potential ignition source inside the center fuel tank which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Relevant Service Information

Airbus has issued Service Bulletin A320–28–1059, Revision 06, dated June 29, 2000. The service bulletin describes procedures for modifying the wiring to the fuel pump control of the center fuel tank to ''latch'' the pumps off when the low-level sensor has been dry for 5 minutes. The modification also includes installing two-pole relays to release the ''latch'' when the refuel door is opened or when switching from ''Auto'' to ''Manual'' mode for center pump operation. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2005–173, dated October 26, 2005, to ensure the continued airworthiness of these airplanes in France.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously.

Difference Between French Airworthiness Directive and This Proposed AD

The applicability of French airworthiness directive F–2005–173 excludes airplanes on which Airbus Service Bulletin A320–28–1059 was accomplished in service. However, we have not excluded those airplanes from the applicability of this proposed AD; rather, this proposed AD includes a requirement to accomplish the actions specified in that service bulletin. This requirement would ensure that the actions specified in the service bulletin and required by this proposed AD are accomplished on all affected airplanes. Operators must continue to operate the airplane in the configuration required by this proposed AD unless an alternative method of compliance is approved.

Costs of Compliance

This proposed AD would affect about 119 airplanes of U.S. registry. The proposed actions would take about 17 work hours per airplane, at an average labor rate of $65 per work hour. There is no cost for parts. Based on these figures, the estimated cost of the proposed AD for U.S. operators is $131,495, or $1,105 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. 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, 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 Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

Airbus: Docket No. FAA–2006–23948; Directorate Identifier 2005–NM–246–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by March 24, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; and Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes; certificated in any category; that have received Airbus Modification 20024 in production (installation of a center tank), except airplanes on which Airbus Modification 24373 has been accomplished.

Unsafe Condition

(d) This AD results from reports that the low-pressure warning for the fuel pumps of the center fuel tank has come on in flight. We are issuing this AD to ensure that the fuel pumps do not run while dry, which could result in a potential ignition source inside the center fuel tank which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Compliance

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

Modification

(f) Within 20 months after the effective date of this AD, modify the wiring to the fuel pump control of the center fuel tank by doing all actions specified in the Accomplishment Instructions of Airbus Service Bulletin A320–28–1059, Revision 06, dated June 29, 2000.

Credit for Previous Revisions of Service Bulletin

(g) Modifications done before the effective date of this AD in accordance with the service bulletins identified in Table 1 of this AD are acceptable for compliance with the requirements of paragraph (f) of this AD.

TABLE 1.—PREVIOUS REVISIONS OF SERVICE BULLETIN

Airbus service bulletin	Revision level	Date
A320–28–1059	04	February 4, 1999.
A320–28–1059	05	March 12, 1999.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(i) French airworthiness directive F–2005–173, dated October 26, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on February 10, 2006.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–2453 Filed 2–21–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NE–01–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Corporation (Formerly Allison Engine Company) 501–D Series Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) for Rolls-Royce Corporation (formerly Allison Engine Company) (RRC) 501–D series turboprop engines. That AD currently requires removal from service of certain turbine rotor components at reduced life limits. This proposed AD would require the same actions but adds two new life limits. This proposed AD results from RRC reevaluating and revising component life limits for 501–D22 series turboprop engines. We are proposing this AD to prevent uncontained turbine rotor failure resulting in an in-flight engine shutdown and possible damage to the airplane.

DATES: We must receive any comments on this proposed AD by April 24, 2006.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD:

- By mail: Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2001–NE–01–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- By fax: (781) 238–7055.
- By e-mail: *9–ane–adcomment@faa.gov.*

You can get the service information identified in this proposed AD from Rolls-Royce Corporation, P.O. Box 420, Indianapolis, IN 46206–0420; telephone (317) 230–6400; fax (317) 230–4243.

You may examine the AD docket at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Michael Downs, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, 2300 East Devon Avenue, Des Plaines, IL 60018; telephone (847) 294–7870; fax (847) 294–7834.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include ''AD Docket No. 2001–NE–01–AD'' in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. If a person contacts us verbally, and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. See **ADDRESSES** for the location.

Discussion

On March 25, 2003, we issued AD 2003–07–02, Amendment 39–13098 (68 FR 15937, April 2, 2003). That AD requires removing from service certain turbine rotor components at reduced life limits. That AD resulted from RRC updating material properties and recalculating component life limits. That condition, if not corrected, could result in uncontained turbine rotor

failure resulting in an in-flight engine shutdown and possible damage to the airplane.

Actions Since AD 2003–07–02 Was Issued

Since we issued AD 2003–07–02, RRC reevaluated turbine wheel assembly and turbine wheel spacer assembly life limits for 501–D series turboprop engines. RRC changed certain life limits for the 501–D22 series turboprop engines because of recent improvements in how low-cycle-fatigue life is determined. RRC similarly reduced the life limit of 2nd-3rd-stage spacer assemblies, part numbers (P/Ns) 23033464 and 6842683, installed on 501–D22 series turboprop engines.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require the same actions specified in AD 2003–07–02, but for 501–D22 series turboprop engines, it would add a life limit of 5,200 cycles-in-service for 2nd-3rd-stage spacer assemblies, P/Ns 23033464 and 6842683.

Costs of Compliance

We estimate that this proposed AD would affect 684 engines installed on aircraft of U.S. registry. The proposed action does not impose any additional labor costs if performed at the time of scheduled engine overhaul. Required parts would cost about $45,000 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $30,780,000.

Special Flight Permits Paragraph Removed

Paragraph (f) of the current AD, AD 2003–07–02, contains a paragraph pertaining to special flight permits. Even though this proposed AD does not contain a similar paragraph, we have made no changes with regard to the use of special flight permits to operate the airplane to a repair facility to do the work required by this proposed AD. In July 2002, we published a new Part 39 that contains a general authority regarding special flight permits and airworthiness directives; *see* Docket No. FAA–2004–8460, Amendment 39–9474 (69 FR 47998, July 22, 2002). Thus, when we now supersede ADs we will not include a specific paragraph on special flight permits unless we want to limit the use of that general authority granted in section 39.23.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed regulation:

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

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

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

We prepared a summary of the costs to comply with this proposal and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include ''AD Docket No. 2001–NE–01–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration 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 39–13098 (68 FR 15937, April 2, 2003) and by adding a new airworthiness directive to read as follows:

Rolls-Royce Corporation: Docket No. 2001–NE–01–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by April 24, 2006.

Affected ADs

(b) This AD supersedes AD 2003–07–02, Amendment 39–13098.

Applicability

(c) This AD applies to Rolls-Royce Corporation (formerly Allison Engine Company) (RRC) 501–D series turboprop engines. These engines are installed on, but not limited to, Lockheed 188 series and 382 series turboprop airplanes, Airbus 377SG5–F (Super Guppy) airplanes, and Convair Models 340 and 440 airplanes which have RRC 501–D series turboprop engines installed under Supplemental Type Certificate No. SE1161EA. These latter models are commonly referred to as Convair 580/580A or 5800 models.

(d) This AD results from RRC reevaluating and revising component life limits for 501–D22 series turboprop engines. We are issuing this AD to prevent uncontained turbine rotor failure resulting in an in-flight engine shutdown and possible damage to the airplane.

Compliance

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

501–D13 Series Engines

(f) For 501–D13 series engines, remove turbine wheels and spacers from service as specified in the following Table 1:

TABLE 1.—501–D13 SERIES LIFE LIMITS

Part name	Part number	Life limit for wheels that have complied with commercial overhaul information letter (COIL) 401, dated May 1978	Life limit for wheels that have not complied with COIL 401, dated May 1978
(1) Second-stage turbine wheel assembly.	6847142 and 6876892.	Remove from service before or upon accumulating 16,000 cycles-in-service (CIS).	Remove from service before or upon accumulating 12,000 CIS.
(2) Third-stage turbine wheel assembly.	6845883 and 6849743.	Remove from service before or upon accumulating 13,000 CIS.	Remove from service before or upon accumulating 10,000 CIS.
(3) Fourth-stage turbine wheel assembly.	6876468	Remove from service before or upon accumulating 24,000 CIS.	Remove from service before or upon accumulating 18,000 CIS.

501–D22 Series Engines

(g) For 501–D22 series engines, remove turbine wheels and spacers from service as specified in the following Table 2:

TABLE 2.—501–D22 SERIES LIFE LIMITS

Part name	Part number	Remove from service
(1) Third-stage turbine wheel assembly.	6855083	Before or upon accumulating 10,000 cycles-in-service (CIS).
(2) 1st–2nd-stage spacer assembly	6844632, 23033463, 23064854, and 23064858.	Before or upon accumulating 4,700 CIS.
(3) 1st–2nd-stage spacer assembly	23056966	(i) Before or upon accumulating 8,000 CIS. (ii) If the 1st–2nd-stage spacer assembly passes the hardness criteria in RRC Commercial Engine Bulletin CEB–A–72–1135, then before or upon accumulating 10,000 CIS.
(4) 2nd–3rd-stage spacer assembly	23033456	Before or upon accumulating 4,200 CIS.
(5) 2nd–3rd-stage spacer assembly	23033464 and 6842683	Before or upon accumulating 5,200 CIS.
(6) 3rd–4th-stage spacer assembly	6844794 prior to revision letter "R"	Before or upon accumulating 5,100 CIS.

Alternative Methods of Compliance

(h) The Manager, Chicago Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(i) Information on 501–D13 series engine turbine life limits can be found in RRC Commercial Service Letter (CSL) No. CSL–120, Revision No. 52, dated July 22, 2002.

(j) Information on 501–D22 series engine turbine life limits can be found in RRC CSL No. CSL–1001, Revision No. 20, dated April 5, 2005.

Issued in Burlington, Massachusetts, on February 14, 2006.

Ann C. Mollica,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E6–2454 Filed 2–21–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD13–06–006]

RIN 1625–AA09

Drawbridge Operation Regulations; Hoquiam River, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to temporarily modify the drawbridge operation regulations for the Simpson Avenue Bridge across the Hoquiam River, mile 0.5, at Hoquiam, Washington. The proposed temporary change will enable the bridge owner to delay openings of the bridge from May 1, 2006, through June 1, 2007. This will facilitate major structural and mechanical rehabilitation of the bascule bridge.

DATES: Comments and related material must reach the Coast Guard on or before March 24, 2006.

ADDRESSES: You may mail comments and related material to Commander (dpw), 13th Coast Guard District, 915 Second Avenue, Seattle, WA 98174–1067 where the public docket for this rulemaking is maintained. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Waterways Management Branch between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Austin Pratt, Chief, Bridge Section, (206) 220–7282.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [CGD13–06–006], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during

the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Aids to Navigation and Waterways Management Branch at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The proposed temporary rule would enable the Washington State Department of Transportation (WSDOT), the owner of the bridge, to rehabilitate the structure and manage interruptions to this refurbishment caused by draw openings. The 2-hour notice requirement proposed as a temporary requirement from May 1, 2006, to June 1, 2007, would enable the work to proceed while still providing operational capability. Between January 2, 2007, and March 31, 2007, there is also proposed an 8-week period in which 24 hours notice would be required. The start and end dates are not yet known for this 8-week portion of the project. The 8-week period of 24-hour notice will be considered for approval and rulemaking via a separate temporary deviation. The work includes mechanical and electrical control system improvements, refurbishment of the center lock system, and the replacement of drive motors, the control building and maintenance access platforms. The eight weeks of testing the new control system will necessitate the 24-hour notice for openings.

The Simpson Avenue Bridge in the closed position provides 36 feet of vertical clearance above high water elevation 11.2 feet (datum mean lower low water 0.0). Drawbridge openings are not frequent at this location. The openings are mostly for recreational and commercial fishing vessels, rarely for sailboats and tugs.

The draw opened for vessels 144 times in 2004 for an average of almost 3 openings per week and 131 times in 2005 for a lesser weekly average.

Discussion of Proposed Rule

The operating regulations currently in effect for the Simpson Avenue Bridge are found at 33 CFR 117.1047. The regulations require at least one hour notice at all times for draw openings.

One-hour notice is insufficient time for WSDOT and its contractors to restore the bridge to operational condition and to clear equipment from moving parts as needed to open the span. As few vessels require openings, the increased notice of two hours proposed would not seem an unreasonable burden to vessel operators.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

With regards to the proposed temporary changes, we reached this conclusion based on the fact that most vessels will be able to plan transits in advance and being locally based will soon adjust to the temporary change.

Small Entities

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

For the same reasons enumerated above, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Austin Pratt, Chief, Bridge Section, at (206) 220–7282. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to

safety that might disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this proposed rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation. There are no expected environmental consequences of the proposed action that would require further analysis and documentation.

List of Subjects in 33 CFR Part 117 Bridges.

Regulations

For the reasons discussed in the preamble, the Coast Guard proposes to temporarily amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1(g); Department of Homeland Security Delegation No. 0170.1; section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. From May 1, 2006 to June 1, 2007, amend § 117.1047 by suspending paragraph (c) and adding paragraph (e) to read as follows:

§ 117.1047 Hoquiam River.

* * * * *

(e) From May 1, 2006 to June 1, 2007, the draw of the Simpson Avenue Bridge, mile 0.5, shall open on signal if at least 2 hours notice is given by marine radio, telephone, or other suitable means to the Washington Department of Transportation. The opening signal is two prolonged blasts followed by two short blasts.

Dated: February 3, 2006.

R.R. Houck,

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

[FR Doc. E6–2426 Filed 2–21–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AL43

Administration of VA Educational Benefits—Centralized Certification

AGENCY: Department of Veterans Affairs.

ACTION: Withdrawal of proposed rule and promulgation of a new proposed rule.

SUMMARY: This document withdraws the proposed rule, Administration of VA Educational Benefits—Centralized Certification, published in the **Federal Register** on June 30, 2003 and promulgates a new proposed rule on the same subject. The new proposed rule would amend Department of Veterans Affairs (VA) rules governing certification of enrollment in approved courses for the training of veterans and other eligible persons under education benefit programs VA administers. Under this new proposed rule, VA would permit educational institutions with multi-state campuses to submit certifications to VA from a centralized location. VA considered comments received on the previous proposed rule when drafting this new proposed rule.

DATES: Comments on this proposed rule must be received on or before April 24, 2006.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or e-mail through *http://www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AL43.'' All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Lynn M. Nelson, Education Advisor, Veterans Benefits Administration, Department of Veterans Affairs (225C), 810 Vermont Avenue, NW., Washington, DC 20420, 202–273–7294.

SUPPLEMENTARY INFORMATION: On June 30, 2003, in 68 FR 38657, VA published a proposed rule that would have amended subpart D of 38 CFR part 21, regarding approval criteria for branches and extensions of educational institutions. Under the proposed rule, VA would have permitted educational institutions with multi-state campuses to submit required certifications from a centralized location. This document withdraws the proposed rule of June 30, 2003, 68 FR 38657. In its place, we are promulgating a new proposed rule concerning the same subject matter. Interested persons were given 60 days to submit comments on the initial proposed rule and VA considered those comments when drafting this new proposed rule. The differences between the now withdrawn proposed rule and the new proposed rule are explained below. In addition, this document addresses the public comments that VA

received in response to the withdrawn proposed rule.

I. Background

Educational institutions are required, under sections 3675 and 3676, title 38, United States Code (U.S.C.), to maintain certain records in order for their courses to be approved for the training of veterans and other eligible persons under the educational assistance programs VA administers. Generally, these records contain information about students' grades and progress, prior training, charges for tuition and fees, and other administrative and policy records that show the institution satisfactorily meets all the applicable approval criteria in 38 U.S.C. 3675 and 3676. In addition, under 38 U.S.C. 3690(c) (38 U.S.C. 3034 and 10 U.S.C. 16136(b) provide the authority to apply § 3690(c) to educational assistance provided under 38 U.S.C. chapter 30 and 10 U.S.C. chapter 1606), each institution must make its records and accounts pertaining to eligible veterans and eligible persons who receive educational assistance under chapters 30, 31, 32, 35, and 36 of title 38, U.S.C. and chapter 1606 of title 10, U.S.C. available for examination by authorized representatives of the Government. Furthermore, by application of 38 U.S.C. 3684 each educational institution offering a course in which a veteran or eligible person is enrolled under chapter 30, 31, 32, 35, or 36 of title 38, U.S.C., or chapter 1606 of title 10, U.S.C., must report to VA the following information:

- The enrollment of each such veteran or eligible person; and
- The interruption or termination of the education of each such person. The school official that prepares and submits the above required certifications to VA is known as the ''Certifying Official.''

Under VA's existing regulations, each educational institution (and generally each of its branches or extensions) must maintain its own administrative records for its students. In addition, a Certifying Official must be present at each location to prepare and submit the required certifications to VA. Over the years, we have referred to the branch's or extension's ability to maintain its own records and to submit its own certifications as the branch or extension having its own ''administrative capability.'' There are limited exceptions to the rule that each campus or extension must have its own administrative capability. One exception is permitted when the parent facility is within the same State as the branch or extension and the parent facility maintains a centralized recordkeeping system, specifies the branch location when certifying enrollments to VA, and can identify the records of students at each location. Another exception allows the State approving agency to combine the approval of the courses offered at the branch or extension with the courses offered at the parent school if the branch or extension is located within the same State and:

- The course offering at the branch or extension consists of a small number of unit subjects that do not comprise a program of education or a set curriculum large enough to allow pursuit on a continuing basis;
- The course offering at the branch or extension is given on a temporary basis (no more than a few cycles of training); or
- The facilities at the branch or extension contain insufficient space for an administrative capability to be developed.

When an educational institution's branches or extensions meet the requirements of the exceptions in the above paragraph, the Certifying Official is (or Certifying Officials are) located at the parent facility and there is no Certifying Official present at the branch or extension.

II. Comments

VA received comments both in favor of and against the withdrawn proposed rule. Favorable comments were submitted by:

- Three representatives from private for-profit educational institutions that offer courses at multiple locations;
- The Legislative Director for the National Association of Veterans Program Administrators (NAVPA) on behalf of NAVPA (NAVPA is an organization for Certifying Officials); and
- A representative from a state educational institution.

All five of the above individuals have experience with Certifying Official duties.

VA received 24 letters against the proposed rule. One of the 24 letters was from the President of the National Association of State Approving Agencies (NASAA) on behalf of the NASAA membership. Each state has a department or agency known as the State approving agency (SAA). Each SAA is responsible, under 38 U.S.C. 3671, for approving courses for veterans training offered in their state. In addition to the letter from the national association, 19 SAAs representing their individual states sent in letters similar to the letter from NASAA. The remaining four comments against the proposed rule were submitted by:

- A former college vice president;
- The President of the New Jersey Association of Veteran Program Administrators (NJAVPA) on behalf of NJAVPA (NJAVPA is an organization for Certifying Officials in New Jersey);
- A veteran who is a former Certifying Official commenting from a veteran's and a Certifying Official's perspective; and
- A Certifying Official from a community college that has five campuses.

The comments in favor of the withdrawn proposed rule say that the change would improve service to veterans and other eligible individuals. In addition, the educational institution representatives in favor of the withdrawn proposed rule feel that centralizing their Certifying Officials would allow them to better manage their resources. The comments against the withdrawn proposed rule fell into these main categories:

- Decline in service to veterans and other eligible individuals;
- Adversely impacts state recordkeeping laws;
- State approving agencies (SAAs) may not be able to fulfill their contracted responsibilities; and
- Lessens the approval criteria for out-of-state institutions;

We address the comments, both for and against, in the following paragraphs.

A. Some providing comments perceived that the proposed change would adversely impact state recordkeeping laws; that State approving agencies might not be able to fulfill their contracted responsibilities; and that the proposed rule would lessen the approval criteria for out-of-state institutions. Based on comments from the SAAs and NASAA, it was apparent that VA needed to redefine the meaning of ''administrative capability.'' Our proposed definition of ''administrative capability'' in the withdrawn proposed rule was that ''administrative capability'' meant the ability to:

- Maintain all records and accounts that 38 CFR 21.4209 requires;
- Designate and have a certifying official on site; and
- Provide VA with the reports and certifications that 38 CFR 21.4203, 21.4204, 21.7252, and 21.7652 require based on source data on site, without referral to another location of an educational institution for documentation.

It now is apparent that including both the recordkeeping requirement and the VA certification element in the definition of ''administrative capability,'' clouded our intent that

(subject to the existing exceptions in § 21.4266(b) and (c)) only the certification duties could be centralized. To alleviate confusion, we are revising our previously proposed definition of ''administrative capability'' and also proposing a definition for the term ''Certifying Official.'' In this document we propose to define ''administrative capability'' to mean ''the ability to maintain all records and accounts that § 21.4209 requires.'' We propose to define the term ''Certifying Official'' to mean ''a representative of an educational institution designated to provide VA with the reports and certifications that §§ 21.4203, 21.4204, 21.5810, 21.5812, 21.7152, and 21.7652 require.''

The revision of the withdrawn proposed rule makes it clear that VA is not proposing to change the existing rules for approval of branches and extensions, other than to permit an educational institution with multi-state campuses the option of centralizing its Certifying Official function. Under this proposed rule, each branch or extension still must maintain all records that 38 CFR 21.4209 requires, unless one of the exceptions in § 21.4266(d) applies. Generally, these records contain information about students' grades and progress, prior training, charges for tuition and fees, and other administrative and policy records that show the institution satisfactorily meets all the applicable approval criteria in 38 U.S.C. 3675 and 3676.

In this proposed rule, we clarify, in revised § 21.4266(e), that the State approving agency may combine the approval of courses offered by an extension of an educational institution with the approval of courses offered at the main campus (or the branch campus it is dependent on) only if the extension and the campus it is dependent on are within the same State. (The proposed rule would not change jurisdiction for approval of courses by the State approving agencies (SAAs). For example, an educational institution in New York with a branch in California must have its courses offered in New York approved by the New York SAA and the courses offered at its California branch approved by the California SAA.) The language in the withdrawn proposed rule did not clearly express that combined approvals only apply to locations within the same State. In addition, we clarify in § 21.4266(e) that (in accordance with § 21.4251) an extension of a proprietary educational institution that offers courses that do not lead to a standard college degree is still subject to the minimum period of operation requirements. The information was included because we recently learned that some individuals erroneously concluded the minimum period of operation rule did not apply when approvals were combined.

In this document, we propose adding § 21.4266(f) to clearly express the existing exceptions and the proposed additional exception to the requirement that each location where a course is offered must have a Certifying Official present. In proposed § 21.4266(f)(1) and (f)(2), we show the two exceptions that are permitted under existing regulations. In proposed § 21.4266(f)(3) we show the proposed additional exception that would apply to educational institutions with multi-state campuses who choose to centralize their Certifying Official functions. An educational institution with multi-state campuses may centralize Certifying Official functions if the institution:

- Submits all required reports and certifications via electronic submission through VA's internet-based education certification application;
- Shows the VA facility code for the location that has administrative capability for the location where the student is training when submitting required reports and certifications to VA;
- Provides the Certifying Official full access to the administrative records and accounts that § 21.4209 requires for each student attending the location (or locations) for which the Certifying Official serves as the designated Certifying Official. The records may be originals, certified copies, or in an electronically formatted record keeping system; and
- Designates an employee, at each location of the educational institution that does not have a Certifying Official present, who will serve as a point of contact for the Certifying Official, veterans and other eligible persons, VA, and the SAA. This employee must have access (other than to transmit certifications) to VA's Internet-based education certification application to provide information to VA beneficiaries, the SAA and VA.

Based on the comments we received, we are proposing rules that an educational institution with multi-state campuses must follow if it chooses to centralize its Certifying Official function. These proposed rules are based on concerns of the State approving agency representatives and to ensure program integrity. The new proposed rules the affected educational institutions must follow are explained in the following paragraphs.

1. Submit all required reports and certifications via VA's Internet-based education certification application. The electronic certification application has safeguards to help prevent fraud that are not available in a paperless environment. In addition the application provides VA with a means to extract electronic reports showing all certifications for VA students submitted by an educational institution. VA can extract this information separately for each location. These reports will be helpful for compliance surveys performed by VA or the SAA.

The SAAs expressed concern that their compliance review and supervisory visits would be hampered if the certification documents are maintained at a location outside of their individual states. This proposed rule requires that there must be an employee (at the location that does not have a Certifying Official present) designated to act as a point of contact for VA, the SAA, veterans, reservists, servicemembers and other eligible persons. The point of contact must have access (other than to transmit certifications) to VA's Internet-based education certification application and must allow the SAA or VA representative conducting a site visit to view any VA enrollment certification data on any VA student attending that location. (The data displayed in VA's Internet-based education certification application is not a new collection of information under the Paperwork Reduction Act. The Office of Management and Budget (OMB) approved the collection of enrollment data on VA Form 22–1999 which includes collecting the information via the Internet-based application. The OMB approval number is 2900–0073 and is valid until October 31, 2006.)

2. Show the VA facility code for the location that has administrative capability for the location where the student is training when submitting required reports and certifications to VA. This proposed rule is necessary so that VA can ensure that veterans and other eligible persons are certified properly. The facility code identifies the location that has administrative capability for the location where the student is enrolled. Administrative capability may be at the location the student is attending, or it may exist at another location of the educational institution within the same state. This code tells VA the location of the educational institution in the state where the student is enrolled, and which location of that institution has administrative capability. This will assist in extracting reports for compliance review and program integrity. In addition to program

integrity, the Internet-based application uses the facility code to automatically route the electronic certifications to the VA regional processing office (RPO) that has jurisdiction over the location where the student is training. VA also uses the facility code to extract statistical data for administrative purposes. (This is not a new collection of information. Certifying Officials show the VA facility code on all enrollment certifications and reports submitted to VA. We included this proposed rule for clarity so that educational institutions that centralize their Certifying Official functions understand they must continue to reflect the VA facility code for the location that has administrative capability for the location where the student is pursuing the course, rather than the facility code of the centralized location from where the certifications are prepared.)

3. Provide the Certifying Official full access to administrative records and accounts that 38 CFR 21.4209 requires for each location the official serves as the designated Certifying Official. This proposed rule is necessary so that the Certifying Official has proper access to report enrollment information. We clarified this requirement in this proposed rule because many readers of the withdrawn proposed rule thought the withdrawn proposed rule would give educational institutions with multi-state campuses the authority to move all administrative records from branches and extensions to one central location. While the Certifying Officials must have access to the records, it was not our intent to say all administrative records would be maintained at the national level and that the administrative records would not be available at the state level. Many states require the branches to maintain administrative records and accounts locally for state licensure requirements. If an educational institution wants to submit VA certifications from a central location, the institution must ensure the individual submitting those certifications has access to all administrative records and accounts to properly certify enrollment information for veterans and other eligible persons.

B. Service to veterans and other eligible individuals. Those commenting against centralizing the Certifying Official function strongly feel that service will decline because there will not be a designated person on campus to:

- Assist with the certification process;
- Provide guidance on VA benefits;
- Provide information on individual State veterans benefits; or
- Serve as a continuing advocate for veterans' education at the facility.

They are also concerned that submitting certifications to VA from a centralized national location rather than directly from the campus where the student is attending will delay reporting and ultimately delay receipt of benefits. In addition, they feel that veterans might have to incur long distance phone charges and may have trouble accessing staff in the centralized office if the veteran resides in a different time zone than the centralized office. Several individuals expressed concerns that educational institutions may choose to centralize certification duties in an effort to reduce their administrative overhead costs and subsequently not properly staff the office at the central location.

Those in favor of the option of centralizing the Certifying Official function feel service to veterans will improve. In several of the branches and extensions, a Certifying Official performs other duties and does not solely concentrate on veteran's certifications. It is an ancillary duty. Those educational institutions that prefer to centralize their certifying officials state that by allowing them this option they could dedicate staff members who specialize in VA certification. Thus, their quality of service would improve. By centralizing their Certifying Official functions, those institutions feel they could better train and manage their Certifying Officials.

VA currently permits educational institutions offering distance learning courses to submit certifications from a central location for all students enrolled in their distance learning programs, regardless of where the student resides. VA has not experienced major problems with educational institutions that perform certifications for their campuses in their distance learning programs.

Many Certifying Officials serve as knowledgeable source persons for VA education program information and assistance. Several individuals commenting strongly feel that these services will decline if educational institutions are permitted to centralize their Certifying Official functions. It is important to note that although many Certifying Officials serve as knowledgeable source persons and veterans advocates, providing a valuable service to veterans and VA, there is no statutory provision that requires them to do so. In addition, there is no evidence to support the allegation that an educational institution that chooses to centralize its Certifying Official function would stop providing quality service to its veteran customers. The majority of educational institutions that have multi-state campuses are not public institutions. The majority of veterans, servicemembers, reservists, and other eligible persons entitled to VA educational assistance attend public educational institutions. (For example, during fiscal year 2003, 81% of individuals in receipt of Montgomery GI Bill educational assistance attended public educational institutions.) A private educational institution that is not concerned with assisting veterans and other eligible persons, and providing good customer service, risks losing those students as customers.

Some providing comments perceive that only a local Certifying Official would have access to information about State benefits for veterans, servicemembers or other eligible individuals. While it may require some effort to obtain this information, a centralized office can obtain all the information about State benefits from the Internet. Most financial aid offices provide information about the types of funding available for those seeking financial aid. The educational institutions that have expressed an interest in centralizing their Certifying Official function already have a central financial aid office.

Although several individuals commented that nothing replaces ''face-to-face'' contact, and veterans will lose that benefit if a Certifying Official is not present on each campus, there are also individuals who prefer to conduct their business via email or telephone rather than in person. One SAA official commented that she has seen service decline within her State at some campuses when certification was centralized into one location. (Centralized certification within a State is permitted under existing regulations in certain instances.) She felt the decline was due to the physical separation and that the physical separation resulted in a disconnect between the veteran and the certification process. VA concedes that in some instances the service may decline, but it also may improve. Even under existing regulations, a veteran might receive better service from one campus Certifying Official than he/she would receive from the Certifying Official at another branch of the educational institution. However, VA cannot assume that all service would improve or all service would decline if centralized certification were permitted for educational institutions that have campuses in more than one state.

The school representatives interested in centralizing their Certifying Official

functions stated, in their official comments on the withdrawn proposed rule, that they would still provide face-to-face representation at all their locations. It is only the individuals who certify and submit reports that they wish to centrally locate. One school representative stated it would be similar to the way they centrally administer Federal financial aid. The central location processes the paperwork and the local campus counsels the students and provides general information about aid that is available. In this proposed rule, we added a proposed requirement that there must be a designated point-of-contact at each location that does not have a Certifying Official present who will be available for VA, the Certifying Official, the SAA, and the student.

C. Several SAAs and NASAA suggested having a requirement that each educational institution that centralizes its Certifying Official function, must:

- Have a knowledgeable point-of-contact for student, VA, and SAA contact purposes at each approved location without a Certifying Official present;
- Grant access to all student records, including VA certification documents, to the point-of-contact;
- Maintain a list of everyone who has applied for, received, or expresses a formal interest in using GI Bill benefits;
- Submit certifications to the VA Regional Processing Office that has jurisdiction of the State or territory in which the student is enrolled;
- Maintain adequate toll free numbers or lines for use by students with the capability to measure missed calls;
- Maintain adequate full-time campus personnel at the location the Certifying Official is present to ensure:
  - That certifications and changes are timely submitted
  - Student progress is monitored
  - Course-to-program applicability is monitored; and
  - Calls from veterans and SAAs are answered timely

In addition, the SAA's suggested that VA:

- Permit centralized certification on a test basis;
- Establish a minimum ratio of veteran students to campus personnel;
- Establish a maximum timeframe to submit enrollment certifications (recommended a two-week timeframe); and
- Conduct an annual survey the first five years after the final rule permitting centralized certification to measure customer satisfaction with respect to centralized certification.

Several of the suggestions would require VA to impose more rules on educational institutions that choose to centralize their Certifying Official functions than on those educational institutions that choose not to centralize. We do not believe, however, that it would be equitable for VA to require that only educational institutions that choose to centralize their Certifying Official functions would be subject to employee/veteran ratios, timeframe measurements, mandatory telephone line requirements; and maintenance of lists of persons interested in GI Bill benefits. VA does not see a need to regulate these matters. When problems arise with the certification process, VA's Education Liaison Representatives (ELR), the SAA official, the Certifying Official, and the educational institution work together to resolve the issues. In those instances where liaison assistance and/or training assistance do not resolve the issues, the approval is withdrawn.

Educational institutions, whether opting to centralize their Certifying Official functions or not, will continue to submit enrollment information to the VA regional processing office (RPO) that has jurisdiction over the campus that has administrative capability for the location where the student is enrolled. This will be controlled automatically in VA's internet-based education certification application by routing certifications to the RPO by the VA facility code identifier.

VA is exploring expanding our annual customer satisfaction survey of education assistance recipients to include questions that cover the certification process for new and continuing students.

In this document we propose a rule, for those educational institutions opting to centralize their Certifying Official functions, that they must designate a point-of-contact at each branch or extension location that does not have a Certifying Official present. This was suggested by the SAAs. This will ensure veterans and other eligible persons know who will assist them as well as provide VA and the SAAs a point-of-contact for compliance reviews.

VA also received a comment expressing concern that veterans would not be able to receive an advance payment if educational institutions centralize the Certifying Official function. We do not find that this would occur. An advance payment is a payment that equals the monthly amount of educational assistance due for the month in which the course begins and the following month. The check is made out to the student and is mailed to the school in advance of the start of the term. Students will still be able to receive an advance payment at the location that has administrative capability for the location where they are training. VA determines where to send the payment by using the VA facility code as an identifier. Less than 10% of students receive advance payments. Most students prefer VA to send payments electronically to their individual bank accounts.

The SAAs expressed concerns that permitting educational institutions to centralize their Certifying Official functions may lead to incidents of fraud, waste, and abuse. VA carefully considered these concerns. By adding the proposed rule that those who centralize must use VA's Internet-based education certification application, VA can monitor certification submissions for each location by reports extracted from the application. VA can provide SAAs with listings of students enrolled and certified for the location that the SAA is visiting to assist in the review. In addition, the SAA may view individual enrollment records in VA's Internet-based education certification application during a supervisory visit at a location that does not have a Certifying Official present. The designated point of contact will have access to the Internet-based education certification application and allow the SAA to view enrollment data stored in the application. The ability to review the enrollments will also help VA employees who conduct compliance reviews to ensure veterans and other eligible persons are properly certified.

In addition to the reports, the existing provisions in 38 CFR 21.4210 permit VA to suspend or discontinue payments of educational assistance to all veterans, servicemembers, reservists, and other eligible persons and to disapprove further enrollments or reenrollments if evidence supports a substantial pattern of veterans, servicemembers, reservists, or other eligible persons who are receiving educational assistance to which they are not entitled because the educational institution offering the course has violated recordkeeping or reporting requirements. If VA obtained evidence of substantial violations of recordkeeping or reporting, VA could suspend and discontinue payments to students at all locations served by the centralized Certifying Official (or Officials). The rules in § 21.4210 provide VA enough latitude, if there were substantial problems, that offering centralized certification on a test basis is not necessary.

Some SAAs are concerned that, without a Certifying Official present at each location, reductions and terminations will not be reported timely

and thus more overpayments will occur. Whether the Certifying Officials are centralized or not, they each must follow the same reporting and certification regulations. VA will not lessen those requirements just because an educational institution decided to centralize. Again, VA can suspend or discontinue payment of educational assistance to all VA students enrolled at all locations for violations of reporting and certification regulations. Additionally, the student is still responsible to report his or her enrollment changes directly to VA. Students in receipt of benefits under the Montgomery GI Bill—Active Duty and the Montgomery GI Bill—Selected Reserve programs must verify their enrollment monthly. The student is required to report changes in enrollment as part of the verification. VA does not make payment under these two programs until the student's verification is received.

It is important to note that the proposed rule only would permit, not require, educational institutions with multi-state campuses to centralize their Certifying Official functions. Under existing rules, educational institutions with campuses within the same State (and who have a centralized recordkeeping system) may centralize their Certifying Official functions. Many educational institutions will have no interest in changing the way they currently do business, especially those locations that have many veterans, servicemembers, or reservists enrolled. This proposed rule provides more flexibility to an educational institution that has many campuses, and that may not have significant veteran enrollment.

Paperwork Reduction Act

This document contains a provision in proposed 38 CFR 21.4266(f)(3)(i) that would require an educational institution to submit required certifications electronically using VA's Internet-based education certification application if the institution chooses to centralize its Certifying Official function. The proposed requirement is a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521) that would need approval by the Office of Management and Budget (OMB). Accordingly, under section 3507(d) of the Act, VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns a control number for each collection of information it approves. VA 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.

VA has approval to collect the information either by paper or electronically under OMB Control No. 2900–0073 (Enrollment Certification). Under the existing approval, educational institutions choose whether to submit their certifications by paper or electronically. The proposed requirement in 38 CFR 21.4266(f)(3) would require electronic submission by those educational institutions centralizing their Certifying Official functions and would require revision to the existing approval. The existing OMB approval expires October 31, 2006. In a separate document VA is requesting an extension of approval. That document will be published in the **Federal Register** in the near future and will provide the public an opportunity to comment on the collection.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or the private sector.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of $100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this proposed rule and has concluded that it is a significant regulatory action because it raises novel policy issues.

Regulatory Flexibility Act

The Secretary of Veterans Affairs (VA) hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The proposed rule will affect only those educational institutions that choose to centralize their Certifying Official functions. Centralizing certifying functions would be at the option of the educational institution should they desire to consolidate their certifying functions. Some educational institutions with multi-state campuses requested VA expand current regulations to permit them to centralize their Certifying Official functions. Those education institutions believe centralizing their functions will allow them to better manage and allocate their resources. Existing VA regulations do not permit educational institutions with multi-state campuses to centralize their Certifying Official functions. The economic effect on small entitles would essentially entail a cost savings associated with the consolidation of certifying functions. By centralizing the functions, the institutions desiring this option say they could dedicate less full-time employees to the centralizing duties and at the same time have those employees specialize. According to the staff members of educational institutions interested in centralizing, their training costs would be reduced by having a centralized staff dedicated to VA certification and serving veterans. The option in this proposed rule that would liberalize current regulations to permit centralizing the certification functions would not impact a substantial number of small entities. Of the 6,900 post secondary educational institutions approved by Department of Education for Title IV funds, only 3 of those institutions commented on the previous proposed rule that would have permitted centralized certification. Less than 10 educational institutions have expressed interest in centralized certification, but those that have are very interested in the proposed change that would allow them the option. Pursuant to 5 U.S.C. 605(b), this proposed rule, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Program Numbers

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this proposed rule are 64.117, Survivors and Dependents Educational Assistance; 64.120, Post-Vietnam Era Veterans' Educational Assistance; and 64.124, All-Volunteer Force Educational Assistance. This proposed rule also affects the Montgomery GI Bill Selected Reserve

program. There is no Catalog of Federal Domestic Assistance number for the Montgomery GI Bill Selected Reserve program.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflicts of interests, Defense Department, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: September 30, 2005.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set out above, 38 CFR part 21 (subpart D) is proposed to be amended as follows.

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart D—Administration of Educational Assistance Programs

1. The authority citation for part 21, subpart D, continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 34, 35, 36, unless otherwise noted.

2. Section 21.4266 is revised to read as follows:

§ 21.4266 Approval of courses at a branch campus or extension.

(a) *Definitions.* The following definitions apply to the terms used in this section.

(1) *Administrative capability.* The term *administrative capability* means the ability to maintain all records and accounts that § 21.4209 requires.

(2) *Certifying Official. Certifying Official* means a representative of an educational institution designated to provide VA with the reports and certifications that §§ 21.4203, 21.4204, 21.5810, 21.5812, 21.7152, and 21.7652 require.

(3) *Main campus.* The term *main campus* means the location where the primary teaching facilities of an educational institution are located. If an educational institution has only one teaching location, that location is its main campus. If it is unclear which of the educational institution's teaching facilities is primary, the main campus is the location of the primary office of its Chief Executive Officer.

(4) *Branch campus.* The term *branch campus* means a location of an educational institution that:

(i) Is geographically apart from and operationally independent of the main campus of the educational institution;

(ii) Has its own faculty, administration and supervisory organization; and

(iii) Offers courses in education programs leading to a degree, certificate, or other recognized education credential.

(5) *Extension.* The term extension means a location of an educational institution that is geographically apart from and is operationally dependent on the main campus or a branch campus of the educational institution.

(Authority: 38 U.S.C. 3675, 3676, 3684)

(b) *State approving agency jurisdiction.* (1) The State approving agency for the State where a residence course is being taught has jurisdiction over approval of that course for VA education benefit purposes.

(2) The fact that the location where the educational institution is offering the course may be temporary will not serve to change jurisdictional authority.

(3) The fact that the main campus of the educational institution may be located in another State from that in which the course is being taught will not serve to change jurisdictional authority.

(Authority: 38 U.S.C. 3672)

(c) *Approving a course offered by a branch campus or an extension of an educational institution.* Before approving a course or a program of education offered at a branch campus or an extension of an educational institution, the State approving agency must ensure that:

(1) Except as provided in paragraph (d) of this section, each location where the course or program is offered has administrative capability; and

(2) Except as provided in paragraph (f) of this section, each location where the course or program is offered has a Certifying Official on site.

(Authority: 38 U.S.C. 3672)

(d) *Exceptions to the requirement that administrative capability exist at each location.* (1) A State approving agency may approve a course or program offered by a branch campus that does not have its own administrative capability if:

(i) The main campus of the educational institution within the same State maintains a centralized recordkeeping system that includes all records and accounts that § 21.4209 requires for each student attending the branch campus without administrative capability. These records may be originals, certified copies, or in an electronically formatted recordkeeping system; and

(ii) The main campus can identify the records of students at the branch campus for which it maintains centralized records.

(2) The State approving agency may approve a course or program offered by an extension that does not have its own administrative capability if:

(i) The extension and the main campus or branch campus it is dependent on are located within the same State;

(ii) The main campus or branch campus the extension is dependent on has administrative capability for the extension; and

(iii) The State approving agency combines the approval of the course(s) offered by the extension with the approval of the courses offered by the main campus or branch campus the extension is dependent on.

(e) *Combined approval.* The State approving agency may combine the approval of courses offered by an extension of an educational institution with the approval of the main campus or the branch campus that the extension is dependent on, if the extension is within the same State as the campus it is dependent on. Combining the approval of courses offered by an extension, with the approval of courses offered by the main campus or branch campus the extension is dependent on, does not negate the minimum period of operation requirements in § 21.4251 for courses that do not lead to a standard college degree offered by an extension of a proprietary educational institution. The State approving agency will list the extension and courses approved on the notice of approval sent to the educational institution pursuant to § 21.4258 of this part.

(f) *Exceptions to the requirement that each location where the course or program is offered must have a Certifying Official on site.* Exceptions to the requirement in paragraph (c) of this section, that each location with an approved course or program of education must have a Certifying Official on site, will be permitted for:

(1) Extensions of an educational institution when the State approving agency combines the approval of the courses offered by the extension with a branch campus or main campus. (See paragraph (e) of this section.)

(2) Educational institutions with more than one campus within the same State if the main campus:

(i) Maintains a centralized recordkeeping system. (See paragraph (d)(1) of this section.);

(ii) Has administrative capability for the branch campus (or branch campuses) within the same State; and

(iii) Centralizes its Certifying Official function at the main campus.

(3) Educational institutions with multi-state campuses when an educational institution wants to centralize its Certifying Official function into one or more locations if:

(i) The educational institution submits all required reports and certifications that §§ 21.4203, 21.4204, 21.5810, 21.5812, 21.7152, and 21.7652 require via electronic submission through VA's internet-based education certification application;

(ii) The educational institution designates an employee, at each teaching location of the educational institution that does not have a Certifying Official present, to serve as a point-of-contact for veterans, servicemembers, reservists, or other eligible persons; the Certifying Official(s); the State approving agency of jurisdiction; and VA. The designated employee must have access (other than to transmit certifications) to VA's internet-based education certification application to provide certification information to veterans, servicemembers, reservists, or other eligible persons, State approving agency representatives, and VA representatives;

(iii) Each Certifying Official uses the VA facility code for the location that has administrative capability for the teaching location where the student is training when submitting required reports and certifications to VA; and

(iv) Each Certifying Official has full access to the administrative records and accounts that § 21.4209 requires for each student attending the teaching location(s) for which the Certifying Official has been designated responsibility. These records may be originals, certified copies, or in an electronically formatted recordkeeping system.

(Authority: 38 U.S.C. 3672)

[FR Doc. 06–1652 Filed 2–21–06; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2005–TX–0003; FRL–8034–8]

Approval and Promulgation of State Implementation Plans; Texas; Revision to the Rate of Progress Plan for the Beaumont/Port Arthur Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve revisions to the Texas State Implementation Plan (SIP) Post-1996 Rate of Progress (ROP) Plan, the 1990 Base Year Inventory, and the Motor Vehicle Emissions Budgets (MVEB) established by the ROP Plan, for the Beaumont/Port Arthur (BPA) ozone nonattainment area submitted November 16, 2004. The intended effect of this action is to approve revisions submitted by the State of Texas to satisfy the reasonable further progress requirements for 1-hour ozone nonattainment areas classified as serious and demonstrate further progress in reducing ozone precursors. We are approving these revisions in accordance with the requirements of the Federal Clean Air Act (the Act).

DATES: Written comments should be received on or before March 24, 2006.

ADDRESSES: Comments may be mailed to Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the Rules section of this **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Carl Young, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone 214–665–6645, *young.carl@epa.gov.*

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, EPA is approving the State's SIP submittal 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 action, no further activity is contemplated. If EPA receives relevant 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. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the Rules section of this **Federal Register.**

Dated: February 6, 2006.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 06–1564 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[EPA–R10–OAR–2006–0001; FRL–8035–6]

Partial Approval of the Clean Air Act, Section 112(l), Delegation of Authority to the Washington State Department of Health

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to partially approve a delegation request submitted by the Washington State Department of Health (WDOH). WDOH has requested delegation authority to implement and enforce the National Emission Standards for Hazardous Air Pollutants for radionuclide air emission. This action is being taken under the Clean Air Act (CAA or the Act).

DATES: Written comments must be received on or before March 24, 2006.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R10–OAR–2006–0001, by one of the following methods:

A. *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. E-Mail: *zhen.davis@epa.gov*.

C. Mail: Davis Zhen, Federal and Delegated Air Programs Unit, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Mail Stop: AWT–107, Seattle, WA 98101.

D. Hand Delivery: U.S. Environmental Protection Agency Region 10, Attn: Davis Zhen (AWT–107), 1200 Sixth

Avenue, Seattle, Washington 98101, 9th Floor. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2006–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM 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 electronic docket are listed in the *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 *www.regulations.gov* or in hard copy during normal business hours at the Office of Air, Waste and Toxics, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, Washington 98101. Copies of the State submittal are also available at the Washington State Department of Health, 111 Israel Road, Tumwater, Washington 98501.

FOR FURTHER INFORMATION CONTACT: Davis Zhen, (206) 553–7660, or by e-mail at *zhen.davis@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. Background and Purpose

A. What Is the NESHAPs Program?

Hazardous air pollutants are defined in the Act as pollutants that threaten human health through inhalation or other type of exposure. These pollutants are commonly referred to as ''air toxics'' or ''hazardous air pollutants'' and are listed in section 112(b)(1) of the Act. National Emission Standards for Hazardous Air Pollutants or NESHAPs control emissions of hazardous air pollutants from specific source categories and implement the requirements of section 112 of the Act. These standards are found in 40 CFR parts 61 and 63.

Section 112(l) of the Act authorizes EPA to approve State and local air toxics programs or rules such that these agencies can accept full or partial delegation of authority for implementing and enforcing the NESHAPs. Typically, a State or local agency requests delegation based on Federal rules adopted unchanged into State or local rules.

B. What Are the Requirements for This Partial Approval and Delegation?

Requirements for partial approval and delegation of NESHAPs adopted unchanged into State or local law are set forth in 40 CFR 63.91(d). This type of delegation is referred to as ''straight delegation.'' There are two basic requirements for straight delegation. First, the requesting agency must show it has adequate authority and resources to implement and enforce the NESHAPs. This criterion must be met for straight delegation as well as for all other types of delegation under section 112(l). Second, in the case of straight delegation, the requesting agency must show that it has adopted the Federal NESHAPs for which it is requesting delegation unchanged into State or local law.

There are two ways a State or local agency can show it has adequate authority and resources to implement and enforce the requested NESHAPs. First, the requesting agency can show that it has received from EPA final or interim approval of its operating permit program under title V of the Clean Air Act. This is because the authority and enforcement requirements for approval of a title V program are equivalent to the requirements for NESHAPs delegation found in 40 CFR 63.91(d). Moreover, EPA approval of a title V program already confers the responsibility to implement and enforce all requirements applicable to major sources and certain other sourcof section 112.

A requesting agency that does not have an EPA-approved title V program can request delegation by showing it has the authority necessary to implement and enforce the NESHAPs, it has the resources and ability to carry out this responsibility, and it is capable of assuring expeditious compliance by sources, all as provided in 40 CFR 63.91(d)(3)(i) through (v). Once a requesting agency demonstrates that it meets the approval criteria, it need only reference that demonstration and reaffirm it still meets the criteria in future requests for updated delegation of section 112 standards.

With respect to radionuclide emissions from licensees of the Nuclear Regulatory Commission or licensees of Nuclear Regulatory Commission Agreement States which are subject to 40 CFR part 61, subparts I, T, or W, a State may request that EPA approve delegation of implementation and enforcement of the Federal standard pursuant to 40 CFR 63.91, but no changes or modifications in the form or content of the standard will be approved pursuant to 40 CFR 63.92, 63.93, 63.94,

or 63.97. *See* 40 CFR 63.90(f). In other words, the only approval option for these NESHAPs is straight delegation.

EPA is authorized to grant, with the State's consent, partial approval to a State request for delegation where the State's legal authorities substantially meet the requirements of 40 CFR 63.91(d)(3)(i) but are not fully approvable. Section 63.91(d)(3)(i) requires the State to show it has enforcement authorities meeting the requirements of 40 CFR 70.11 (the enforcement authorities of the title V program), the authority to request information from regulated sources regarding their compliance status, and the authority to inspect sources and any records required to determine a source's compliance status. In addition, if a State delegates authorities to a local agency and the local agency does not have authorities that meet the requirements of 40 CFR 70.11, the State must retain enforcement authority. In the case of a partial approval, EPA will continue to implement and enforce those authorities under 40 CFR 63.91(d)(3)(i) that are not approved.

C. What Is the History of This Partial Approval and Delegation?

EPA granted interim delegation of 40 CFR part 61, subparts H and I, to WDOH on August 2, 1995. *See* 60 FR 39263. That interim delegation expired by its terms on November 9, 1996. Subsequent to that delegation, EPA revised 40 CFR part 61, subparts H and I on September 9, 2002. *See* 67 FR 57166 and 57167, respectively. In addition, EPA raised a concern regarding whether Washington's Regulatory Reform Act of 1995, RCW Ch. 43.05, conflicted with requirements for delegation or approval of Clean Air Act programs to WDOH. WDOH revised its regulations to incorporate by reference the updated NESHAP standards and obtained a determination that RCW Ch. 43.05 does not apply to the Federally-delegated Radionuclide NESHAPs.

In a letter dated October 6, 2004, WDOH submitted a new request for delegation of subparts H and I, as well as for 40 CFR part 61, subparts B, K, Q, R, T, and W. EPA considered WDOH's October 2004 delegation request, but determined that WDOH had not adopted into State law the general provisions for part 61 in 40 CFR part 61, subpart A, and the construction/modification provisions of Subpart H, which are essential for full implementation and enforcement of the Radionuclide NESHAPs. EPA therefore did not proceed with the October 2004 delegation request.

Since then, WDOH has revised its regulations to fully incorporate by reference all of the Radionuclide NESHAPs, including 40 CFR part 61, subpart A. On June 6, 2005, WDOH submitted a new request for delegation of authority to implement and enforce 40 CFR part 61, subparts A, B, H, I, K, Q, R, T, and W, as in effect on July 1, 2004. WDOH supplemented this request with a letter from the Washington Attorney General's Office dated December 14, 2005 regarding WDOH's authority to implement and enforce the radionuclides NESHAP. In addition, WDOH clarified on December 20, 2005 that it would consent to partial delegation in the event EPA determined that WDOH did not have all the enforcement authorities required by 40 CFR 63.91(d)(3)(i) for full approval.

D. How Has WDOH Satisfied the Requirements for Partial Approval and Delegation of the Radionuclide NESHAPs?

Although WDOH works with the Washington Department of Ecology (Ecology) in issuing Title V permits to radionuclide sources, Ecology, not WDOH is the EPA-approved Title V permitting program for such sources. Therefore, EPA must determine whether WDOH meets the criteria in 40 CFR 63.91(d)(3)(i) through (v).

Based on WDOH's June 6, 2005 request for delegation and supporting documentation, EPA has determined that WDOH meets the criteria for partial approval and straight delegation of the Radionuclide NESHAP. Specifically, WDOH has submitted a letter from the Washington Attorney General's Office dated December 14, 2005 stating that WDOH has the enforcement, inspection, and information gathering authority required by 40 CFR 63.91(d)(3)(i) with one exception. The exception is that, although WDOH has the authority required by 40 CFR 70.11(a)(3)(ii) and 63.91(d)(3)(i) to recover criminal penalties for knowing violations of the Radionuclide NESHAPs, WDOH does not currently have express authority to recover criminal fines for knowingly making a false material statement or knowingly rendering inadequate any required monitoring device or method, as required by 40 CFR 70.11(a)(3)(iii) and 63.91(d)(3)(i). The letter states that WDOH intends to include express prohibitions against these actions in the near future.

WDOH has also submitted copies of State statutes, regulations, and requirements that grant WDOH authority to implement and enforce the Radionuclide NESHAPs.

In addition, WDOH has submitted a demonstration that it has adequate resources to implement and enforce all aspects of the Radionuclide NESHAPs. This is especially important with respect to the Radionuclide NESHAPs. EPA and other Federal agencies have traditionally played the primary role in regulating radionuclide air emissions, both because radiation is not a ''traditional'' hazardous air pollutant and because very few State and local agencies have developed the technical expertise to independently implement the Radionuclide NESHAPs. WDOH, however, has a long history of regulating large sources of radionuclide air emissions in the State of Washington, in particular, the Department of Energy's Hanford site near Richland, Washington. The submittal also includes a plan for assuring expeditious implementation and enforcement of the Radionuclide NESHAPs.

Finally, WDOH has adopted without change or modification all of the provisions of the Radionuclide NESHAPs, 40 CFR part 61, subparts A, B, H, I, K, Q, R, T, and W, as in effect on July 1, 2004. WDOH does, as a matter of State law, have additional regulations and requirements that sources of radionuclide air emissions must meet. As discussed below, however, those additional authorities and requirements are not part of this partial delegation.

II. EPA Action

A. What Authorities Are Included in This Partial Approval and Delegation?

Except as provided in Section II.B., EPA is delegating to WDOH authority to implement and enforce 40 CFR part 61, subparts A, B, H, I, K, Q, R, T, and W, as in effect on July 1, 2004. NESHAPs that are promulgated or revised substantively after July 1, 2004 are not delegated to WDOH. These remain the responsibility of EPA.

Included as part of the delegation is the authority to approve:

1. ''Minor changes to monitoring,'' including the use of the specified monitoring requirements and procedures with minor changes in methodology as described in 40 CFR 61.14(g)(1)(i);
2. ''Intermediate changes to monitoring'';
3. ''Minor changes to recordkeeping/reporting'';
4. ''Minor changes in test methods,'' including the use of a reference method with minor changes in methodology as described in 40 CFR 61.13(h)(1)(i);
5. Waiver of the requirement for emission testing because the owner or operator of a source has demonstrated

by other means to WDOH's satisfaction that the source is in compliance with the standard as described in 40 CFR 61.13(h)(1)(iii).

For purposes of this paragraph, the terms in quotations have the meaning assigned to them in 40 CFR 63.90.

B. What Authorities Are Excluded From This Partial Approval and Delegation?

EPA is not delegating authorities under 40 CFR part 61 that specifically indicate they cannot be delegated, that require rulemaking to implement, that affect the stringency of the standard, or where national oversight is the only way to ensure national consistency. Table 1 below identifies the specific authorities within 40 CFR part 61, subparts A, B, H, I, K, Q, R, T, and W that EPA is specifically excluding from this delegation.

TABLE 1.—PART 61 AUTHORITIES EXCLUDED FROM PARTIAL APPROVAL AND DELEGATION

Section	Authorities
61.04(b)	Waiver of recordkeeping.
61.12(d)(1)	Approval of alternative means of emission limitation.
61.13(h)(1)(ii)	Approval of alternatives to test methods (except as provided in 40 CFR 61.13(h)(1)(i)).
61.14(g)(1)(ii)	Approval of alternatives to monitoring that do not qualify as "Minor changes to monitoring," "Intermediate changes to monitoring," or "Minor changes to recordkeeping/reporting" For purposes of the previous sentence, the terms in quotes are defined in 40 CFR 63.90.
61.16	Availability of information.
61.23(b)	Subpart B—Radon Emissions from Underground Uranium Mines Alternative compliance demonstration to COMPLY—R (requires EPA Headquarters approval).
61.93(b)(2)(iii), (c)(2)(iii)	Subpart H—Emissions of Radionuclides Other than Radon from DOE Facilities (alternatives to test methods).
61.107(b)(2)(iii), (d)(2)(iii)	Subpart I—Radionuclide Emissions from Federal Facilities Other than NRC licensees and Not Covered in Subpart H (alternatives to test methods).
61.125(a)	Subpart K—Radionuclide Emissions from elemental Phosphorus Plants (alternatives to test methods).
61.206(c), (d), and (e)	Subpart R—Emission from Phosphogypsum Stacks (requires Approval from Assistant Administrator of EPA Office of Air and Radiation).

In addition, because WDOH does not currently have express authority to recover criminal fines for knowingly making a false material statement, representation, or certificate in any form, notice or report or knowingly rendering inadequate any required monitoring device or method, as required by 40 CFR 70.11(a)(3)(iii) and 40 CFR 63.91(d)(3)(i), EPA will continue to retain primary authority to implement and enforce these authorities. This is the basis for partial rather than full approval.

III. Implications

A. How Will This Partial Approval and Delegation Affect the Regulated Community?

Once a State or local agency has been delegated the authority to implement and enforce a NESHAP, they become the primary point of contact with respect to that NESHAP. Generally speaking, the transfer of authority from EPA to WDOH in this delegation changes EPA's role from primary implementer and enforcer to overseer.

As a result, if this partial approval and delegation is finalized, sources in Washington to the delegated Radionuclide NESHAPs should direct questions and compliance issues to WDOH. For authorities that are NOT delegated (those noted in Section II.B. above), affected sources should continue to work with EPA as their primary contact and submit materials directly to EPA. In such cases, affected sources should copy WDOH on all submittals, questions, and requests.

EPA will continue to have primary responsibility to implement and enforce Federal regulations that do not have current State or local agency delegations.

B. Where Will the Regulated Community Send Notifications and Reports?

If this partial approval and delegation is finalized, sources subject to the delegated NESHAPs will be required to send required notifications, reports and requests to WDOH for WDOH's action and to provide copies to EPA. For authorities that are excluded from this delegation, sources should continue to send required notifications, reports, and requests to EPA and to provide copies to WDOH.

C. What Are WDOH's Reporting Obligations?

WDOH must maintain a record of all approved alternatives to all monitoring, testing, recordkeeping, and reporting requirements and provide this list of alternatives to EPA at least semi-annually, or at a more frequent basis if requested by EPA. EPA may audit the WDOH-approved alternatives and disapprove any that it determines are inappropriate, after discussion with WDOH. If changes are disapproved, WDOH must notify the source that it must revert to the original applicable monitoring, testing, recordkeeping, and/or reporting requirements (either those requirements of the original section 112 requirements, the alternative requirements approved under this subpart, or the previously approved site-specific alternative requirements). Also, in cases where the source does not maintain the conditions which prompted the approval of the alternatives to the monitoring testing, recordkeeping, and/or reporting requirements, WDOH must require the source to revert to the original monitoring, testing, recordkeeping, and reporting requirements, or more stringent requirements, if justified.

D. What Is the Effect of Other State Laws Regulating Radionuclide Air Emissions?

This partial approval and delegation delegates to WDOH authority to implement and enforce 40 CFR part 61, subparts A, B, H, I, K, Q, R, T, and W, as in effect on July 1, 2004. The partial approval and delegation does not extend to any additional State standards, including other State standards regulating radionuclide air emissions.

However, if both a State or local regulation and a Federal regulation apply to the same source, both must be complied with, regardless of whether the one is more stringent than the other, pursuant to the requirements of section 116 of the Clean Air Act.

E. How Will WDOH Receive Partial Approval and Delegation of Newly Promulgated and Revised Radionuclide NESHAPs?

WDOH may receive partial approval and delegation of newly promulgated or revised Radionuclide NEHAPs by the following streamlined process: (1) WDOH will send a letter to EPA requesting delegation for such new or revised NESHAPs which WDOH has adopted by reference into Washington regulations; (2) EPA will send a letter of response back to WDOH granting partial approval of the delegation request (or explaining why EPA cannot grant the request), and publish only EPA's approval in the **Federal Register**; (3) WDOH does not need to send a response back to EPA.

F. How Frequently Should WDOH Update Its Partial Approval and Delegations?

WDOH is not obligated to request or receive future delegations. However, EPA encourages WDOH, on an annual basis, to revise its rules to incorporate by reference newly promulgated or revised Radionuclide NESHAPs and request updated delegation. Preferably, WDOH should adopt Federal regulations effective July 1, of each year; this corresponds with the publication date of the Code of Federal Regulations (CFR).

G. How Will This Partial Approval and Delegation Affect Indian Country?

This partial approval and delegation to WDOH to implement and enforce the Radionuclide NESHAPs does not extend to sources or activities located in Indian country, as defined in 18 U.S.C. 1151. ''Indian country'' is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe, even if the trust lands have not been formally designated as a reservation. Consistent with previous Federal program approvals or delegations, EPA will continue to implement the NESHAPs in Indian country, because WDOH has not adequately demonstrated its authority over sources and activities located within the exterior boundaries of Indian reservations and other areas in Indian country.

IV. Summary of Proposed Action

EPA proposes to grant partial approval to WDOH's request for program approval and delegation of authority to implement and enforce the Radionuclide NESHAPs. Pursuant to the authority of section 112(l) of the Act, this partial approval is based on EPA's finding that State law, regulations, and agency resources meet the requirements for partial program approval and delegation of authority specified in 40 CFR 63.91 and applicable EPA guidance.

The purpose of this partial approval and delegation is to acknowledge WDOH's ability to implement a Radionuclide NESHAPs program and to transfer primary implementation and enforcement responsibility for this program from EPA to WDOH. Although EPA will look to WDOH as the lead for implementing delegated Radionuclide NESHAPs for its sources, EPA retains authority under Section 113 of the Act to enforce any applicable emission standard or requirement, if needed. With partial program approval, WDOH may request newly promulgated or revised Radionuclide NESHAPs by way of a streamlined process.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it 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).

The rule also does not have Tribal implications because it will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). Consistent with EPA policy, however, EPA nonetheless initiated consultation with representatives of tribal governments in the process of developing this proposal to permit them to have meaningful and timely input into its development. In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this proposed rule from tribal officials.

This action also does not have Federalism implications because it 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a State request to receive delegation of certain Federal standards, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing program approval and delegation submissions, EPA's role is to approve submissions provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a delegation submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA to use VCS in place of a delegation submission that otherwise satisfies the provisions of the Clean Air Act. Thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not

apply. This rule does not impose an information collection burden under the provisions of Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 61

Environmental protection, Air pollution control, Radionuclides, Reporting, and recordkeeping requirements.

Dated: January 27, 2006.

Julie M. Hagensen,

Acting Regional Administrator, Region 10.

[FR Doc. E6–2472 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2005–0170; FRL–8035–3]

Regulation of Fuels and Fuel Additives: Removal of Reformulated Gasoline Oxygen Content Requirement for California Gasoline and Revision of Commingling Prohibition To Address Non-Oxygenated Reformulated Gasoline in California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: In the Energy Policy Act of 2005 (Energy Act), Congress removed the oxygen content requirement for reformulated gasoline (RFG) in Section 211(k) of the Clean Air Act (CAA). The Energy Act specified that this change was to be immediately effective in California, and that it would be effective 270 days after enactment for the rest of the country. This proposed rule would amend the fuels regulations to remove the oxygen content requirement for RFG for gasoline produced and sold for use in California, thereby making the fuels regulations consistent with amended Section 211(k). In addition, for gasoline produced and sold for use in California, this rule would extend the current prohibition against combining VOC-controlled RFG blended with ethanol with VOC-controlled RFG blended with any other type of oxygenate from January 1 through September 15, to also prohibit combining VOC-controlled RFG blended with ethanol with non-oxygenated VOC-controlled RFG during that time period, except in limited circumstances authorized by the Act.

The removal of the RFG oxygen content requirement and revision of the commingling prohibition for gasoline produced and sold for use in all areas of the country is being published in a separate rulemaking that would have a later effective date than this California specific rulemaking.

In the ''Rules and Regulations'' section of the **Federal Register**, we are issuing these amendments to the RFG regulations as a direct final rule without prior proposal because we view them as noncontroversial amendments and anticipate no adverse comment. We have explained our reasons for these amendments in the preamble to the direct final rule. If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final fuel and it will not take effect. We will address all public comments in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

DATES: *Comments:* Comments must be received on or before March 24, 2006. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by OMB on or before March 24, 2006.

Hearings: If EPA receives a request from a person wishing to speak at a public hearing by March 9, 2006, a public hearing will be held on March 24, 2006. If a public hearing is requested, it will be held at a time and location to be announced in a subsequent **Federal Register** notice. To request to speak at a public hearing, send a request to the contact in **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2005–0170 by one of the following methods:

1. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. E-mail: Group *A-AND-R-DOCKET@epa.gov.* Attention Docket ID No. OAR–2005–0170.

4. Mail: Air and Radiation Docket, Environmental Protection Agency, Mailcode: 6406J, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

5. Hand Delivery: EPA Docket Center, Environmental Protection Agency, 1301 Constitution Avenue, NW, Room B102, Mail Code 6102T, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2005–0170. 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 information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' systems, 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.*

We are only taking comment on issues related to the removal of the oxygen requirement for RFG produced and sold for use in California, and the provisions regarding the combining of ethanol blended California RFG with non-oxygenated California RFG and provisions for retailers regarding the combining of ethanol blended California RFG with non-ethanol blended California RFG. Comments on any other issues or provisions in the RFG regulations are beyond the scope of this rulemaking.

Docket: All documents in the 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,

will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Marilyn Bennett, Transportation and Regional Programs Division, Office of Transportation and Air Quality (6406J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343–9624; fax number: (202) 343–2803; e-mail address: *mbennett@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

I. General Information

A. Does This Action Apply to Me?

Entities potentially affected by this action include those involved with the production and importation of conventional gasoline motor fuel. Regulated categories and entities affected by this action include:

Category	NAICS codes [a]	SIC codes [b]	Examples of potentially regulated parties
Industry	324110	2911	Petroleum Refiners, Importers.
Industry	422710	5171	Gasoline Marketers and Distributors.
	422720	5172	
Industry	484220	4212	Gasoline Carriers.
	484230	4213	

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of Part 80, subparts D, E and F of title 40 of the Code of Federal Regulations. If you have any question regarding applicability of this action to a particular entity, consult the person in the preceding **FOR FURTHER INFORMATION CONTACT** section above.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.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:

1. Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
2. 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.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR part 2.

C. Outline of This Preamble

I. General Information
II. Removal of the RFG Oxygen Content Requirement for California Gasoline
III. Combining Ethanol Blended RFG With Non-Ethanol Blended RFG
IV. Environmental Effects of This Action
V. Statutory and Executive Order Reviews
VI. Statutory Provisions and Legal Authority

II. Removal of the RFG Oxygen Content Requirement for California Gasoline

Section 211(k) of the 1990 Amendments to the CAA required reformulated gasoline (RFG) to contain oxygen in an amount that equals or exceeds 2.0 weight percent. CAA Section 211(k)(2)(B). Accordingly, EPA's current regulations require RFG refiners, importers and oxygenate blenders to meet a 2.0 or greater weight percent oxygen content standard. 40 CFR 80.41. Recently, Congress passed legislation which amended Section 211(k) of the CAA to remove the RFG oxygen requirement.[1] The Energy Act specified that this change was to be immediately effective in California, and that it would be effective 270 days after enactment for the rest of the country. To make the fuels rules consistent with the current Section 211(k), today's rule would modify the RFG regulations to remove the oxygen standard in § 80.41 for gasoline produced and sold for use in California.[2] (Modifications to the RFG regulations to remove the oxygen standard for gasoline produced and sold for use in all areas of the country are

[1] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1504(a), 119 STAT 594, 1076–1077(2005).

[2] The RFG regulations were promulgated under authority of CAA Section 211(c) as well as CAA Section 211(k). The regulations were adopted under section 211(c) primarily for the purpose of applying the preemption provisions in Section 211(c)(4). *See* 59 FR 7809 (February 16, 1994.)

being published in a separate rulemaking.)

Today's rule also would modify other provisions of the RFG regulations which relate to the removal of the oxygen content requirement for gasoline produced and sold for use in California. The modifications to the affected sections are listed in the following table:

§§ 80.41(e) and (f)	Would remove the per-gallon and averaged oxygen standards for Phase II Complex Model RFG for gasoline produced and sold for use in California.[3]
§ 80.41(o)	Would add a provision which specifies that the requirements in § 80.41(o) do not apply to California gasoline.
§ 80.78(a)	Would remove the prohibition against producing and marketing California RFG that does not meet the oxygen minimum standard since the oxygen standard has been removed. Also would remove requirements for California gasoline to meet the oxygen minimum standard during transition from RBOB to RFG in a storage tank. (Today's rule also would remove the provision in § 80.78(a)(1) regarding compliance with the maximum oxygen standard in § 80.41 for simple model RFG. *See* footnote 3.)
§ 80.79	Would remove quality assurance requirement to test California gasoline for compliance with the oxygen standard.
§ 80.81(d)	Would remove requirement for oxygenate blenders to exclude California gasoline from compliance calculations since oxygenate blenders are no longer required to demonstrate compliance with a standard.
§ 80.81(e)	Would remove § 80.81(e)(2) which required refiners, importers and oxygenate blenders to provide written notification to EPA to produce or import gasoline certified under Title 13 of the California Code of Regulations, sections 2265 or 2266, or to comply with an oxygen content compliance survey option, since these requirements related to ensuring compliance with the Federal RFG oxygen content standard. Also removes reference to oxygenate blenders in § 80.81(e)(3) regarding withdrawal of California gasoline exemptions for parties who have violated California or federal RFG regulations.
§ 80.81(h)	Would remove provisions for oxygenate blenders to use California test methods for purposes of compliance testing, since oxygenate blenders are no longer required to conduct testing for compliance with the oxygen standard.

III. Combining Ethanol Blended California RFG With Non-Ethanol Blended California RFG

As discussed above, Section 211(k) required RFG to contain a minimum of 2.0 weight percent oxygen, and the current fuels regulations reflect this requirement. Refiners, importers and oxygenate blenders have used different oxygenates to meet this requirement. RFG that contains ethanol must be specially blended to account for the RVP ''boost'' that ethanol provides, and the consequent possibility of increased VOC emissions. EPA's existing regulations prohibit the commingling of ethanol-blended RFG with RFG containing other oxygenates because the non-ethanol RFG is typically not able to be mixed with ethanol and still comply with the VOC performance standards. Since all RFG is currently required to contain oxygen, the regulations do not now contain a prohibition against combining ethanol-blended RFG with non-oxygenated RFG. With the removal of the oxygen content requirement for RFG, EPA expects that refiners and importers will be producing some RFG without oxygen and some with ethanol or other oxygenates. Mixing ethanol-blended RFG with non-oxygenated RFG has the same potential to create an RVP ''boost'' for the non-oxygenated gasoline as mixing ethanol-blended RFG with RFG blended with other oxygenates. This is of particular concern regarding RFG because most refiners and importers comply with the RFG VOC emissions performance standard on an annual average basis calculated at the point of production or importation. All downstream parties are prohibited from marketing RFG which does not comply with a less stringent downstream VOC standard. However, even though the combined gasoline may meet the downstream VOC standard, combining ethanol-blended RFG with non-oxygenated RFG may cause some gasoline to have VOC emissions which are higher on average than the gasoline as produced or imported. Thus, with regard to gasoline produced and sold for use in California, today's rule would extend the commingling prohibition currently in the fuels regulations to include a prohibition against combining VOC-controlled ethanol-blended RFG with VOC-controlled non-oxygenated RFG during the period January 1 through September 15, with one exception, described below.

The Energy Act contains a provision which specifically addresses the combining of ethanol-blended RFG with non-ethanol-blended RFG.[4] Under this new provision, retail outlets are allowed to sell non-ethanol-blended RFG which has been combined with ethanol-blended RFG under certain conditions. First, each batch of gasoline to be blended must have been ''individually certified as in compliance with subsections (h) and (k) prior to being blended.'' Second, the retailer must notify EPA prior to combining the gasolines and identify the exact location of the retail outlet and specific tank in which the gasoline is to be combined. Third, the retailer must retain, and, upon request by EPA, make available for inspection certifications accounting for all gasoline at the retail outlet. Fourth, retailers are prohibited from combining VOC-controlled gasoline with non-VOC-controlled gasoline between June 1 and September 15. Retailers are also limited with regard to the frequency in which batches of non-ethanol-blended RFG may be combined with ethanol-blended RFG. Retailers may combine such batches of RFG a maximum of two periods between May 1 and September 15. Each period may be no more than ten consecutive calendar days. This proposed rule would implement this provision of the Energy Act for California gasoline. A separate rule will implement this provision for the rest of the country, with a later effective date coinciding with the removal of the RFG oxygen content requirement for such areas.

This new provision will typically be used by retail outlets to change from the use of RFG containing ethanol to RFG not containing ethanol or vice versa. (Such a change is usually referred to as a ''tank turnover.'') Such blending can result in additional VOC emissions,

[3] The regulations also include oxygen minimum standards for simple model RFG and Phase I complex Model RFG, and an oxygen maximum standard for simple model RFG. See §§ 80.41(a) through (d), and (g). These standards are no longer in effect and today's rule would not modify the regulations to remove these standards or compliance requirements relating to these standards, except where such requirements are included in provisions requiring other changes in today's rule.

[4] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1513, 119 STAT 594, 1088–1090 (2005).

perhaps resulting in gasoline that does not comply with downstream VOC standards. The Energy Act is unclear as to when the gasoline in the tank where blending occurs must be in compliance with the downstream VOC standard.

EPA has already promulgated regulations setting out a methodology for making tank turnovers. 40 CFR 80.78(a)(10). EPA believes retailers and wholesale purchaser-consumers should have additional flexibility during the time that they are converting their tanks from one type of RFG to another, while minimizing the time period during which non-compliant gasoline is present in their tanks and being sold. Today's changes would provide additional flexibility to the regulated parties by interpreting the Energy Act to provide retailers and wholesale purchaser-consumers with relief from compliance with the downstream VOC standard during the ten-day blending period, but requiring that the gasoline in the tank thereafter be in compliance or be deemed in compliance with the downstream VOC standard.

To provide assurance that gasoline is in compliance with the downstream VOC standard after the ten-day period, today's regulations would provide two options for retailers and wholesale purchaser-consumers. Under the first option, the retailer may add both ethanol-blended RFG and non-ethanol-blended RFG to the same tank an unlimited number of times during the ten-day period, but must test the gasoline in the tank at the end of the ten-day period to make sure that the RFG is in compliance with the VOC standard. Under the second option, the retailer must draw the tank down as much as practicable at the start of the ten-day period, before RFG of another type is added to the tank, and add only RFG of one type to the tank during the ten-day period. That is, the retailer may not add both ethanol-blended RFG and non-ethanol-blended RFG to the tank during the ten-day period, but may add only one of these types of RFG. EPA believes that when retailers and wholesale purchaser-consumers use this second option it is likely that their gasoline will comply with the downstream VOC standard at the end of the ten-day period, so that testing will not be necessary. We also believe that this approach is compatible with current practices of most retailers and wholesale purchaser-consumers, and expect that most will find it preferable to testing at the end of the ten-day period.

The commingling provisions would apply at a retail level such that each retailer may take advantage of a maximum of two ten-day blending periods between May 1 and September 15 of each calendar year. Thus, the options described above would be available to each retail outlet for each of two ten-day periods during the VOC control period. During each ten-day period the options would be available for all tanks at that retail outlet.

Regarding the requirement that each batch of gasoline to be blended must have been individually certified as in compliance with subsections (h) and (k), EPA notes that all gasoline in compliance with RFG requirements is deemed certified under Section 211(k) pursuant to § 80.40(a). Section 211(h) addresses RVP requirements for gasoline, but EPA does not have a program to certify gasoline as in compliance with this provision. For purposes of the commingling exception for retail outlets incorporated today in § 80.78(a)(8), EPA would deem gasoline that is in compliance with the regulatory requirements implementing Section 211(h) to be certified under that section. Regarding the requirement that retailers retain and make available to EPA upon request ''certifications'' accounting for all gasoline at the retail outlet, EPA would deem this requirement fulfilled where the retailer retains and makes available to EPA, upon request, the product transfer documentation required under § 80.77 for all gasoline at the retail outlet.

Under this proposed rule, the provisions which allow retailers to sell non-ethanol-blended California RFG that has been combined with ethanol-blended California RFG would also apply to wholesale purchaser-consumers. Like retailers, wholesale purchaser-consumers are parties who dispense gasoline into vehicles, and EPA interprets the Energy Act reference to retailers as applying equally to them. As a result, wholesale purchaser-consumers are treated in the same manner as retailers under this rule. This is consistent with the manner in which wholesale purchaser-consumers have been treated in the past under the fuels regulations.

Most of the provisions of this rule are necessary to implement amendments to the Clean Air Act included in the Energy Act that eliminate the RFG oxygen content requirement and allow limited commingling of ethanol-blended and non-ethanol-blended RFG. The extension of the general commingling prohibition in the fuels regulations to cover non-oxygenated RFG is necessary because of the Energy Act amendments, but is issued pursuant to authority of CAA Section 211(k). This provision extends the current program to reflect the presence of non-oxygenated RFG, and is designed to enhance environmental benefits of the RFG program at reasonable cost to regulated parties.

IV. Environmental Effects of This Action

We anticipate that little or no environmental impact would occur as a result of today's proposed action to remove the oxygenate requirement for RFG. The RFG standards consist of content and emission performance standards. Refiners and importers would have to continue to meet all the emission performance standards for RFG whether or not the RFG contains any oxygenate. This includes both the VOC and NO_X emission performance standards, as well as the air toxics emission performance standards which were tightened in the mobile source air toxics (MSAT) rule in 2001.[5] New MSAT standards currently under development are anticipated to achieve even greater air toxics emission reductions.

We have analyzed the potential impacts on emissions that could result from removal of the oxygenate requirement in the context of requests for waivers of the Federal oxygen requirement.[6] We found that changes in ethanol use could lead to small increases in some emissions and small decreases in others while still meeting the RFG performance standards. These potential impacts are associated with the degree to which ethanol would continue to be blended into RFG after removal of the oxygen requirement. Past analyses have projected significant use of ethanol in RFG in California despite removal of the oxygenate requirement.[7] Given current gasoline prices and the tightness in the gasoline market, the favorable economics of ethanol blending, a continuing concern over MTBE use by refiners, the emission performance standards still in place for RFG, and the upcoming renewable fuels mandate,[8] we believe that ethanol will continue to be used in RFG in California after the oxygen requirement is

[5] 66 FR 17230 (March 29, 2001).

[6] *See e.g.*, California Oxygen Waiver Decision, EPA420–S–05–005 (June 2005); Analysis of and Action on New York Department of Conservation's Request for a Waiver of the Oxygen Content Requirement in Federal Reformulated Gasoline, EPA420–D–05–06 (June 2005).

[7] Technical Support Document: Analysis of California's Request for Waiver of the Reformulated Gasoline Oxygen Content Requirement for California Covered Areas, EPA420-R–01–016 (June 2001).

[8] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1501, 119 STAT 594, 1067–1076, (2005).

removed. As a result, we believe that the removal of the oxygenate mandate would have little or no environmental impact in the near future. We will be looking at the long term effect of oxygenate use in the context of the rulemaking to implement the renewable fuels mandate.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this direct final rule does not satisfy the criteria stated above. As a result, this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review. Today's rule would remove certain requirements for all refiners, importers and oxygenate blenders of RFG in California. As a result, this rule is expected to greatly reduce overall compliance costs for all refiners, importers and oxygenate blenders of California RFG. This rule also would provide options for gasoline retailers in California to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Although there may be small compliance costs associated with one of these options, we believe that the additional flexibility provided by this option would reduce overall compliance costs for these parties.

B. Paperwork Reduction Act

This proposed action would not impose any new information collection burden. Refiners, importers and oxygenate blenders of California RFG are exempt from the reporting and recordkeeping requirements under the RFG regulations. 40 CFR 80.81. Therefore, the removal of the oxygen requirement for California RFG would not have any ICR implications for refiners, importers and oxygenate blenders of California RFG. Small testing costs may be associated with one of the options for California gasoline retailers to commingle compliant gasolines. However, these testing costs are expected to be minimal and would be greatly outweighed by the flexibility provided by the option to commingle compliant gasolines. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations in 40 CFR Part 80 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0277, EPA ICR number 1591.15. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures 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 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 today's rule on small entities, EPA certifies that this action would not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed rule would remove certain requirements for all refiners, importers and oxygenate blenders of California RFG, including small business refiners, importers and oxygenate blenders. Specifically, this rule would remove the burden on refiners, importers and oxygenate blenders to comply with the RFG oxygen requirement and associated compliance requirements. This rule also would provide options for gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Although one option requires some compliance testing, the testing costs are expected to be minimal. As a result, we have concluded that this proposed rule, overall, would relieve regulatory burden for small entities subject to the RFG regulations. We continue to be interested in the potential impacts of the proposed rule on small entities and

welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

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 proposed and 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. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector that will result in expenditures of $100 million or more. This rule would affect gasoline refiners, importers and oxygenate blenders by removing the oxygen content requirement for RFG and associated compliance requirements, and would allow gasoline retailers options for commingling compliant gasolines which otherwise would be prohibited from being commingled. This rule would have the overall effect of reducing the burden of the RFG regulations on these regulated parties. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

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 Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It would 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 rule would remove the burden on regulated parties of having to comply with the oxygen standard for RFG in California, and would allow gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, 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.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This proposed rule does not have tribal implications. It would not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This rule would apply to gasoline refiners, importers, oxygenate blenders and retailers who supply RFG in California. This action contains certain modifications to the Federal requirements for RFG, and would not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it is not economically significant and does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Acts That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not an economically ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it does not have a significant adverse effect on the supply, distribution, or use of energy. This rule would eliminate the oxygen content requirement for RFG in California. This change would have the effect of reducing burdens on suppliers of RFG, which, in turn, may have a positive effect on gasoline supplies. RFG refiners and blenders may continue to use oxygenates at their discretion where and when it is most economical to do so. With the implementation of the renewable fuels standard also contained in the Energy Act, the blending of

ethanol, in particular, into gasoline is expected to increase considerably, not decrease. Therefore, despite this action to remove the oxygenate mandate for RFG in California, when viewed in the context of companion energy legislation, overall use of oxygenates is expected to increase in the future. This rule also would allow gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. This also may have a positive effect on gasoline supplies.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub. L. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed would not establish new technical standards within the meaning of the NTTAA. Therefore, EPA did not consider the use of any voluntary consensus standards.

VI. Statutory Provisions and Legal Authority

The statutory authority for the actions in today's direct final rule comes from sections 211(c), 211(k) and 301(a) of the CAA.

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: February 14, 2006.

Stephen L. Johnson,

Administrator.

[FR Doc. 06–1614 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2005–0170; FRL–8034–9]

Regulation of Fuels and Fuel Additives: Removal of Reformulated Gasoline Oxygen Content Requirement and Revision of Commingling Prohibition To Address Non-Oxygenated Reformulated Gasoline

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: In the Energy Policy Act of 2005 (Energy Act), Congress removed the oxygen content requirement for reformulated gasoline (RFG) in section 211(k) of the Clean Air Act (CAA). To be consistent with the current CAA Section 211(k), this rule would amend the fuels regulations at 40 CFR Part 80 to remove the oxygen content requirement for RFG. This rule also would remove requirements which were included in the regulations to implement and ensure compliance with the oxygen content requirement. In addition, this rule would extend the current prohibition against combining VOC-controlled RFG blended with ethanol with VOC-controlled RFG blended with any other type of oxygenate from January 1 through September 15, to also prohibit combining VOC-controlled RFG blended with ethanol with non-oxygenated VOC-controlled RFG during that time period, except in limited circumstances authorized by the Act.

In the ''Rules and Regulations'' section of the **Federal Register**, we are issuing these amendments to the RFG regulations as a direct final rule without prior proposal because we view them as noncontroversial amendments and anticipate no adverse comment. We have explained our reasons for these amendments in the preamble to the direct final rule. If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final fuel and it will not take effect. We will address all public comments in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

DATES: *Comments:* Comments must be received on or before March 24, 2006. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by OMB on or before March 24, 2006.

Hearings: If EPA receives a request from a person wishing to speak at a public hearing by March 9, 2006, a public hearing will be held on March 24, 2006. If a public hearing is requested, it will be held at a time and location to be announced in a subsequent **Federal Register** notice. To request to speak at a public hearing, send a request to the contact in **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2005–0170 by one of the following methods:

1. *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

2. E-mail: Group *A-AND-R-DOCKET@epa.gov.* Attention Docket ID No. OAR–2005–0170.

4. Mail: Air and Radiation Docket, Environmental Protection Agency, Mailcode: 6406J, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

5. Hand Delivery: EPA Docket Center, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B102, Mail Code 6102T, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2005–0170. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically

captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM 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 Home page at *http://www.epa.gov/epahome/dockets.htm.*

We are only taking comment on issues related to the removal of the oxygen requirement for RFG and associated compliance requirements, and the provisions regarding the combining of ethanol blended RFG with non-oxygenated RFG and provisions for retailers regarding the combining of ethanol blended RFG with non-ethanol blended RFG. Comments on any other issues or provisions in the RFG regulations are beyond the scope of this rulemaking.

Docket: All documents in the docket are listed in the *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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Marilyn Bennett, Transportation and Regional Programs Division, Office of Transportation and Air Quality (6406J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343–9624; fax number: (202) 343–2803; e-mail address: *mbennett@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

I. General Information

A. Does This Action Apply To Me?

Entities potentially affected by this action include those involved with the production and importation of conventional gasoline motor fuel. Regulated categories and entities affected by this action include:

Category	NAICS codes [a]	SIC codes [b]	Examples of potentially regulated parties
Industry	324110	2911	Petroleum Refiners, Importers.
Industry	422710	5171	Gasoline Marketers and Distributors.
	422720	5172	
Industry	484220	4212	Gasoline Carriers.
	484230	4213	

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of part 80, subparts D, E and F of title 40 of the Code of Federal Regulations. If you have any question regarding applicability of this action to a particular entity, consult the person in the preceding **FOR FURTHER INFORMATION CONTACT** section above.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.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:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

2. 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.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR part 2.

C. Outline of This Preamble

I. General Information
II. Removal of the RFG Oxygen Content Requirement
III. Combining Ethanol Blended RFG With Non-Ethanol Blended RFG
IV. Environmental Effects of This Action
V. Statutory and Executive Order Reviews
VI. Statutory Provisions and Legal Authority

II. Removal of the RFG Oxygen Content Requirement

Section 211(k) of the 1990 Amendments to the Clean Air Act (CAA) required reformulated gasoline (RFG) to contain oxygen in an amount that equals or exceeds 2.0 weight percent. CAA Section 211(k)(2)(B). Accordingly, EPA's current regulations require RFG refiners, importers and oxygenate blenders to meet a 2.0 or greater weight percent oxygen content standard. 40 CFR 80.41. Recently, Congress passed legislation which amends Section 211(k) of the CAA to remove the RFG oxygen requirement.[1] To be consistent with the current CAA Section 211(k), today's proposed rule would modify the RFG regulations to remove the oxygen standard in § 80.41.[2]

Today's proposed rule would also modify several other sections of the RFG regulations which contain provisions designed to implement and ensure compliance with the oxygen standard. The proposed modifications to the affected sections are listed in the following table:

§ 80.2(ii)	Would remove oxygen in the definition of ''reformulated gasoline credit.'' With the removal of the oxygen standard, there would be no basis for the generation oxygen credits.
§§ 80.41(e) and (f)[3]	Would remove the per-gallon and averaged oxygen standard for Phase II Complex Model RFG
§ 80.41(o)	Would remove the provisions relating to oxygen survey failures. With the removal of the oxygen standard, oxygen surveys would not longer be needed.
§ 80.41(q)	Would remove reference to § 180.41(o). Also would remove reference to oxygenate blenders since oxygenate blenders were subject only to adjusted standards in the case of an oxygen survey failure and not any other survey failure.
§ 80.65 heading	Would remove oxygenate blenders from the heading since oxygenate blenders were only responsible for demonstrating compliance with the oxygen standard which would be removed.
§ 80.65(c)	Would remove requirements relating to compliance with the oxygen standard which would be removed.
§ 80.65(d)	Would remove the designation requirement relating to oxygen content, remove the RBOB designation categories of ''any oxygenate'' and ''ether only,'and add a requirement for RBOB to be designated regarding the type and amount of oxygenate required to be added.
§ 80.65(e)	Would remove the requirement for oxygen test results to be received prior to the gasoline leaving the refinery or importer facility since there would no longer be an oxygen per-gallon minimum standard.
§ 80.65(h)	Would remove the requirement for oxygenate blenders to comply with the audit requirements under subpart F since they would no longer be a requirement to demonstrate compliance with the oxygen standard.
§ 80.67(a)	Would remove the option to comply with the oxygen standard on average for oxygenate blenders since there no longer would be an oxygen standard. Also would remove provisions for refiners and importers to use gasoline that exceeds the average standard for oxygen to offset gasoline which does not achieve the average standard for oxygen.
§ 80.67(b)	Would remove requirements relating to oxygenate blenders who meet the oxygen standard on average since there no longer would be an oxygen standard.
§ 80.67(f)	Would remove requirements relating to compliance with the oxygen standard on average since there no longer would be an oxygen standard.
§ 80.67(g)	Would remove requirements relating to compliance calculations for meeting the oxygen standard on average, since there no longer would be an oxygen standard. Also would remove requirements relating to the generation and use of oxygen credits.
§ 80.67(h)	Would remove requirements relating to the transfer of oxygen credits.
§ 80.68(a) and (b)	Would remove references to oxygenate blenders since, with the removal of the requirement for oxygen survey, they would no longer be subject to survey requirements. Also would remove reference to oxygen regarding consequences of a failure to conduct a required survey.
§ 80.68(c)	Would remove general survey requirements relating to oxygen surveys.
§ 80.73	Would clarify the applicability of this section to oxygenate blenders.
§ 80.74(c)	Would remove recordkeeping requirements for oxygenate blenders who comply with the oxygen standard on average, since they would no longer be required to demonstrate compliance with an oxygen standard. Also would remove reference to ''types'' of credits, since there would now only be one type of credit (*i.e.*, benzene.)
§ 80.74(d)	Would revise this paragraph to clarify recordkeeping requirements for oxygenate blenders.
§ 80.75 heading and paragraph (a).	Would remove reporting requirements for oxygenate blenders since they would no longer be required to demonstrate compliance with an oxygen standard.
§ 80.75(f)	Would remove requirement for submitting oxygen averaging reports since there would no longer be a requirement to comply with the oxygen standard.
§ 80.75(h)	Would remove credit transfer report requirements for oxygen credits, since oxygen credits would no longer be generated.
§ 80.75(i)	Would remove requirement for oxygenate blenders to submit a report identifying each covered area that was supplied with averaged RFG, since they would no longer be required to demonstrate compliance with an oxygen standard.
§ 80.75(l)	Would remove reporting requirement for oxygenate blenders who comply with the oxygen standard on a per-gallon basis, since they would no longer be required to demonstrate compliance with an oxygen standard.
§ 80.75(m)	Would remove requirement for oxygenate blenders to submit a report of the audit required under § 80.65(h), since oxygenate blenders would no longer be required to comply with the audit requirement.
§ 80.75(n)	Would remove requirement for oxygenate blenders to have reports signed and certified, since they would no longer be required to submit reports under this section.
§ 80.76(a)	Would clarify registration requirements for oxygenate blenders.

[1] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1504(a), 119 STAT 594, 1076–1077 (2005).

[2] The RFG regulations were promulgated under authority of CAA Section 211(c) as well as CAA Section 211(k). The regulations were adopted under Section 211(c) primarily for the purpose of applying the preemption provisions in section 211(c)(4). See 59 FR 7809 (February 16, 1994.)

[3] The regulations also include oxygen minimum standards for simple model RFG and Phase I complex Model RFG, and an oxygen maximum standard for simple model RFG. See §§ 80.41(a) through (d), and (g). These standards are no longer in effect and today's rule would not modify the regulations to remove these standards or compliance requirements relating to these standards, except where such requirements are included in provisions requiring other changes in today's rule.

§ 80.77(g)	Would remove product transfer documentation requirement for oxygen content.
§ 80.77(i)	Would remove requirement for RBOB to be identified on product transfer documents as suitable for blending with ''any-oxygenate,'' ''ether-only,'' since these categories would be removed.
§ 80.78(a)	Would remove the prohibition against producing and marketing RFG that does not meet the oxygen minimum standard since the oxygen standard would be removed. Also would remove requirements to meet the oxygen minimum standard during transition from RBOB to RFG in a storage tank. (Today's rule would also remove the provision in § 80.78(a)(1) regarding compliance with the maximum oxygen standard in § 80.41 for simple model RFG. See footnote 3.)
§ 80.79	Would remove quality assurance requirement to test for compliance with the oxygen standard.
§ 80.81(b)	Would remove exemptions for California gasoline survey and independent analysis requirements for oxygenate blenders since they would no longer be subject to these requirements.
§ 80.125(a), (c) and (d)	Would remove attest engagement auditor requirements for oxygenate blenders, since they would no longer be required to conduct attest engagement audits.
§ 80.126(b)	Would revise attest engagement definition of credit trading records to remove reference to oxygen credits.
§ 80.128(e)	Would remove reference to RBOB designations of ''any-oxygenate'' and ''ether-only'' with regard to refiner and importer contracts with downstream oxygenate blenders, since these designations would be removed from the regulations.
§ 80.129	Would remove and reserve this section which provided for alternative attest engagement procedures for oxygenate blenders, since they would no longer be required to conduct attest audits.
§ 80.130(a)	Would remove requirement for a certified public accountant or an internal auditor certified by the Institute of Internal Auditors, Inc. to issue an attest engagement report to blenders, since they would no longer be required to conduct attest audits. Would remove requirement for blenders to provide a copy of the auditor's report to EPA.
§ 80.133(h)	Would remove references to ''any-oxygenate'' and ''ether-only'' RBOB under § 80.69(a)(8) since this section would be removed.
§ 80.134	Would remove this section which provides attest procedures for oxygenate blenders since they would no longer be required to conduct attest audits.

Today's proposed rule would also modify the provisions for downstream oxygenate blending in § 80.69. Under the current regulations, some refiners and importers produce or import a product called ''reformulated gasoline blendstock for oxygenate blending,'' or RBOB, which is gasoline that becomes RFG upon the addition of an oxygenate. The refiner or importer of the RBOB determines the type(s) and amount (or range of amounts) of oxygenate that must be added to the RBOB. The RBOB is then transported to an oxygenate blender downstream from the refiner or importer who adds the type and amount of oxygenate designated for the RBOB by the refiner or importer. The RBOB refiner or importer includes the designated amount of oxygenate in its emissions performance compliance calculations for the RBOB, however, it is the oxygenate blender who actually adds the oxygenate to the RBOB to comply with the 2.0 weight percent oxygen standard for the RFG that is produced by blending oxygenate into the RBOB. The regulations require oxygenate blenders to conduct testing for oxygen content to ensure that each batch of RFG complies with the oxygen standard. With the removal of the oxygen standard, the current requirement for oxygenate blenders to conduct testing to ensure compliance with the oxygen standard would no longer be necessary. Accordingly, today's rule would modify § 80.69 to remove the requirement for oxygenate blenders to test RFG for compliance with the oxygen standard.

Although there would no longer be an oxygen content requirement, we believe that many refiners and importers would want to continue to include oxygenate blended downstream in their emissions performance compliance calculations. As a result, the category of RBOB would be retained and RBOB refiners and importers would be required to comply with the contract and quality assurance (QA) oversight requirements in § 80.69 for any RBOB produced or imported.[4]

Under the current regulations, RBOB refiners and importers are required to have a contract with the downstream oxygenate blender and conduct QA oversight testing of the oxygenate blending operation to ensure that the proper type and amount of oxygenate is added downstream. Section 80.69(a)(6) and (7). The regulations also provide that, in lieu of complying with these requirements, a refiner or importer may designate one of two generic categories of oxygenates to be added to the RBOB, and assume for purposes of its emissions compliance calculations that the minimum amount of oxygenate needed to result in RFG containing 2.0 weight percent oxygen will be added downstream. Section 80.69(a)(8). RBOB refiner or importer compliance with the contract and oversight requirements is not required in this situation because, as discussed above, the oxygenate blender has been required to meet the 2.0 weight percent oxygen standard and conduct testing designed to ensure that each batch of RFG complies with the oxygen standard.[5] Where an RBOB refiner or importer wishes to include a larger amount of oxygenate in its compliance calculations (*i.e*, an amount that would result in RFG containing more than 2.0 weight percent oxygen), the refiner or importer must comply with the contract and oversight requirements in § 80.69(a)(6) and (7) to ensure that the proper type and amount of oxygenate is added.

Because oxygenate blenders would no longer be conducting testing to ensure compliance with the oxygen standard, we believe that RBOB refiner or importer compliance with the contract and QA oversight requirements would be necessary for RBOB designated to be blended with any amount of oxygenate, including an amount of oxygenate which would result in RFG containing 2.0 weight percent (or less) oxygen. As a result, today's rule would require RBOB refiners and importers to comply with the contract and QA oversight requirements in § 80.69 for any RBOB produced or imported. This approach is consistent with the oversight

[4] EPA is developing a rule which would allow RBOB refiners and importers to use an alternative method of quality assurance (QA) oversight of downstream oxygenate blenders in lieu of the contract and QA requirements in §§ 80.78(a)(6) and (a)(7). This alternative method consists of a QA sampling and testing survey program carried out by an independent surveyor pursuant to a survey plan approved by EPA. This alternative QA method is available to RBOB refiners and importers under enforcement discretion until the rule is promulgated, or December 31, 2007, whichever is earlier. *See* Letter to Edward H. Murphy, American Petroleum Institute, dated December 22, 2005, from Grant Y. Nakayama, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

[5] For a discussion of the downstream oxygenate blending requirements, see the preamble to the RFG final rule at 59 FR 7770 (February 16, 1994).

requirements in § 80.101(d)(4) for refiners and importers of conventional gasoline who wish to include oxygen added downstream from the refinery or importer in anti-dumping emissions compliance calculations.

Although oxygenate blenders would no longer be subject to the oxygen standard and associated testing requirements, we believe that the current requirements for oxygenate blenders to be registered with EPA, to add the specific type(s) and amount (or range of amounts) of oxygenate designated for the RBOB, and to maintain records of their blending operation continue to be necessary in order to ensure compliance with, and facilitate enforcement of, the emissions performance standards for RFG produced by blending oxygenate with RBOB downstream. As a result, these oxygenate blender requirements would be retained.

We anticipate that the effective date for the removal of the oxygen requirement would occur during 2006. As a result, refiners, importers and oxygenate blenders would be subject to the oxygen standard for the months in 2006 prior to the effective date of this rule. The current regulations allow parties to demonstrate compliance either on a per-gallon basis or on an annual average basis. Parties wishing to base their compliance on the per-gallon requirements, would be able to formulate and sell RFG without oxygen after the effective date of the rule. EPA would interpret its regulations regarding annual averaging as follows. Parties would be able to demonstrate compliance based on the average oxygen content of RFG during the months prior to the effective date for the removal of the oxygen content requirement. In addition, any refiner, importer or oxygenate blender who is unable to meet the annual average oxygen standard in 2006 based on the months prior to the effective date for the removal of the oxygen content requirement would be able to include all of the oxygenated RFG it produces or imports during 2006 in its annual average compliance calculations.

III. Combining Ethanol Blended RFG With Non-Ethanol Blended RFG

As discussed above, Section 211(k) required RFG to contain a minimum of 2.0 weight percent oxygen, and the current fuels regulations reflect this requirement. Refiners, importers and oxygenate blenders have used different oxygenates to meet this requirement. RFG that contains ethanol must be specially blended to account for the RVP ''boost'' that ethanol provides, and the consequent possibility of increased VOC emissions. EPA's existing regulations prohibit the commingling of ethanol-blended RFG with RFG containing other oxygenates because the non-ethanol RFG is typically not able to be mixed with ethanol and still comply with the VOC performance standards. Since all RFG is currently required to contain oxygen, the regulations do not now contain a prohibition against combining ethanol-blended RFG with non-oxygenated RFG. With the removal of the oxygen content requirement for RFG, EPA expects that refiners and importers will be producing some RFG without oxygen and some with ethanol or other oxygenates. Mixing ethanol-blended RFG with non-oxygenated RFG has the same potential to create an RVP ''boost'' for the non-oxygenated gasoline as mixing ethanol-blended RFG with RFG blended with other oxygenates. This is of particular concern regarding RFG because most refiners and importers comply with the RFG VOC emissions performance standard on an annual average basis calculated at the point of production or importation. All downstream parties are prohibited from marketing RFG which does not comply with a less stringent downstream VOC standard. However, even though the combined gasoline may meet the downstream VOC standard, combining ethanol-blended RFG with non-oxygenated RFG may cause some gasoline to have VOC emissions which are higher on average than the gasoline as produced or imported. Thus, today's rule would extend the commingling prohibition currently in the fuels regulations to include a prohibition against combining VOC-controlled ethanol-blended RFG with VOC-controlled non-oxygenated RFG during the period January 1 through September 15, with one exception, described below.

The Energy Act contains a provision which specifically addresses the combining of ethanol-blended RFG with non-ethanol-blended RFG.[6] This new provision allows retail outlets to sell non-ethanol-blended RFG which has been combined with ethanol-blended RFG under certain conditions. First, each batch of gasoline to be blended must have been ''individually certified as in compliance with subsections (h) and (k) prior to being blended.'' Second, the retailer must notify EPA prior to combining the gasolines and identify the exact location of the retail outlet and specific tank in which the gasoline is to be combined. Third, the retailer must retain, and, upon request by EPA, make available for inspection certifications accounting for all gasoline at the retail outlet. Fourth, retailers are prohibited from combining VOC-controlled gasoline with non-VOC-controlled gasoline between June 1 and September 15. Retailers are also limited with regard to the frequency in which batches of non-ethanol-blended RFG may be combined with ethanol-blended RFG. Retailers may combine such batches of RFG a maximum of two periods between May 1 and September 15. Each period may be no more than 10 consecutive calendar days. Today's rule would implement this provision of the Energy Act.

This provision will typically be used by retail stations to change from the use of RFG containing ethanol to RFG not containing ethanol or vice versa. (Such a change is usually referred to as a ''tank turnover.'') Such blending can result in additional VOC emissions, perhaps resulting in gasoline that does not comply with downstream VOC standards. The Energy Act is unclear as to when the gasoline in the tank where blending occurs must be in compliance with the downstream VOC standard.

EPA has already promulgated regulations setting out a methodology for making tank turnovers. 40 CFR 80.78(a)(10). EPA believes retailers and wholesale purchaser-consumers should have additional flexibility during the time that they are converting their tanks from one type of RFG to another, while minimizing the time period during which non-compliant gasoline is present in their tanks and being sold. Today's changes would provide additional flexibility to the regulated parties by interpreting the Energy Act to provide retailers and wholesale purchaser-consumers with relief from compliance with the downstream VOC standard during the ten-day blending period, but requiring that the gasoline in the tank thereafter be in compliance or be deemed in compliance with the downstream VOC standard.

To provide assurance that gasoline is in compliance with the downstream VOC standard after the ten-day period, we propose that there be two options available for retailers and wholesale purchaser-consumers. Under the first option, the retailer may add both ethanol-blended RFG and non-ethanol-blended RFG to the same tank an unlimited number of times during the ten-day period, but must test the gasoline in the tank at the end of the ten-day period to make sure that the RFG is in compliance with the VOC standard. Under the second option, the

[6] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1513, 119 STAT 594, 1088–1090 (2005).

retailer must draw the tank down as much as practicable at the start of the ten-day period, before RFG of another type is added to the tank, and add only RFG of one type to the tank during the ten-day period. That is, the retailer may not add both ethanol-blended RFG and non-ethanol-blended RFG to the tank during the ten-day period, but may add only one of these types of RFG. EPA believes that when retailers and wholesale purchaser-consumers use this second option it is likely that their gasoline will comply with the downstream VOC standard at the end of the ten-day period, so that testing will not be necessary. We also believe that this approach is compatible with current practices of most retailers and wholesale purchaser-consumers, and expect that most will find it preferable to testing at the end of the ten-day period.

The commingling provisions apply at a retail level such that each retailer may take advantage of a maximum of two ten-day blending periods between May 1 and September 15 of each calendar year. Thus, the options described above would be available to each retail outlet for each of two ten-day periods during the VOC control period. During each ten-day period the options would be available for all tanks at that retail outlet.

Regarding the requirement that each batch of gasoline to be blended must have been individually certified as in compliance with subsections (h) and (k), EPA notes that all gasoline in compliance with RFG requirements is deemed certified under Section 211(k) pursuant to § 80.40(a). Section 211(h) addresses RVP requirements for gasoline, but EPA does not have a program to certify gasoline as in compliance with this provision. For purposes of the commingling exception for retail outlets which would be incorporated in the regulations at § 80.78(a)(8), EPA would deem gasoline that is in compliance with the regulatory requirements implementing Section 211(h) to be certified under that section. Regarding the requirement that retailers retain and make available to EPA upon request ''certifications'' accounting for all gasoline at the retail outlet, EPA would deem this requirement fulfilled where the retailer retains and makes available to EPA, upon request, the product transfer documentation required under § 80.77 for all gasoline at the retail outlet.

Under today's proposed rule, the provisions blended RFG would also apply to wholesale purchaser-consumers. Like retailers, wholesale purchaser-consumers are parties who dispense gasoline into vehicles, and EPA interprets the Energy Act reference to retailers as applying equally to them. As a result, wholesale purchaser-consumers would be treated in the same manner as retailers under this rule. This is consistent with the manner in which wholesale purchaser-consumers have been treated in the past under the fuels regulations.

Most of the provisions of this proposed rule are necessary to implement amendments to the Clean Air Act included in the Energy Act that eliminate the RFG oxygen content requirement and allow limited commingling of ethanol-blended and non-ethanol-blended RFG. The extension of the general commingling prohibition in the fuels regulations to cover non-oxygenated RFG, and the provisions requiring refiners and importers to conduct oversight of downstream blenders adding oxygen to RBOB, are necessary because of the Energy Act amendments, but would be issued pursuant to authority of CAA Section 211(k). Both provisions would extend current programs to reflect the presence of non-oxygenated RFG, and are designed to enhance environmental benefits of the RFG program at reasonable cost to regulated parties.

IV. Environmental Effects of This Action

We anticipate that little or no environmental impact would occur as a result of today's action to remove the oxygenate requirement for RFG. The RFG standards consist of content and emission performance standards. Refiners and importers would have to continue to meet all the emission performance standards for RFG whether or not the RFG contains any oxygenate. This includes both the VOC and NO_X emission performance standards, as well as the air toxics emission performance standards which were tightened in the mobile source air toxics (MSAT) rule in 2001.[7] New MSAT standards currently under development are anticipated to achieve even greater air toxics emission reductions.

We have analyzed the potential impacts on emissions that could result from removal of the oxygenate requirement in the context of requests for waivers of the Federal oxygen requirement.[8] We found that changes in ethanol use could lead to small increases in some emissions and small decreases in others while still meeting the RFG performance standards. These potential impacts are associated with the degree to which ethanol would continue to be blended into RFG after removal of the oxygen requirement. Past analyses have projected significant use of ethanol in RFG in California despite removal of the oxygenate requirement.[9] Given current gasoline prices and the tightness in the gasoline market, the favorable economics of ethanol blending, a continuing concern over MTBE use by refiners, the emission performance standards still in place for RFG, and the upcoming renewable fuels mandate,[10] we believe that ethanol will continue to be used in RFG after the oxygen requirement is removed, and that as MTBE is phased out, it is likely to be replaced with ethanol to a large degree despite the removal of the oxygenate requirement. As a result, we believe that the removal of the oxygenate mandate would have little or no environmental impact in the near future. We will be looking at the long term effect of oxygenate use in the context of the rulemaking to implement the renewable fuels mandate.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

[7] 66 FR 17230 (March 29, 2001).

[8] *See e.g.,* California Oxygen Waiver Decision, EPA420–S–05–005 (June 2005); Analysis of and Action on New York Department of Conservation's Request for a Waiver of the Oxygen Content Requirement in Federal Reformulated Gasoline, EPA420–D–05–06 (June 2005).

[9] Technical Support Document: Analysis of California's Request for Waiver of the Reformulated Gasoline Oxygen Content Requirement for California Covered Areas, EPA420–R–01–016 (June 2001).

[10] Energy Policy Act of 2005, Pub. L. 109–58 (HR6), section 1501, 119 STAT 594, 1067–1076, (2005).

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this proposed rule does not satisfy the criteria stated above. As a result, this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review. Today's proposed rule would remove certain requirements for all refiners, importers and oxygenate blenders of RFG. Although small additional costs may be incurred by some refiners and importers as a result of this rule, on balance, this rule is expected to greatly reduce overall compliance costs for all refiners, importers and oxygenate blenders. This rule would also provide options for retailers to commingle certain compliant gasoline which otherwise would be prohibited from being commingled. Although there may be small compliance costs associated with one of these options, we believe that the additional flexibility provided by this option would reduce overall compliance costs for these parties.

B. Paperwork Reduction Act

The modifications to the RFG 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 modifications to the RFG information collection requirements are not enforceable until OMB approves them.

This rule would have the effect of reducing the burdens on certain regulated parties under the reformulated gasoline regulations. All parties currently subject to the requirement to submit and annual oxygen averaging report would no longer be required to submit such report, resulting in an estimated total burden reduction of 100 hours and $6,500 (100 parties × 1 report/yr × 1 hr/report × $65/hr). Oxygenate blenders currently subject to the following requirements would no longer be subject to these requirements and associated burdens:

RFG batch reports: Total 2500 hours, $162,500(25 blenders × 100 reports/yr × 1 hr/report × $65/hr) plus $600,000 in purchased services;

RFG annual report: Total 25 hours, $1,625(25 blenders × 1 report/yr × 1 hr/report × $65/hr);

RFG survey reports: Total 500 hours, $32,500(25 blenders × 1 report/yr × 20 hrs/report × $65/hr) plus $1,200,000 for purchased services:

RFG attest engagement reports: Total 3000 hours, $195,000(25 blenders × 1 report/yr × 120 hrs/report × $65/hr) plus $250,000 for purchased services.

The estimated total reduction in burdens for this rule is 6,125 hours and $398,125, plus $2,050,000 in purchased services.

Small testing costs may be associated with one of the options for gasoline retailers to commingle compliance gasolines. However, these testing costs are expected to be minimal and would be greatly outweighed by the flexibility provided by the option to commingle compliant gasolines.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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 proposed rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, EPA certifies that this action would not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed rule would remove certain requirements for all refiners, importers and oxygenate blenders of RFG, including small business refiners, importers and oxygenate blenders. Specifically, this rule would remove the burden on refiners, importers and oxygenate blenders to comply with the RFG oxygen requirement and associated compliance requirements. Although in certain situations some refiners and importers, including some small refiners and importers, may be required to conduct additional oversight of oxygenate blenders, we believe that the relief from the burden of complying with the oxygen requirement would more than outweigh the burden of having to conduct any additional oversight. This rule also would provide options for gasoline retailers, including small gasoline retailers, to commingle certain compliant gasoline which otherwise would be prohibited from being commingled. Although there may be small compliance costs associated with one of these options, we believe that the additional flexibility provided by this option would reduce overall compliance costs for these parties. We have therefore concluded that today's proposed rule would relieve regulatory burden for all small entities subject to the RFG regulations. We continue to be interested in the potential impacts of the

proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

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 proposed and 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. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector that would result in expenditures of $100 million or more. This proposed rule would affect gasoline refiners, importers and oxygenate blenders by removing the oxygen content requirement for RFG and associated compliance requirements. This rule also would allow gasoline retailers an option to commingle certain compliant gasoline which otherwise would be prohibited from being commingled. As a result, this rule would have the overall effect of reducing the burden of the RFG regulations on these regulated parties. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

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 Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It would 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 rule would remove the oxygen standard for RFG and provide gasoline retailers the option to commingle certain compliance gasolines that otherwise would be prohibited from being commingled. The requirements of the rule would be enforced by the federal government at the national level. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, 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.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This proposed rule does not have tribal implications. It would not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This rule would apply to gasoline refiners and importers who supply RFG, and to other parties downstream in the gasoline distribution system. Today's action contains certain modifications to the federal requirements for RFG, and would not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it is not economically significant and does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Acts That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule would not be an economically ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it would not have a significant adverse effect on the supply, distribution, or use of energy. This rule would eliminate the oxygen content requirement for RFG and associated compliance requirements. This change would have the effect of reducing burdens on suppliers of RFG, which, in turn, may have a positive effect on gasoline supplies. RFG refiners and blenders may continue to use oxygenates at their discretion where and

when it is most economical to do so. With the implementation of the renewable fuels standard also contained in the Energy Act, the blending of ethanol, in particular, into gasoline is expected to increase considerably, not decrease. Therefore, despite this action to remove the oxygenate mandate in RFG, when viewed in the context of companion energy legislation, overall use of oxygenates is expected to increase in the future. This rule also would allow gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. This also may have a positive effect on gasoline supplies.

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, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rule does not establish new technical standards within the meaning of the NTTAA. Therefore, EPA did not consider the use of any voluntary consensus standards.

VI. Statutory Provisions and Legal Authority

The statutory authority for the actions in today's proposed rule comes from sections 211(c), 211(k) and 301(a) of the CAA.

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: February 14, 2006.

Stephen L. Johnson,

Administrator.

[FR Doc. 06–1611 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–271; MB Docket No. 04–410, RM–11109]

Radio Broadcasting Services; Woodson, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: The Audio Division dismisses a Petition for Rule Making filed by Charles Crawford, requesting the allotment of Channel 298A at Woodson, Texas, as the community's first local aural transmission service. Charles Crawford withdrew his petition for rulemaking. Katherine Pyeatt filed a timely counterproposal to this petition, proposing to allot Channel 248A at three communities, Woodson, Chillicothe and Henrietta, Texas, with a channel substitution at Archer City, Texas. Subsequently, Katherine Pyeatt also withdrew her counterproposal. *See* 69 FR 67882, November 11, 2004. No other party filed comments supporting the allotment of Channel 298A at Woodson, Texas. It is the Commission's policy to refrain from making a new allotment or reservation to a community absent an expression of interest.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–410, adopted February 2, 2006, and released February 6, 2006. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, and Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* This document is not subject to the Congressional Review Act. (The Commission, is, therefore, not required to submit a copy of this Report and Order to GAO, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A) because the proposed rule was dismissed.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1518 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–272; MB Docket No. 06–19; RM–11288

Radio Broadcasting Services; Hattiesburg and Sumrall, MS

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a Petition for Rule Making filed by Unity Broadcasting requesting to upgrade Channel 226A, FM Station WGDQ, to Channel 226C3 and to reallot Channel 226C3 to Sumrall, Mississippi, as that community's second local aural transmission service. To accommodate this allotment, Petitioner requested the reclassification of FM Station WUSW, Channel 279C, Hattiesburg, Mississippi, to specify operation on Channel 279C0 pursuant to the reclassification procedures adopted by the Commission. *See 1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 65 FR 79773 (December 20, 2000). The licensee of Station WUSW did not respond to an Order to Show Cause why Station WUSW should not be downgraded from Channel 279C to Channel 279C0. Therefore, the Commission has reclassified Station WUSW to Channel 279C0. Channel 226C3 can be allotted with a site restriction of 19.5 kilometers (12.1 miles) northeast of Sumrall, at reference coordinates of 31–33–15 NL and 89–24–50 WL.

DATES: Comments must be filed on or before March 30, 2006, and reply comments on or before April 14, 2006. Any counterproposal filed in this proceeding need only protect FM Station WUSW, Hattiesburg, Mississippi, Channel 279C, as a Class C0 allotment.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel as follows: Jerrold Miller, Esq, Miller and Neely, P.C.; 6900 Wisconsin Ave., Suite 704; Bethesda, Maryland 20815.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MB Docket No. 06–19, adopted February 2, 2006, and released February 6, 2006. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of l980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Mississippi, is amended by removing Channel 226A at Hattiesburg, and by adding Channel 226C3 at Sumrall.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1519 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–268, MB Docket No.05–113; RM–11195]

Radio Broadcasting Services; Ely and Spring Creek, Nevada

AGENCY: Federal Communications Commission.

ACTION: Proposed rule, dismissal.

SUMMARY: At the request of the Petitioner, this document dismisses a petition for rulemaking filed by Ruby Radio Corporation, licensee of Station KCLS(FM), Ely, Nevada, proposing the substitution of Channel 269C1 for Channel 269C3 at Ely, the reallotment of Channel 269C1 from Ely to Spring Creek, Nevada, as the community's first local transmission service, and the modification of the license for Station KCLS(FM) to reflect the new community.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, MB Docket No. 05–113, adopted February 2, 2006, and released February 6, 2006. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20054, telephone 800–378–3160 or *http://www.BCPIWEB.com.* This document is not subject to the Congressional Review Act. (The Commission, is, therefore, not required to submit a copy of this Report and Order to GAO, pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A) because the proposed rule was dismissed.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1522 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–273, MB Docket No.04–275, RM–11017]

Radio Broadcasting Services; Coalinga, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule, dismissal.

SUMMARY: This document dismisses a pending petition for rulemaking filed by 105 Mountain Air, Inc. to allot Channel 265A at Coalinga, California for failure to state a continuing interest in the requested allotment. The document therefore terminates the proceeding. *See* 69 FR 46474, published August 3, 2004.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Helen McLean, Media Bureau (202) 418–2738.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–275, adopted February 2, 2006, and released February 6, 2006. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractors, 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.*

This document is not subject to the Congressional Review Act. (The Commission, is, therefore, not required to submit a copy of this Report and Order to Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. section 801(a)(1)(A) since this proposed rule is dismissed, herein.)

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1523 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 14

RIN 1018–AT69

Regulations To Implement the Captive Wildlife Safety Act

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reminder.

SUMMARY: We, the U.S. Fish and Wildlife Service, publish a followup document to our proposed rule to implement the Captive Wildlife Safety Act (CWSA), which published in the **Federal Register** on January 31, 2006. We want to remind the public that the addresses for comments on the proposed rule are different from the addresses for comments on the information collection aspects of the proposed rule.

DATES: Submit comments on our proposed rule or on the proposed information collection in our proposed rule by March 2, 2006.

ADDRESSES: *See* **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Kevin Garlick, Special Agent in Charge, Branch of Investigations, U.S. Fish and Wildlife Service, OLE, at (703) 358–1949.

SUPPLEMENTARY INFORMATION: We published a proposed rule to implement the Captive Wildlife Safety Act (CWSA) in the **Federal Register** on January 31, 2006 (71 FR 5041). With this followup document, we want to draw the public's attention to the fact that the addresses we provided in 71 FR 5041 for comments on the proposed rule are different from the addresses we provided for comments on the information collection contained in the proposed rule. We are not changing any of the addresses or providing any new ones, just reminding the public which addresses are for which purposes.

The following are ways to submit your comments. Identify all your comments and materials by RIN 1018–AT69.

Submitting Comments on the Proposed Rule

You may submit comments and materials on our proposed rule (71 FR 5041), but *not* on the information collection aspects, by any one of the following methods:

1. U.S. mail: Special Agent in Charge, Branch of Investigations, U.S. Fish and Wildlife Service, Office of Law Enforcement (OLE), 4501 North Fairfax Drive, MS 3000, Arlington, Virginia 22203.

2. Fax: Special Agent in Charge, Branch of Investigations, OLE, 703–358–2271.

3. Hand-delivery: U.S. Fish and Wildlife Service, OLE, 4501 North Fairfax Drive, Suite 3000, Arlington, VA (this option is available between the hours of 8 a.m. and 4 p.m., Monday through Friday).

4. Internet: Go to the Federal eRulemaking portal at: *http://www.regulations.gov* and follow the instructions for submitting comments for RIN 1018–AT69.

If you have already submitted your comments on the proposed rule by one of the above methods, they have become part of the administrative record for this rulemaking action and you do not need to resubmit them.

Submitting Comments on the Information Collection

Send any comments on the information collection contained in our proposed rule (*not* the proposed rule in general) to both of the following entities:

1. Desk Officer for the Department of the Interior, OMB–OIRA, Office of Management and Budget (OMB). Use one of the following methods:

(a) Fax: Desk Officer for the Department of the Interior, OMB–OIRA, 202–95–6566.

(b) E-mail: *OIRA_DOCKET@OMB.eop.gov.*

2. Hope Grey, Information Collection Clearance Officer, U.S. Fish and Wildlife Service. Use one of the following methods:

(a) U.S. Mail: Hope Grey, Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203.

(b) Fax: Hope Grey, Information Collection Clearance Officer, US–FWS, 703–358–2269.

(c) E-mail: *hope_grey@fws.gov.*

Dated: February 16, 2006.

Sara Prigan,

Federal Register Liaison, Fish and Wildlife Service.

[FR Doc. 06–1674 Filed 2–17–06; 12:45 pm]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 71, No. 35

Wednesday, February 22, 2006

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 15, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Cooperative Agreement for Field Trials and Research Projects for the Advancement of the National Animal ID System (NAIS).

OMB Control Number: 0579–NEW.

Summary of Collection: The Animal and Plant Health Inspection Service (APHIS) regulates the importation and interstate movement of animals and animal products and conducts various other activities to protect the health of our Nation's livestock and poultry. The goal of the NAIS is to be able to identify all animals and premises that have had contact with a foreign or domestic animal disease of concern within 48 hours after discovery. The implementation of the NAIS continues to progress. The first priority has been to get each state operational on premises registration. This will allow producers across the entire country to participate in the NAIS. APHIS will solicit application from State and Tribal government that outline NAIS field trails and research projects that address problems or questions related to NAIS implementation. The information provided on the applications will be used to determine which projects and research receives USDA funding as well as how much funding is received.

Need and Use of the Information: The advent of increased animal disease outbreaks around the globe over the past decade, especially the recent BSE-positive cow found in Washington State, has intensified the public interest in developing a national animal identification program for the purpose of protecting animal health. Fundamental to controlling any disease threat, foreign or domestic, to the Nation's animal resources is to have a system that can identify individual animals or groups, the premises where they are located, and the date of entry to each premises. APHIS initiated implementation of a national animal identification system (NAIS) in 2004. In order to develop and implement an effective national animal identification system, APHIS needs the cooperation of States and industry. The cooperative agreements that APHIS will fund as a result of the information collected on the applications will help ensure stakeholder input and will also help in troubleshooting problems that might arise as NAIS continues to develop.

Description of Respondents: State, Local or Tribal Government; Business or other for-profit.

Number of Respondents: 35.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,400.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E6–2440 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 17, 2006.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information

unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Risk Management Agency

Title: General Administrative Regulations; Interpretations of Statutory and Regulatory Provisions.

OMB Control Number: 0563–0055.

Summary of Collection: Section 533 of the 1998 Research Act requires the Federal Crop Insurance Corporation (FCIC) to publish regulation on how FCIC will provide a final agency determination in response to certain inquiries. This section provides procedures when FCIC fails to respond in the established time, the interpretation of the requested information is considered correct for the crop year. It becomes necessary for the requester, or respondent, to identify himself so he can be provided a response and state his interpretation of the regulation for which he is seeking a final agency interpretation.

Need and Use of the Information: FCIC will use the requester's information to provide a response. The respondent's detailed interpretation of the regulation is required to comply with the requirements of Sec. 533 of the 1998 Research Act and to clarify the boundaries of the request to FCIC. If the requested information is not collected with each submission, FCIC will not be able to comply with the statutory mandates.

Description of Respondents: Business or other for-profit; Farms.

Number of Respondents: 45.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 78.

Charlene Parker,

Departmental Information Clearance Officer.

[FR Doc. E6–2496 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 17, 2006.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Business—Cooperative Service

Title: 1890 Land Grant Institutions: Rural Entrepreneurial Program Outreach Initiative.

OMB Control Number: 0570–0041.

Summary of Collection: Rural Business Service mission is to improve the quality of life in rural America by financing community facilities and businesses, providing technical assistance and creating effective strategies for rural development. Funding has been allocated to support the Outreach Initiative developed to help future entrepreneurs and businesses in rural communities that have the most economic need. Funds are awarded on a competitive basis using specific selection criteria.

Need and Use of the Information: The information collected will be used to determine (1) Eligibility; (2) the specific purpose for which the funds will be utilized; (3) time frames or dates by which activities surrounding the use of funds will be accomplished; (4) feasibility of the project; (5) applicants' experience in managing similar activities; and (6) the effectiveness and innovation used to address critical issues vital to the development and sustainability of businesses. Without this information there would be no basis on which to award funds.

Description of Respondents: Business or other for-profit; Farms; State, Local or Tribal Government.

Number of Respondents: 18.

Frequency of Responses: Reporting: Quarterly.

Total Burden Hours: 762.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E6–2499 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 16, 2006.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information

displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal & Plant Health Inspection Service

Title: Foreign Quarantine Notices.

OMB Control Number: 0579–0049.

Summary of Collection: The United States Department of Agriculture is responsible for preventing plant disease or insect pests from entering the United States, preventing the spread of pests and noxious weeds not widely distributed in the United States, and eradicating those imported pests when eradication is feasible. Under the Plant Protection Act (Title IV, Pub. L. 106–224, 114 Stat. 438, 7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of plant pests and other articles to prevent the introduction of plant pests into the United States. Implementing the laws is necessary to prevent injurious plant and insect pest from entering the United States, a situation that could produce serious consequences for U.S. agriculture. The Animal and Plant Health Inspection Service (APHIS) is required to collect information from a variety of individuals, both within and outside the United States, who are involved in growing, packing, handling, transporting, and importing foreign plants, roots, bulbs, seeds, importing foreign logs, lumber, other unmanufactured wood articles, and other plant products. APHIS will collect this information using a number of forms.

Need and Use of the Information: APHIS will collect information to ensure that plants, fruits, vegetables, roots, bulbs, seeds, foreign logs, lumber, other unmanufactured wood articles, and other plant products imported into the United States do not harbor plant diseases or insect pests that could cause serious harm to U.S. agriculture.

Description of Respondents: Business or other for-profit; individuals or households; not-for-profit institutions; farms; State, Local or Tribal Government.

Number of Respondents: 90,781.

Frequency of Responses: Recordkeeping; reporting: On occasion.

Total Burden Hours: 95,641.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E6–2502 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. LS–06–02]

Notice of Request for Extension of Approval and Revision to an Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Agricultural Marketing Service's (AMS) intention to request from the Office of Management and Budget approval for an extension of and revision to a currently approved information collection ''Customer Service Survey (Meat Grading and Certification Services).''

DATES: Comments must be received on or before April 24, 2006.

Additional Information or Comments: You may send your comments to Larry R. Meadows, Chief, Meat Grading and Certification Branch, Livestock and Seed Program, AMS, USDA; STOP 0248, Room 2628-S, 1400 Independence Avenue, SW., Washington, DC 20250–0248. Comments will be available for public inspection at the above address during regular business hours. Comments may also be submitted by e-mail to *Larry.Meadows@usda.gov* or by facsimile at 202–690–1062. All comments should reference the docket number (LS–06–02), the date, and the page number of this issue of the **Federal Register**. All responses to this notice will be summarized and included in the request for OMB approval.

SUPPLEMENTARY INFORMATION:

Title: Customer Service Survey (Meat Grading and Certification Services).

OMB Number: 0581–0193.

Expiration Date of Approval: 7/31/2006.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The customer service survey is used to evaluate how well we are meeting customer expectations. The information obtained is used to manage the program in providing cost effective, quality services expected by our customers.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.0830 hours per response.

Respondents: Livestock producers, feeders, and owners of meat establishments.

Estimated Number of Respondents: 12 respondents.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1 hour.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and 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.

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6–2438 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers To Be Used for Publication of Legal Notice of Appealable Decisions Under 36 CFR Part 217, 36 CFR Part 215 and 36 CFR Part 218 for the Southern Region; KY

AGENCY: Forest Service, USDA.

ACTION: Notice and correction.

SUMMARY: On November 1, 2005, the USDA Forest Service published a notice of newspapers to be used for publication of Legal Notices under 36 CFR part 217 and corrections under 36 CFR part 215 and 36 CFR part 218 for the Southern Region. This notice corrects the listed newspapers for Kentucky as a result of the December 27, 2005 decision to re-organize the Daniel Boone National Forest from six (6) to four (4) districts. Deciding Officers in the southern Region will publish notice of decisions subject to administrative appeal under 36 CFR part 217 in the legal notice section of the newspapers listed in the

SUPPLEMENTARY INFORMATION section of this notice. As provided in 36 CFR part 217.5(d), the public shall be advised through **Federal Register** notice, of the newspaper of record to be utilized for publishing legal notice of decisions. Newspaper publication of notice of decisions is in addition to direct notice of decisions to those who have requested it and to those who have participated in project planning. The Responsible Official gave notice in the **Federal Register** published on November 1, 2005, of newspapers of record to be utilized for publishing notice of proposed actions and of decisions subject to appeal under 36 CFR part 215.5 and for publishing notice of opportunities to object to proposed authorized hazardous fuel reduction projects under 36 CFR part 218.4. The list of newspapers to be used for 215 notice and decision and 218 notice of objection opportunities is as listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Use of these newspapers for purposes of publishing legal notice of decisions subject to appeal under 36 CFR part 217 shall begin on or after the date of this publication.

FOR FURTHER INFORMATION CONTACT: Cheryl Herbster, Regional Appeals Coordinator, Southern Region, Planning, 1720 Peachtree Road, NW., Atlanta, Georgia 30309, Phone: 404–347–5235.

SUPPLEMENTARY INFORMATION: Deciding Officers in the Southern Region, Daniel Boone National Forest will give legal notice of decisions subject to appeal under 36 CFR part 217 in the following newspapers which are listed by Forest Service Administrative unit. The timeframe for appeal shall be based on the date of publication of the legal notice of the decision in the newspaper of record. The following newspapers will be used to provide notice.

Southern Region

Daniel Boone National Forest, Kentucky

Forest Supervisor Decisions:
- *Lexington Herald-Leader,* published daily in Lexington, KY

District Ranger Decisions:
- Cumberland Ranger District: *Lexington Herald-Ledger,* published daily in Lexington, KY
- London Ranger District: *The Sentinel-Echo,* published tri-weekly (Monday, Wednesday and Friday) in London, KY
- Redbird Ranger District: *Manchester Enterprise,* published weekly (Thursday) in Manchester, KY
- Stearns Ranger District: *McCreary County Record,* published weekly (Tuesday) in Whitley City, KY

Dated: February 13, 2006.

Melvin R. Booker,

Deputy Regional Forester.

[FR Doc. 06–1593 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

DeBaugan Fuels Reduction EIS, Lolo National Forest, Mineral County, MT

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement (EIS) on a proposal for a hazardous fuel reduction project to reduce the threat of wildfire to the communities of Saltese, Haugan, DeBorgia, and Cabin City in the St. Regis River drainage, Lolo National Forest, Superior Ranger District, Mineral County, Montana.

This EIS will tier to the Lolo Forest Plan Final EIS (April, 1986).

DATES: Written comments should be received within 30 days following publication this notice.

ADDRESSES: Please submit written comments on the proposed management activities or a request to be placed on the project mailing list to: Rob Harper, District Ranger, Superior Ranger District, Lolo National Forest, P.O. Box 460, Superior, Montana 59872.

FOR FURTHER INFORMATION CONTACT: Larry Svalberg, EIS Team Leader, (406) 826–4310.

SUPPLEMENTARY INFORMATION: The DeBaugan analysis area is located between St. Regis, Montana and Lookout Pass along the Interstate 90 corridor, in Mineral County. The project is located in parts of Townships and Ranges: T19N, R29W; T19N, R30W; T19N, R31W; and T20N, R31W; P.M.M., Mineral County, Montana. Within this area, the Lolo National Forest proposes to reduce fuels and reduce the threat of wildlife of up to 5,732. The proposed treatments include: (1) Prescribed burning approximately 1,347 acres; (2) heavy thinning of approximately 504 acres; (3) light thinning approximately 3,402 acres; (4) precommercial thinning of burning piles on approximately 58 acres; (6) constructing approximately 3.2 miles of new permanent roads; (7) constructing and later decommissioning approximately 8 miles of temporary road; (8) reconstruction of approximately 46 miles of existing roads to meet Montana Best Management Practices; (9) decommissioning of approximately 8.4 miles of existing road; (10) approximately 30 miles of herbicide treatment of noxious weeds along roadsides; (11) application of herbicide on dry sites to minimize spread of noxious weeds approximately 2,000 acres.

The Lolo National Forest Plan, 1986, provides overall guidance for land management activities in the project area. The purposes for these actions are to: (1) Reduce the intensity of wildlife near the communities of Cabin City, DeBorgia, Haugan, and Saltese to improve the chances of protecting these communities in the event of wildfires as defined in the Mineral County Community Protection Plan; (2) bring existing roads that will be utilized up to ''Best Management Practices Standards''; (3) improve water quality and fish passage on roads that will be used during the fuels reduction project; (4) reduce the potential for the spread of noxious weeds during project implementation.

Issues currently identified for analysis in the EIS include potential effects on wildlife, sensitive plant species, water quality, fisheries, visual quality and forest access.

Under the Healthy Forest Restoration Act, the Forest Service will consider only one action alternative (that was developed during an intensive collaborative effort) and the no action alternative.

The Draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and available for public review in May, 2007. Comments on the Draft EIS will be considered and responded to in the Final EIS, scheduled to be completed by January, 2008.

The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the Federal Register.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental reviews of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, 435 U.S. 519, 553 (1978).* Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be

waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day scoping comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Responsible Official: Deborah L.R. Austin, Forest Supervisor, Lolo National Forest, Building 24—Fort Missoula, Missoula, MT 59804, is the responsible official. In making the decision, the responsible official will consider comments, responses, disclosure of environmental consequences, and applicable laws, regulations, and policies. The responsible official will state the rationale for the chosen alternative in the Record of Decision.

Dated: February 13, 2006.

Deborah L.R. Austin,

Forest Supervisor.

[FR Doc. 06–1591 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Plumas County Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Plumas County Resource Advisory Committee (RAC) will hold a meeting on March 10, 2006, in Quincy, CA. The primary purpose of the meeting is to review, discuss, and comment on the concept papers submitted for Cycle 6 funding consideration.

DATES AND ADDRESSES: The March 10, 2006 meeting will take place from 9–4 at the Mineral Building-Plumas/Sierra County Fairgrounds, 208 Fairgrounds Road, Quincy, CA.

FOR FURTHER INFORMATION CONTACT: Lee Anne Schramel Taylor, Forest Coordinator, USDA, Plumas National Forest, P.O. Box 11500/159 Lawrence Street, Quincy, CA 95971; (530) 283–7850; or by e-mail *eataylor@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items for the March 10 meeting include: (1) Forest Service Update; (2) Review, discuss, and comment on the concept papers submitted for Cycle 6 funding consideration; and, (3) Review future meeting schedule and agenda. The meetings are open to the public and individuals may address the Committee after being recognized by the Chair. Other RAC information including previous meeting agendas and minutes may be obtained at *http://wwwnotes.fs.fed.us:81/r4/payments_to_states.*

Dated: February 15, 2006.

Michael K. Condon,

Forest Fire Management Officer.

[FR Doc. 06–1592 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Housing Service, USDA.

ACTION: Proposed collection; Comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's intention to request an extension for a currently approved information collection in support of the regulation for Account Servicing Policies.

DATES: Comments on this notice must be received by April 24, 2006 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Janet Stouder, Multi-Family Housing Portfolio Management Division, Rural Housing Service, STOP 0782, 1400 Independence Avenue, SW., Washington, DC 20250–0782; Telephone: (202) 720–9728.

SUPPLEMENTARY INFORMATION:

Title: Account Servicing Policies.

OMB Number: 0575–0075.

Expiration Date of Approval: June 30, 2009.

Type of Request: Extension of a currently approved information collection.

Abstract: The Rural Housing Service provides supervised credit in the form of Multi-Family Housing and Community Facility loans and grants. 7 CFR part 1951, subpart A sets forth the policies and procedures, including the collection and use of information, regarding the application of payments on loans made under the programs administered by the agencies and the return of paid-in-full and satisfied promissory notes.

The programs are administered under the provisions of the Consolidated Farm and Rural Development Act (CONACT), as amended. Section 335(a) of the CONACT authorizes the Secretary of Agriculture to make the rules and regulations necessary to carry out the programs authorized within the Act.

Information collection is submitted by Agency borrowers to the local Agency office servicing the county in which their operation is located and is used by agency servicing officials.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .25 hours per response.

Respondents: Individuals or households and businesses and other for-profits.

Estimated Number of Respondents: 110.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 110.

Estimated Total Annual Burden on Respondents: 28 hours.

Copies of this information collection can be obtained from Renita Bolden, Regulations and Paperwork Management Branch, at (202) 692–0035.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Renita Bolden, Regulations and

Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave. SW., Washington, DC 20250.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: February 8, 2006.

Russell T. Davis,

Administrator, Rural Housing Service.

[FR Doc. E6–2460 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Processing Equipment Technical Advisory Committee; Notice of Open Meeting

The Materials Processing Equipment Technical Advisory Committee (MPETAC) will meet on March 15, 2006 at 9 a.m. in Room 1410 of the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials processing equipment and related technology.

Agenda

1. Opening Remarks and Introductions.
2. Presentation of Papers and Comments by the Public.
3. Report on Upcoming April Wassenaar Experts Meeting.
4. Report on proposed changes to the Export Administration Regulation.
5. Other Business.

The meeting will be open to the public and a limited number of seats will be available. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to Yvette Springer at *Yspringer@bis.doc.gov.*

For more information, please contact Ms. Springer at 202–482–4814.

Dated: February 14, 2006.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 06–1610 Filed 2–21–06; 8:45 am]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Regulations and Procedures Technical Advisory Committee; Notice of Partially Closed Meeting

The Regulations and Procedures Technical Advisory Committee (RPTAC) will meet March 7, 2006, 9 a.m., Room 3884, in the Herbert C. Hoover Building, 14th Street between Constitution and Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on implementation of the Export Administration Regulations (EAR) and provides for continuing review to update the EAR as needed.

Agenda

Public Session

1. Opening remarks by the Chairman
2. Presentation of papers or comments by the Public
3. Regulations update
4. Update on proposed rule on deemed export related regulatory requirements (RIN 0694–AD29)
5. Update on Wassenaar Statement of Understanding on Military End-uses
6. Update on Implementation of 2005 Wassenaar change
7. Update on Encryption Reviews and Licensing
8. Update on Country Group revision project
9. Update on Automated Export System
10. RPTAC proposals on definition of the term ''specially designed''
11. Working group reports

Closed Session

12. Discussion of matters determined to be exempt from the provisions relating to public meetings and found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3)

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Yvette Springer at *Yspringer@bis.doc.gov.*

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on February 14, 2006, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 §§ (10)(d)), that the portion of the meeting dealing with matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public. For more information, call Yvette Springer at (202) 482–4814.

Dated: February 14, 2006.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 06–1609 Filed 2–21–06; 8:45 am]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–801]

Circumvention and Scope Inquiries on the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Partial Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order, Partial Preliminary Termination of Circumvention Inquiry, Preliminary Rescission of Scope Inquiry and Extension of Final Determination.

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Determination of Circumvention of Antidumping Duty Order and Rescission of Scope Inquiry.

PRELIMINARY DETERMINATION

We preliminarily determine that frozen fish fillets produced by Lian Heng Trading Co. Ltd. (''Lian Heng Trading'') and Lian Heng Investment Co. Ltd. (''Lian Heng Investment'') (collectively, ''Lian Heng''),[1] are circumventing the antidumping duty

[1] Lian Heng Trading and Lian Heng Investment are two separate entities. However, the two companies share the same Chairman and Chief Executive Officer, and both companies have exported subject merchandise to the United States.

order on frozen fish fillets from the Socialist Republic of Vietnam (''Vietnam''), as provided in section 781(b) of the Tariff Act of 1930, as amended (''the Act''). *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 47909 (August 12, 2003) (''*Order*''). We are also terminating the circumvention inquiry with respect to L.S.H. (Cambodia) Pte. Ltd. (''L.S.H.''), and Sun Wah Fisheries Co. Ltd. (''Sun Wah''), and preliminarily rescinding the concurrently initiated scope inquiry.

EFFECTIVE DATE: February 22, 2006.

FOR FURTHER INFORMATION CONTACT: Kit L. Rudd or Alex Villanueva, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC, 20230; telephone: (202) 482–1385 and (202) 482–3208, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 12, 2004, pursuant to 19 CFR 351.225(c), the Department received a request from Piazza Seafood World LLC (''Piazza'') for a scope ruling on whether certain basa and tra fillets from Cambodia made from Vietnamese origin basa or tra fish are excluded from the antidumping duty order on certain frozen fish fillets from Vietnam. The scope of the order on frozen fish fillets from Vietnam includes fillets only of the following species: *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus,*[2] and does not include unprocessed fish of these species. On June 9, 2004, the Department issued a supplemental questionnaire to Piazza requesting additional information pertaining to its scope request. On July 7, 2004, the Department received Piazza's response to this supplemental questionnaire. On July 23, 2004, the Catfish Farmers of America and certain individual U.S. catfish processors (collectively, ''Petitioners'') commented on Piazza's May 12, 2004, and July 7, 2004, submissions. On August 20, 2004, Petitioners requested that the Department initiate a circumvention inquiry pursuant to section 781(b) of the Act to determine whether imports of frozen fish fillets from Cambodia made from Vietnamese origin basa or tra fish are circumventing the antidumping duty order on certain frozen fish fillets from Vietnam. On October 19, 2004, Piazza submitted additional information supplementing its July 7, 2004, response.

With regard to their August 20, 2004, circumvention inquiry request, Petitioners alleged that the processing in and exporting from Cambodia of frozen fish fillets of the species *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus* produced from Vietnamese–origin fish of the same species constitutes circumvention of the antidumping duty order on certain frozen fish fillets from Vietnam. On October 20, 2004, Piazza submitted comments on Petitioners' August 20, 2004, request for a circumvention inquiry.

On October 22, 2004, the Department initiated concurrent circumvention and scope inquiries on imports of frozen fish fillets from Cambodia. *See Certain Frozen Fish Fillets From The Socialist Republic of Vietnam: Initiation of Anticircumvention Inquiry and Scope Inquiry*, 69 FR 63507 (November 2, 2004) (''*Initiation*''). In the *Initiation*, the Department stated that it would focus its analysis of the significance of the production process in Cambodia on the single processor identified by Petitioners in their August 20, 2004, circumvention request.[3] The Department, however, provided interested parties an additional 45 days from the date of initiation of the inquiry to present the Department with sufficient evidence that other Cambodian processors were involved in processing Vietnamese–origin fish into frozen fish fillets for export to the United States.

On November 29, 2004, Piazza submitted comments on the *Initiation*. On November 30, 2004, Petitioners submitted comments on the *Initiation*.[4] On December 6, 2004, Piazza submitted rebuttal comments to Petitioners' November 30, 2004, comments. On December 6, 2004, Petitioners submitted rebuttal comments to Piazza's November 29, 2004, comments[5] and factual information identifying Lian Heng, Sun Wah, L.S.H and the Kampuchea Fish Import and Export Company (''KAMFIMEX'') as Cambodian fish fillet exporters potentially involved in the processing of Vietnamese–origin fish.

Questionnaires and Verification of Responses

On January 31, 2005, the Department issued questionnaires to Lian Heng, Sun Wah and L.S.H[6] soliciting information regarding their frozen fish fillet production and exports to the United States. On March 10, 2005, the Department reissued its January 31, 2005, questionnaire to L.S.H. with a revised response deadline of March 24, 2005.

On February 18, 2005, the Department received Sun Wah's questionnaire response. On March 10, 2005, the Department issued a letter to Sun Wah requesting that it submit a clarification to its February 18, 2005, questionnaire response by March 17, 2005. On March 12, 2005, Sun Wah submitted a response to the Department's March 10, 2005 letter. On June 7, 2005, and June 21, 2005, the Department issued letters notifying Sun Wah of the Department's intention to verify its February 18, 2005, and March 10, 2005, questionnaire responses.

On March 8, 2005, the Department received Lian Heng's questionnaire response. On March 30, 2005, Petitioners submitted comments to the Department regarding Lian Heng's March 8, 2005, questionnaire response. On April 20, 2005, the Department issued a supplemental questionnaire to Lian Heng. On May 10, 2005, the Department granted Lian Heng an extension of time to May 18, 2005, to respond to its April 20, 2005, supplemental questionnaire and also issued an additional supplemental questionnaire to Lian Heng. On May 18, 2005, the Department received Lian Heng's response to the Department's April 20, 2005, and April 29, 2005, questionnaires. On June 6, 2005, Lian Heng submitted financial statements for Lian Heng Trading and Lian Heng Investment.

On June 10, 2005, the Department issued a supplemental questionnaire to Lian Heng. On June 22, 2005, the Department issued a letter to Lian Heng requesting it submit sales and cost reconciliations for Lian Heng Trading and Lian Heng Investment. On June 29, 2005, the Department issued its verification outline to Lian Heng. On July 1, 2005, Lian Heng submitted its supplemental response to the Department's June 10, 2005, supplemental questionnaire. On July 5,

[2] Whole fish of these species will be hereinafter referred to as ''basa'' and ''tra'' fish, which are the Vietnamese common names for these species of fish. Likewise, frozen fish fillets produced from these species shall be referred to as frozen ''basa'' or ''tra'' fillets.

[3] Lian Heng was the single processor identified by Petitioners in their August 20, 2004 circumvention request.

[4] On December 9, 2004, Piazza submitted a clarification of its November 29, 2004, submission.

[5] On December 7, 2004, Petitioners resubmitted its December 6, 2004, rebuttal comments.

[6] The Department did not issue a questionnaire to KAMFIMEX because the Department had information indicating that KAMFIMEX did not actually produce fish fillets, but was rather a reseller of fish to licensed export agents or processing plants. *See* Memorandum to the File dated March 9, 2005.

2005, Lian Heng submitted its sales and cost reconciliations, tax returns and documentation supporting its value–added calculations. On July 6, 2005, Lian Heng submitted translated tax returns for Lian Heng Trading and Lian Heng Investment. On July 7, 2005, Petitioners submitted pre–verification comments for Lian Heng. On July 19, 2005, Lian Heng submitted its pre–verification corrections.

From July 12 through July 15, 2005, the Department conducted verification of Lian Heng's questionnaire responses at the production facilities and offices of Lian Heng Trading in Phnom Penh, Cambodia. On July 15, 2005, Lian Heng company officials terminated the verification prior to its scheduled completion.[7] *See Memorandum to the File Regarding Verification of Sales and Cost of Production for Lian Heng Trading* (''*Lian Heng Verification Report*'') dated August 8, 2005, at 23.

On July 22, 2005, counsel to Lian Heng submitted its formal withdrawal of representation for Lian Heng in the circumvention/scope inquiries and a reaffirmation of its representation of importer Piazza. On August 8, 2005, the Department released to interested parties its verification report of the questionnaire responses for Lian Heng in the circumvention/scope inquiries. On August 16, 2005, the Department issued an extension from August 18, 2005, to November 17, 2005, of the final determination in the circumvention/scope inquiries. On September 12, 2005, the Department received notification of new counsel for Piazza. On September 19, 2005, the Department received Petitioners' comments on the upcoming preliminary determination.

Scope of the Antidumping Duty Order

The product covered by this order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus*. Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact (''regular'' fillets), boneless fillets with the belly flap removed (''shank'' fillets), boneless shank fillets cut into strips (''fillet strips/finger''), which include fillets cut into strips, chunks, blocks, skewers, or any other shape. Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly–flap nuggets. Frozen whole dressed fish are deheaded, skinned, and eviscerated. Steaks are bone–in, cross-section cuts of dressed fish. Nuggets are the belly–flaps. The subject merchandise will be hereinafter referred to as frozen ''basa'' and ''tra'' fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article code 0304.20.60.33 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the Harmonized Tariff Schedule of the United States (''HTSUS'').[8] This order covers all frozen fish fillets meeting the above specification, regardless of tariff classification. Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive. *See Order* at 47909.

Preliminary Rescission of Scope Inquiry

As noted above, on May 12, 2004, the Department received a scope ruling request from Piazza on whether certain basa and tra fillets from Cambodia made from Vietnamese origin live basa and tra fish are excluded from the antidumping duty order on certain frozen fish fillets from Vietnam. Subsequent to Piazza's scope ruling request, the Department received a request from Petitioners to initiate a circumvention inquiry on August 20, 2004, pursuant to 781(b) of the Act.

In the *Initiation* of the concurrent scope and circumvention inquiries, the Department found that because the circumvention and scope requests may necessitate an analysis of the significance of the production process in Cambodia, it was appropriate to initiate them concurrently. However, we are preliminarily rescinding the scope inquiry because Lian Heng, the Cambodian fish producer/exporter upon which Piazza relied for information to file its scope request, is also subject to the concurrent circumvention inquiry.

Termination of the Circumvention Inquiry for L.S.H. and Sun Wah

In reviewing the record evidence we note that the Department's decision to issue questionnaires to L.S.H. and Sun Wah in the context of this proceeding was based solely on information submitted by Petitioners that such processors were producing frozen fish fillets for export. In reviewing Petitioners' submission and all evidence to date on the record of this proceeding, however, we find no evidence that either of the two processors exported frozen fish fillets to the United States. Indeed, one processor has claimed to have made no shipments to the United States, and data from U.S. Customs and Border Protection (''CBP'') do not indicate shipments from either of the two companies at issue. In general, a circumvention inquiry should be supported by evidence of shipments to the United States of the product in question. Moreover, in this particular case, there is insufficient data to satisfy the explicit criteria set out in the initiation notice regarding the identification of Cambodian processors involved in processing Vietnamese–origin fish into fish fillets for export to the United States. Accordingly, we do not believe this circumvention inquiry should proceed for Sun Wah and L.S.H., as the evidentiary standard which was established for purposes of this inquiry has not been met. *See* section 781(b) of the Act. Therefore, the Department is preliminarily terminating the inquiry with respect to these companies. The Department is, however, allowing Petitioners to provide additional information on Sun Wah and L.S.H regarding their processing and export of fish fillets to the United States. Specifically, if sufficient information is received that meets the evidentiary standard established in the notice of *Initiation*, the Department may initiate a new and separate circumvention inquiry with regard to these companies.

With respect to Lian Heng, record evidence exists that Lian Heng was involved in processing and exporting frozen fish fillets to the United States made from Vietnamese–origin live basa and tra fish. *See* Piazza's May 12, 2004, submission. In addition, the Department corroborated that Lian Heng is an exporter of frozen fish fillets from Cambodia by examining CBP data. *See* Memo to File from Kit Rudd, dated January 27, 2006. As such, the Department is continuing the inquiry with respect to Lian Heng.

Statutory Provisions Regarding Circumvention

Section 781(b) of the Act provides that the Department may find circumvention of an antidumping duty order when merchandise of the same class or kind subject to the order is

[7] As Lian Heng's questionnaire responses concerned both Lian Heng Trading and Lian Heng Investment, the Department scheduled verification at the facilities of both companies. As a result of the termination of verification prior to its scheduled completion, the Department was able to conduct on-site verification at the production facilities and offices of Lian Heng Trading only.

[8] Until July 1, 2004, these products were classifiable under tariff article codes 0304.20.60.30 (Frozen Catfish Fillets), 0304.20.60.96 (Frozen Fish Fillets, NESOI), 0304.20.60.43 (Frozen Freshwater Fish Fillets) and 0304.20.60.57 (Frozen Sole Fillets) of the HTSUS.

completed or assembled in a foreign country other than the country to which the order applies. In conducting circumvention inquiries under section 781(b) of the Act, the Department relies upon the following criteria: (A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is subject to an antidumping duty order; (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to the order or produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in (B) is minor or insignificant; and (D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States. Section 781(b)(3) of the Act further provides that, in determining whether to include merchandise assembled or completed in a foreign country in an antidumping duty order, the Department shall consider: (A) the pattern of trade, including sourcing patterns; (B) whether the manufacturer or exporter of the merchandise described in accordance with section 781(b)(1)(B) of the Act is affiliated with the person who uses the merchandise described in accordance with section 781(b)(1)(B) to assemble or complete in the foreign country the merchandise that is subsequently imported in to the United States; and (C) whether imports into the foreign country of the merchandise described in accordance with section 781(b)(1)(B) have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

Analysis/Facts Available/Adverse Facts Available

The Department's questionnaires issued to Lian Heng were designed to elicit information for purposes of conducting both qualitative and quantitative analyses in accordance with the criteria enumerated in section 781(b) of the Act as outlined above. This approach is consistent with our analysis in previous circumvention inquiries. *See, e.g., Hot–Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom; Negative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders (Carbon Steel Products)*, 64 FR 40336 (July 26, 1999) and *Steel Wire Rope from Mexico; Affirmative Preliminary Determination of Circumvention of Antidumping Duty Order*, 59 FR 29176 (June 3, 1994). Although the Department received information addressing these criteria under section 781(b) of the Act, we are unable to complete an analysis of the criteria for Lian Heng in this proceeding because Lian Heng prematurely terminated the verification of its questionnaire responses.

Section 776(a)(2) of the Act provides that if an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Further, section 776(b) of the Act provides that, if the Department finds that an interested party ''has failed to cooperate by not acting to the best of its ability to comply with a request for information,'' the Department may use information that is adverse to the interests of that party as facts otherwise available. Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action (''SAA'') accompanying the URAA, H.R. Doc. No. 316, 103d Cong., 2d Session at 870 (1994). An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act.

In accordance with sections 776(a)(2)(C) and (D) of the Act, the Department finds that applying facts available is warranted for Lian Heng because Lian Heng prematurely terminated verification, thereby significantly impeding this proceeding and rendering the information submitted unverifiable. In addition, we disagree with Piazza's rebuttal comments that the Department's verification confirmed Piazza's responses on the record with respect to several elements of the statutory analysis under section 781(b) of the Act. The Department finds that Lian Heng's termination of verification constitues a failure by Lian Heng to provide verifiable data and thus renders the totality of the record responses unverified. Furthermore, pursuant to section 776(b) of the Act, the Department finds that Lian Heng failed to cooperate to the best of its ability as a result of its termination of verification, and therefore we find an adverse inference is warranted in determining the facts otherwise available.

Summary

We have made an affirmative preliminary determination that Lian Heng has engaged in circumvention of the antidumping duty order on frozen fish fillets from Vietnam within the meaning of section 781(b) of the Act. In the course of this proceeding, Lian Heng was given an opportunity to provide verifiable documentation supporting the country of origin of the fish used to produce frozen fish fillets in Cambodia for export to the United States. However, as noted above, Lian Heng failed to provide verifiable data supporting the country of origin of the fish used in the frozen fish fillet production process. Specifically, at verification the Department attempted to verify documentation regarding the origin of Lian Heng's whole fish used to produce fish fillets for the period January 1, 2003, to July 15, 2005 (the last day of verification). Lian Heng prematurely terminated the verification on July 15, 2005. Moreover, it was apparent during the verification that Lian Heng could not provide adequate documentation supporting the origin of the whole fish. *See Lian Heng Verification Report* at 1–2 and 16–17.

Therefore, as adverse facts available under section 776(b) of the Act, the Department concludes that Lian Heng's processing in and exporting from Cambodia constitutes circumvention of the antidumping duty order within the meaning of section 781(b) of the Act. A second adverse inference is that for the period of October 22, 2004 through July 15, 2005, Lian Heng used Vietnamese–origin fish. As a result of these inferences, the Department finds that the use of Vietnamese–origin fish by Lian Heng to produce frozen fish fillets for export to the United States constitutes circumvention of the antidumping duty order on frozen fish fillets from Vietnam under section 781(b) of the Act. As such, the Department will consider all entries of frozen fish fillets of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus* produced by Lian Heng entered, or withdrawn from warehouse, for consumption on or after October 22, 2004, the date of initiation of the circumvention inquiry, through July 15,

2005, the last day of the Lian Heng verification, to be produced from Vietnamese–origin fish. Therefore, for all such merchandise entered between October 22, 2004, and July 15, 2005, but not yet liquidated, we preliminarily determine to require suspension of liquidation and to require a cash deposit at the Vietnam–wide rate of 63.88 percent.

For all entries of frozen fish fillets produced by Lian Heng entered on or after July 16, 2005, CBP will allow Lian Heng to certify that no Vietnamese–origin fish was used in the production of the frozen fish fillets. Any entries of frozen fish fillets not accompanied by this certification will be subject to antidumping duty cash deposits at the Vietnam–wide rate of 63.88 percent. *See* Attachment I. Upon request, the Department may conduct a review of these certified entries during the third administrative review period (August 1, 2005 to July 31, 2006). The Department will expand the third administrative review period back to October 22, 2004, the date of initiation of the circumvention inquiry, to include all of Lian Heng's entries covered by this determination. In addition, we hereby serve notice to Lian Heng that such certified entries are subject to verification by the Department. If a review of these certified entries is conducted, the Department will, at a minimum, examine whole fish country of origin documentation that Lian Heng is required to maintain, as an exporter of fish products to the United States, by the United States Food and Drug Administration's Hazard Analysis Critical Control Point (''HACCP'')[9] program and Bioterrorism Act of 2002.[10] The Department will also examine any other records Lian Heng maintains in its normal course of business supporting its certifications that no Vietnamese–origin fish was used in the production of its frozen fish fillets.

Extension of Final Determination

Section 781(f) of the Act states that the administering authority shall, to the maximum extent practicable, make determinations under section 781 of the Act within three–hundred days from the date of the initiation of an antidumping circumvention inquiry. At this time, the Department requires additional time to allow parties to submit briefs, conduct a hearing if requested, and analyze all comments submitted prior to issuance of the final determination. Therefore, the Department is extending the current deadline of the final determination by sixty days until Monday, April 17, 2006.

Suspension of Liquidation

As noted, in accordance with section 733(d) of the Act, the Department will direct CBP to suspend liquidation and to require a cash deposit of estimated duties, at the Vietnam–wide rate, on all unliquidated entries of frozen fish fillets produced by Lian Heng that were entered, or withdrawn from warehouse, for consumption from on or after October 22, 2004, the date of initiation of the circumvention inquiry, through July 15, 2005.

Notification to the International Trade Commission

The Department, consistent with section 781(e) of the Act, has notified the International Trade Commission (''ITC'') of this preliminary determination to include the merchandise subject to this inquiry within the antidumping duty order on certain frozen fish fillets from Vietnam. Pursuant to section 781(e) of the Act, the ITC may request consultations concerning the Department's proposed inclusion of the subject merchandise. If, after consultations, the ITC believes that a significant injury issue is presented by the proposed inclusion, it will have 60 days to provide written advice to the Department.

Public Comment

Interested parties may request a hearing within 10 days from the date of publication of this notice. Comments from interested parties may be submitted no later than 20 days from the publication of this notice. Rebuttals limited to issues raised in the initial comments may be filed no later than 27 days after publication of this notice. Any hearing, if requested, will be held no later than 34 days after publication of this notice. The Department will publish the final determination with respect to this circumvention inquiry, including the results of its analysis of any written comments.

This affirmative preliminary circumvention determination is in accordance with section 781(b) of the Act and 19 CFR 351.225.

Dated: February 15, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

Attachment I

Certification of Lian Heng[1]

CERTIFICATION TO U.S. CUSTOMS AND BORDER PROTECTION

1. Lian Heng hereby certifies that the frozen fish fillets being exported and subject to this certification were not produced from fish of Vietnamese origin of the following species: *Pangasius Bocourti* (commonly known as basa or trey basa), *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius* and commonly known as tra or trey pra), or *Pangasius Micronemus*.

2. By signing this certificate, Lian Heng also hereby agrees to maintain sufficient documentation supporting the above statement such as country of origin certificates for all fish used to process the exported frozen fish fillets.[2] Further, Lian Heng agrees to submit to verification of the underlying documentation supporting the above statement. Lian Heng agrees that failure to submit to verification of the documentation supporting these statements will result in immediate revocation of Lian Heng's certification rights and that Lian Heng will be required to post a cash deposit equal to the Vietnam–wide entity rate on all entries of frozen fish fillets of the species *Pangasius Bocourti* (commonly known as basa or trey basa), *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius* and commonly known as tra or trey pra), or *Pangasius Micronemus*. In addition, if the Department of Commerce identifies any misrepresentation or inconsistencies regarding the certifications, it may report the matter to Customs and Border Protection for possible enforcement action.

Signature:

Printed Name:

Title:

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BILLING CODE 3510–DS–S

[9] Hazard Analysis Critical Control Point. Details regarding this program can be found at *http://www.cfsan.fda.gov/lrd/haccp.html*.

[10] Details regarding the Bioterrorism Act of 2002 can be found at the following URL: *http://www.fda.gov/oc/bioterrorism/bioact.html*.

[1] Lian Heng Trading Co. Ltd. (''Lian Heng Trading'') or Lian Heng Investment Co. Ltd. (''Lian Heng Investment'') (collectively ''Lian Heng'')

[2] Documentation may include, but is not limited to the records that (EXPORTER OF RECORD) is required to maintain by the United States Food and Drug Administration's HACCP program and Bioterrorism Act of 2002 and other documents kept in the normal course of business.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–507–501]

Certain In–shell Pistachios from the Islamic Republic of Iran: Preliminary Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the countervailing duty (CVD) order on certain in–shell (raw) pistachios from the Islamic Republic of Iran (Iran) for the period January 1, 2004, through December 31, 2004. For information on the net subsidy rate for the reviewed company, please see the ''Preliminary Results of Review'' section of this notice. Interested parties are invited to comment on these preliminary results. (See the ''Public Comment'' section of this notice.)

EFFECTIVE DATE: February 22, 2006.

FOR FURTHER INFORMATION CONTACT: Darla Brown, AD/CVD Operations, Office 3, Import Administration, U.S. Department of Commerce, Room 4014, 14th Street and Constitution Avenue NW., Washington DC 20230; telephone (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On March 11, 1986, the Department published in the **Federal Register** the countervailing duty order on certain in–shell (raw) pistachios from Iran. *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: In–shell Pistachios from Iran*, 51 FR 8344 (March 11, 1986) (*In–shell Pistachios*). On March 1, 2005, the Department published a notice of opportunity to request an administrative review of this CVD order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 70 FR 9918 (March 1, 2005). On March 31, 2005, we received timely requests for administrative review from the California Pistachio Commission (CPC) and Cal Pure Pistachios, Inc. (Cal Pure). The CPC and Cal Pure requested that the Department conduct a review with respect to Tehran Negah Nima Trading Company, Inc., trading as Nima Trading Company (Nima), the respondent company in this proceeding. On April 22, 2005, we initiated an administrative review of the CVD order on in–shell (raw) pistachios from Iran covering the period of review (POR) January 1, 2004, through December 31, 2004. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 70 FR 20862 (April 22, 2005).

On June 8, 2005, we issued our initial questionnaire to the Government of Iran (GOI) and Nima. Neither the GOI nor Nima submitted questionnaire responses. Therefore, as discussed below in the ''Use of Facts Available'' section of this notice, we have resorted to the facts otherwise available, employing an adverse inference. *See* Section 776 of the Tariff Act of 1930, as amended (the Act).

On December 5, 2005, we extended the period for the completion of the *Preliminary Results* pursuant to Section 751(a)(3)(A) of the Act. *See Certain In–shell (Raw) Pistachios from the Islamic Republic of Iran: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review*, 70 FR 72426 (December 5, 2005).

In accordance with 19 CFR 351.213(b), this administrative review covers only those producers or exporters for which a review was specifically requested. Accordingly, this administrative review covers Nima and ten programs.

Scope of Order

The product covered by this order is in–shell (raw) pistachio nuts from which the hulls have been removed, leaving the inner hard shells and edible meat, as currently classifiable in the Harmonized Tariff Schedules of the United States (HTSUS) under item number 0802.50.20.00. The HTSUS subheading is provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

Use of Facts Available

During the course of this proceeding, we have sought information from the company subject to this review, Nima, and from the GOI pertaining to countervailable subsidy programs in Iran and their use by Nima and Nima's growers and producers. Specifically, we have asked for information concerning Nima's and its growers' usage of the following programs: Provision of Credit, Provision of Fertilizer and Machinery, Tax Exemptions, Provision of Water and Irrigation Equipment, Technical Support, Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods, Program to Improve Quality of Exports of Dried Fruit, Iranian Export Guarantee Fund, GOI Grants and Loans to Pistachio Farmers, and Crop Insurance for Pistachios. *See* pages II–3 through II–8 and pages III–6 through III–11 of the Department's June 8, 2005, questionnaire. In addition, we have requested information concerning the total sales and sales of subject merchandise made by Nima during the POR. *See* pages III–3 through III–6 of the Department's June 8, 2005, questionnaire.

Section 776(a) of the Act requires the use of facts available when an interested party withholds information that has been requested by the Department, or when an interested party fails to provide the information requested in a timely manner and in the form required. As described above, by failing to respond to our questionnaire, Nima and the GOI have failed to provide information regarding these programs, as well as Nima's sales, in the manner explicitly requested by the Department; therefore, we must resort to the facts otherwise available.

Furthermore, Section 776(b) of the Act provides that in selecting from among the facts available, the Department may use an inference that is adverse to the interests of a party if it determines that a party has failed to cooperate to the best of its ability. The Department finds that by not providing necessary information specifically requested by the Department, the GOI and Nima have failed to cooperate to the best of their ability. Therefore, in selecting from among the facts available, the Department determines that an adverse inference is warranted.

When employing an adverse inference in an administrative review, the statute indicates that the Department may rely upon information derived from (1) the petition, a final determination in a countervailing duty or an antidumping investigation, any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or (2) any other information placed on the record. *See* Section 776(b) of the Act and 19 CFR 351.308(c). Thus, in applying adverse facts available, we have used information from the final determination of *In–shell Pistachios*; *Certain In–Shell Pistachios and Certain Roasted In–Shell Pistachios from the Islamic Republic of Iran: Final Results of New Shipper Countervailing Duty Reviews*, 68 FR 4997 (January 31, 2003) (*New Shipper Reviews*); and *Certain In–shell Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review*, 70 FR 54027 (September 13, 2005) (*2003 In–shell Pistachios*).

If the Department relies on secondary information (*e.g.*, data from a petition) as facts available, Section 776(c) of the Act provides that the Department shall, ''to the extent practicable,'' corroborate such information using independent sources reasonably at its disposal.[1] The SAA further provides that to corroborate secondary information means that the Department will satisfy itself that the secondary information to be used has probative value. *See* also 19 CFR 351.308(d) (describing the corroboration of secondary information).

Thus, in those instances in which it determines to apply adverse facts available, the Department, in order to satisfy itself that such information has probative value, will examine, to the extent practicable, the reliability and relevance of the information used. However, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company–specific benefits resulting from countervailable subsidy programs. The only source for such information normally is administrative determinations. In the instant case, no evidence has been presented or obtained which contradicts the reliability of the evidence relied upon in previous segments of this proceeding.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render benefit data not relevant. *See Cotton Shop Towels from Pakistan: Final Results of Countervailing Duty Administrative Review*, 66 FR 42514 (August 13, 2001). Where circumstances indicate that the information is not appropriate as adverse facts available, the Department will not use it. *See Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996). In the instant case, no evidence has been presented or obtained which contradicts the relevance of the benefit data relied upon in previous segments of this proceeding. Thus, in the instant case, the Department finds that the information used has been corroborated to the extent practicable.

[1] The Statement of Administrative Action accompanying the URAA clarifies that information from the petition is ''secondary information.'' *See* Statement of Administrative Action, URAA, H. Doc. No. 316, Vol. 1, 103d Cong. (1994) (SAA) at 870.

Analysis of Programs

Programs Preliminarily Determined to Be Countervailable

Because the GOI and Nima did not provide the information necessary to conduct an analysis of these programs, we are making an adverse inference that each of these programs continues to exist, is countervailable, and that a benefit was conferred upon Nima during the POR.

A. Provision of Fertilizer and Machinery

In *In–shell Pistachios*, 51 FR at 8345–6, the Department found that growers, processors or exporters of pistachios in Iran can obtain fertilizer and machinery from the GOI at preferential prices.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

To calculate the net subsidy rate under this program, we used the highest rate listed in *In–shell Pistachios* for this program. Accordingly, we preliminarily determine that the net subsidy rate for this program is 7.11 percent *ad valorem*.

B. Provision of Credit

In *In–shell Pistachios*, the Department found that bounties or grants were provided to growers, processors, or exporters in Iran of pistachios under this program. Specifically, the Department found that agricultural cooperatives in Iran make credit available on terms inconsistent with commercial considerations from funds provided by the GOI to their members. *See* 51 FR at 8346.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

To calculate the net subsidy rate under this program, we used the highest rate listed in *In–shell Pistachios* for this program. Accordingly, we preliminarily determine that the net subsidy rate for this program is 7.11 percent *ad valorem*.

C. Tax Exemptions

In *In–shell Pistachios*, the Department found that bounties or grants were provided to growers, processors, or exporters in Iran of pistachios under this program. Specifically, the Department determined that farmers benefit from legislation that exempts farmers and livestock breeders from paying taxes, provided they follow government agricultural guidelines. *See* 51 FR at 8346.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

To calculate the net subsidy rate under this program, we used the highest rate listed in *In–shell Pistachios* for this program. Accordingly, we preliminarily determine that the net subsidy rate for this program is 7.11 percent *ad valorem*.

D. Provision of Water and Irrigation Equipment

In *In–shell Pistachios*, the Department found that bounties or grants were provided to growers, processors, or exporters in Iran of pistachios under this program. Specifically, the Department determined that pistachio growers in Iran may benefit from the construction of soil dams, flood barriers, canals, and other irrigation projects undertaken by the government to increase agricultural production. *See* 51 FR at 8346.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

To calculate the net subsidy rate under this program, we used the highest rate listed in *In–shell Pistachios* for this program. Accordingly, we preliminarily determine that the net subsidy rate for this program is 7.11 percent *ad valorem*.

E. Technical Support

In *In–shell Pistachios*, the Department found that bounties or grants were provided to growers, processors, or exporters in Iran of pistachios under this program. Specifically, the

Department determined that pistachio growers in Iran receive technical support as part of the GOI's program to support agricultural development, and that this technical support included research projects to improve cultivation techniques, as well as assistance in harvesting, marketing, and the use of fertilizer. *See* 51 FR at 8346.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

To calculate the net subsidy rate under this program, we used the highest rate listed in *In–shell Pistachios* for this program. Accordingly, we preliminarily determine that the net subsidy rate for this program is 7.11 percent *ad valorem*.

F. Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods

In the *New Shipper Reviews*, we found that there was sufficient information on the record to suggest that duties and levies paid in connection with the importation of intermediate materials used in the production of the exported commodities and goods are refunded to exporters, pursuant to the Third Five Year Development Plan (TFYDP) enacted by the GOI. See the May 8, 2002, Memorandum to Melissa G. Skinner from the Team, re: New Subsidy Allegations, contained in the February 2, 2006, Memorandum to the File from the Team, re: Placing Memos on the Record.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

This program was alleged for the first time in the *New Shipper Reviews*, and thus was not among the programs addressed in *In–shell Pistachios*. However, lacking any information from Nima and the GOI on the record of the instant review, we find that the net subsidy rate of 7.11, the highest rate established for individual programs in *In–shell Pistachios*, is the only available information on the record and is therefore, as adverse facts available, the appropriate rate to apply to this program in these preliminary results. Accordingly, we preliminarily find that the net subsidy rate for this program is 7.11 percent *ad valorem*.

G. Program to Improve Quality of Exports of Dried Fruit

In the *New Shipper Reviews*, we found that there was sufficient information on the record to suggest that pursuant to the Budget Act of 2001 - 2002, the GOI provides financial assistance to exporters of dried fruit and pistachios to assist them in the production of export quality goods. *See* the May 8, 2002, Memorandum to Melissa G. Skinner from the Team, re: New Subsidy Allegations, contained in the February 2, 2006, Memorandum to the File from the Team, re: Placing Memos on the Record.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

This program was alleged for the first time in the *New Shipper Reviews*, and thus was not among the programs addressed in *In–shell Pistachios*. However, lacking any information from Nima and the GOI on the record of the instant review, we find that the net subsidy rate of 7.11, the highest rate established for individual programs in *In–shell Pistachios*, is the only available information on the record and is therefore, as adverse facts available, the appropriate rate to apply to this program in these preliminary results. Accordingly, we preliminarily find that the net subsidy rate for this program is 7.11 percent *ad valorem*.

H. Iranian Export Guarantee Fund

In the 2003 administrative review of raw in–shell pistachios, we found that petitioners had provided sufficient evidence to support their allegation that the GOI pays a ''prize'' in the form of an export subsidy to exporters; these prizes are payable commensurate with the added value of export goods and services. *See* the October 27, 2004, Memorandum to Melissa G. Skinner from the Team, re: New Subsidy Allegations, contained in the February 2, 2006, Memorandum to the File from the Team, re: Placing Memos on the Record.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

This program was alleged for the first time in *2003 In–shell Pistachios*, and thus was not among the programs addressed in *In–shell Pistachios*. However, lacking any information from Nima and the GOI on the record of the instant review, we find that the net subsidy rate of 7.11, the highest rate established for individual programs in *In–shell Pistachios*, is the only available information on the record and is therefore, as adverse facts available, the appropriate rate to apply to this program in these preliminary results. Accordingly, we preliminarily find that the net subsidy rate for this program is 7.11 percent *ad valorem*.

I. GOI Grants and Loans to Pistachio Farmers

In *2003 In–shell Pistachios*, we found that petitioners had provided sufficient evidence to support their allegation that the GOI's Foreign Exchange Reserve Account Board of Trustees agreed to provide both a grant of $100,000,000 and a $50,000,000 buyer's credit to Iranian pistachio cooperatives and pistachio farmers. *See* the May 8, 2002, Memorandum to Melissa G. Skinner from the Team, re: New Subsidy Allegations, contained in the February 2, 2006 Memorandum to the File from the Team, re: Placing Memos on the Record.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

This program was alleged for the first time in *2003 In–shell Pistachios*, and thus was not among the programs addressed in *In–shell Pistachios*. However, lacking any information from Nima and the GOI on the record of the instant review, we find that the net subsidy rate of 7.11, the highest rate established for individual programs in *In–shell Pistachios*, is the only available information on the record and is therefore, as adverse facts available, the appropriate rate to apply to this program in these preliminary results.

Accordingly, we preliminarily find that the net subsidy rate for this program is 7.11 percent *ad valorem*.

J. Crop Insurance for Pistachios

In *2003 In–shell Pistachios*, we found that petitioners had provided sufficient evidence to support their allegation that the GOI established the Iranian Agricultural Product Insurance Act (IAPIA), whereby the Agricultural Bank will insure agricultural produce as a means of achieving the goals and policies of the agricultural sector and that the GOI aids farmers in securing insurance premiums at less than market value. *See* the May 8, 2002, Memorandum to Melissa G. Skinner from the Team, re: New Subsidy Allegations, contained in the February 2, 2006 Memorandum to the File from the Team, re: Placing Memos on the Record.

As further discussed above in the ''Use of Facts Available'' section of this notice, we have determined that the application of adverse facts available is warranted on the grounds that Nima and the GOI did not respond to our request for information. Therefore, we have determined as adverse facts available that this program continues to exist and that Nima received a countervailable benefit during the POR.

This program was alleged for the first time in *2003 In–shell Pistachios*, and thus was not among the programs addressed in *In–shell Pistachios*. However, lacking any information from Nima and the GOI on the record of the instant review, we find that the net subsidy rate of 7.11, the highest rate established for individual programs in *In–shell Pistachios*, is the only available information on the record and is therefore, as adverse facts available, the appropriate rate to apply to this program in these preliminary results. Accordingly, we preliminarily find that the net subsidy rate for this program is 7.11 percent *ad valorem*.

Preliminary Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we have calculated an individual subsidy rate for Nima, the only producer/exporter subject to this administrative review, for the POR, *i.e.*, calendar year 2004. We preliminarily determine that the total estimated net countervailable subsidy rate is 71.10 percent *ad valorem*.

As Nima is the exporter but not the producer of subject merchandise, should the final results of this review remain the same as these preliminary results, the Department's final results of review will apply to subject merchandise exported by Nima and produced by any grower. *See* 19 CFR 351.107(b).

The Department intends to instruct U.S. Customs and Border Protection (CBP), within 15 days of publication of the final results of this review, to liquidate all shipments of subject merchandise exported by Nima, entered, or withdrawn from warehouse, for consumption during the POR at the rate established in this administrative review.

We will instruct CBP to continue to collect cash deposits for non–reviewed companies at the most recent company–specific or country–wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to non–reviewed companies covered by this order will be the rate for that company established in the most recently completed administrative proceeding. *See Certain In–Shell Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review*, 68 FR 41310 (July 11, 2003). These cash deposit rates shall apply to all non–reviewed companies until a review of a company assigned these rates is requested.

Public Comment

Pursuant to 19 CFR 351.224(b), the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the date of the public announcement of this notice. Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Unless otherwise indicated by the Department, case briefs must be submitted within 30 days after the publication of these preliminary results. Rebuttal briefs, which are limited to arguments raised in case briefs, must be submitted no later than five days after the time limit for filing case briefs, unless otherwise specified by the Department. Parties who submit argument in this proceeding are requested to submit with the argument: (1) a statement of the issue, and (2) a brief summary of the argument. Parties submitting case and/or rebuttal briefs are requested to provide the Department copies of the public version on disk. Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f). Also, pursuant to 19 CFR 351.310, within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Secretary specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs.

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under 19 CFR 351.309(c)(ii), are due. The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are issued and published in accordance with Sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 14, 2006.

David M. Spooner,

Assistant Secretaryfor Import Administration.

[FR Doc. E6–2511 Filed 2–21–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 021506F]

Gulf of Mexico Fishery Management Council; Public Meetings

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

ACTION: Notice of Closed Session Scientific and Statistical Committee (SSC) Selection Committee Conference Call.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene its SSC Selection Committee via conference call to select members for an Ad Hoc Shrimp Effort Working Group for recommendation to the Council.

DATES: The conference call will be held on Wednesday, March 8, 2006.

ADDRESSES: The meeting will be held via closed session conference call.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Mr. Wayne Swingle, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico Fishery Management Council

(Council) will convene its SSC Selection Committee in a closed session conference call on Wednesday, March 8, 2006 at 10 a.m. EST. The purpose of the meeting is to select members for an Ad Hoc Shrimp Effort Working Group for recommendation to the Council. The Committee recommendations will be presented to the Council at the March 20 – 23, 2006 Council meeting in Mobile, AL.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Dawn Aring at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: February 16, 2006.

Tracey L. Thompson,

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

[FR Doc. E6–2442 Filed 2–21–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 021506D]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Research Steering Committee in March, 2006 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Wednesday, March 8, 2006, at 9:30 a.m.

ADDRESSES: The meeting will be held at the Sheraton Colonial Hotel, One Audubon Road, Wakefield, MA 01940; telephone: (781) 245–9300; fax: (781) 245–0842.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Committee will review several final cooperative research project reports and develop management advice for use by the Council. In addition, the committee will receive an update on Cooperative Research Partners Program's long-term projects, including industry-based survey and study fleet projects and discuss outreach issues such as communication of final report results.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: February 15, 2006.

Tracey L. Thompson,

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

[FR Doc. E6–2434 Filed 2–21–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Science Advisory Board

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of open meeting.

SUMMARY: The Science Advisory Board (SAB) was established by a Decision Memorandum dated September 25, 1997, and is the only Federal Advisory Committee with responsibility to advise the Under Secretary of Commerce for Oceans and Atmosphere on strategies for research, education, and application of science to operations and information services. SAB activities and advice provide necessary input to ensure that National Oceanic and Atmospheric Administration (NOAA) science programs are of the highest quality and provide optimal support to resource management.

Time and Date: The meeting will be held Wednesday March 8, 2006, from 1 p.m. to 5 p.m. and Thursday March 9, 2006, from 8:30 a.m. to 5 p.m. These times and the agenda topics described below are subject to change. Refer to the Web page *http://www.sab.noaa.gov/Meetings/meetings.html* for the most up-to-date meeting agenda.

Place: The meeting will be held both days at the Courtyard Marriott Hotel, 8506 Fenton Street, Silver Spring, Maryland 20910.

Status: The meeting will be open to public participation with a 30-minute public comment period on March 8 (check Web site to confirm time). The SAB expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of five (5) minutes. Written comments (at least 35 copies) should be received in the SAB Executive Director's Office by March 1, 2006 to provide sufficient time for SAB review. Written comments received by the SAB Executive Director after March 1 will be distributed to the SAB, but may not be reviewed prior to the meeting date. Seats will be available on a first-come, first-served basis.

Matters to be Considered: The meeting will include the following topics: (1) Briefing on the Environmental Impact of Hurricane Katrina; (2) Update and discussion of the Preliminary Report of the Hurricane Intensity Research Working Group; (3) Update on the Review of NOAA Ecosystem Science and Research; (4) Report on the Status of Social Science in NOAA; (5) Briefing on Invasive Species Activities in NOAA; (6) Discussion of Stakeholder Input and NOAA's Annual Guidance Memorandum for Fiscal Years 2009–2013 and (7) Update on the NOAA Strategy for Environmental Literacy.

FOR FURTHER INFORMATION CONTACT: Michael Uhart, Executive Director, Science Advisory Board, NOAA, Rm. 11142, 1315 East-West Highway, Silver Spring, Maryland 20910. (Phone: 301–713–9121, Fax: 301–713–3515, E-mail: *Michael.Uhart@noaa.gov)*; or visit the NOAA SAB Web site at *http://www.sab.noaa.gov.*

Dated: February 15, 2006.

Mark E. Brown,

Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration, Atmospheric Administration.

[FR Doc. E6–2459 Filed 2–21–06; 8:45 am]

BILLING CODE 3510–KD–P

COMMODITY FUTURES TRADING COMMISSION

Meetings; Sunshine Act

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, March 10, 2006.

PLACE: 1155 21st. St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Jean A. Webb, (202) 418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 06–1660 Filed 2–17–06; 11:09 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Meetings; Sunshine Act

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, March 3, 2006.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 06–1661 Filed 2–17–06; 11:09 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Meetings; Sunshine Act

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, March 17, 2006.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 06–1662 Filed 2–17–06; 11:09 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Meetings; Sunshine Act

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, March 31, 2006.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Jean A. Webb, (202) 418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 06–1663 Filed 2–17–06; 11:09 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Meetings; Sunshine Act

Agency Holding the Meeting: Commodity Futures Trading Commission.

Sunshine Act Meeting

TIME AND DATE: 11 a.m., Friday, March 24, 2006.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed

MATTER TO BE CONSIDERED:

Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 06–1664 Filed 2–17–06; 11:09 am]

BILLING CODE 6351–01–M

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection; Submission for OMB Review, Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), has submitted a public information collection request (ICR) entitled AmeriCorps State and National Information Collection Related to Disaster Relief Efforts, to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995, Pub. L. 104–13, (44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Corporation for National and Community Service, AmeriCorps, Amy Borgstrom, Associate Director of Policy, (202) 606–6930, or by e-mail at *ABorgstrom@cns.gov.* Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 606–3472 between 8:30 a.m. and 5 p.m. eastern time, Monday through Friday.

ADDRESSES: Comments may be submitted, identified by the title of the information collection activity, to Office of Information and Regulatory Affairs, Attn: Ms. Rachel Potter, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods within 30 days from the date of publication in this **Federal Register**:

(a) By fax to: (202) 395–6974, Attention: Ms. Rachel Potter, OMB Desk Officer for the Corporation for National and Community Service; and

(b) Electronically by e-mail to: *Rachel_F._Potter@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments that:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including

whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Propose ways to enhance the quality, utility, and clarity of the information to be collected; and

• Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Current Action

Description: This submission includes one set of instructions for current grantees to submit requests for budget amendment in order to carry out disaster relief efforts. The instructions were approved on the basis of an emergency request submitted on 9/29/2005 and approved 10/5/2005, with OMB Control Number 3045–0113 and expiration date of 03/31/2006.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Requests for Budget Amendment Related to Disaster Relief Efforts.

OMB Number: 3045–0113.

Agency Number: None.

Affected Public: States and nonprofit organizations.

Total Respondents: 111 for Budget Amendment Requests.

Frequency: Each grantee is only eligible to use these instructions once. The Corporation plans to continue to engage in disaster relief efforts using these instructions after the date that the emergency approval expires, hence this request for regular clearance.

Average Time per Response: Budget Amendment Request: 1 hour.

Estimated Total Burden Hours: 111 hours for Budget Amendment Requests.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Dated: February 14, 2006.

Elizabeth D. Seale,

Interim Director, AmeriCorps State and National, COO, Corporation for National and Community Service.

[FR Doc. E6–2432 Filed 2–21–06; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[No. DoD–2006–OS–0018]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 24, 2006.

Title, Form and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 245, Government Property, related clauses in DFARS 252, and related forms in DFARS 253; DD Forms 1149, 1149C, 1342, 1419, 1637, 1639, 1640, and 1662; OMB Control Number 0704–0246.

Type of Request: Extension.

Number of Respondents: 14,862.

Responses Per Respondent: 3.

Annual Responses: 42,497.

Average Burden Per Response: 70 minutes (average).

Annual Burden Hours: 50,170.

Needs and Uses: DoD needs this information to keep an account of Government property in the possession of contractors. Property administrators, contracting officers, and contractors use this information to maintain property records and material inspection, shipping, and receiving reports.

Affected Public: Business or other for-profit; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Hillary Jaffe.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jaffe at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: February 14, 2006.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–1600 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

[No. DoD–2006–OS–0017]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 24, 2006.

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 243, Contract Modifications and related clauses at DFARS 252–243–7002; OMB Control Number 0704–0397.

Type of Request: Extension.

Number of Respondents: 440.

Responses Per Respondents: 1.

Annual Responses: 440.

Average Burden Per Response: 4.8 hours (average).

Annual Burden Hours: 2,120.

Needs and Uses: The information collection required by the clause at DFARS 252.243–7002, Requests for Equitable adjustments, implements 10 U.S.C. 2410(a). DoD contracting officers and auditors use this information to evaluate contractor requests for equitable adjustment to contract terms.

Affected Public: Business or other for-profit; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Hillary Jaffe.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jaffe at the Office of Management and Budget, Desk Officer for DoD, Room

10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: February 14, 2006.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–1601 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

[No. DoD–2006–HAM–0016]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Notice.

In accordance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Assistant Secretary of Defense for Health Affairs announces the proposed revision of a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received April 24, 2006.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

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

• Mail: Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Assistant Secretary of Defense for Health Affairs, TMA, HPA&E, Attn: Richard R. Bannick, Ph.D., 5111 Leesburg Pike, Suite 810, Falls Church, Virginia 22041–3206.

Title and OMB Number: Viability of TRICARE Standard Survey; OMB Control Number 0720–0031.

Needs and Uses: As mandated by Congress, confidential surveys of civilian physicians will be completed in TRICARE market areas within the United States to determine how many accept new TRICARE Standard patients in each market area. At least 20 TRICARE market areas in the United States will be conducted each fiscal year until all TRICARE market areas in the United States have been surveyed.

Affected Public: Individuals and households.

Annual Burden Hours: 3,333.

Number of Respondents: 40,000.

Responses per Respondent: 1.

Average Burden per Response: 5 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The Health Program Analysis and Evaluation Directorate (HPA&E) under the authority of the Office of the Assistant Secretary of Defense (Health Affairs)/TRICARE Management Activity will undertake an evaluation of the DoD's TRICARE Standard healthcare option. HPA&E will collect and analyze data that are necessary to meet the requirements outlined in Section 723 of the National Defense Authorization Act for FY2004.

Activities include the collection and analyses of data obtained confidentially from civilian physicians (M.D.s & D.O.s) within U.S. TRICARE market areas. Specifically, Mail surveys with telephone follow-up of civilian providers will be conducted in the TRICARE market areas to determine how many healthcare providers are accepting new patients under TRICARE Standard in each market area. The surveys will be conducted in at least 20 TRICARE market areas in the United States each fiscal year until all market areas in the United States have been surveyed. In prioritizing the order in which these market areas will be surveyed, representatives of TRICARE beneficiaries will be consulted in identifying locations that have evidence of access-to-care problems under TRICARE Standard. Information will be collected by mail or telephonically to determine the number of healthcare providers that currently accept new Medicare patients or accept new MHS beneficiaries as patients under TRICARE Standard in each market area. Analyses will support all legislative requirements.

Dated: February 10, 2006.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–1603 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Revision to the Standard Forms 76, 76A, 186, and 186A

AGENCY: Under Secretary of Defense for Personnel and Readiness, Federal Voting Assistance Program, DoD.

ACTION: Notice.

SUMMARY: The Department of Defense, Under Secretary of Defense (Personnel and Readiness), Federal Voting Assistance Program, revised Standard Form 76, Federal Post Card Application for Registration and Absentee Ballot; SF 76A, Registration and Absentee Ballot Request—Federal Post Card Application (FPCA) (Electronic); SF 186, Federal Write-in Absentee Ballot; and SF 186A, Federal Write-in Absentee Ballot (Electronic) to meet new Federal laws and technology, including but not limited to, the use of electronic

transmission (faxing) for transmitting the form. The SF 76 and SF 186 will be stocked by GSA, Federal Acquisition Inventory Management Branch, 819 Taylor Street, Ft. Worth, TX 76102, and available February 6, 2006.

DATES: Effective upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Betty Collins, Department of Defense, 703–588–8123.

Dated: February 22, 2006.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–1602 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Defense Policy Board Advisory Committee

AGENCY: Department of Defense, Defense Policy Board Advisory Committee.

ACTION: Notice.

SUMMARY: The Defense Policy Board Advisory Committee will meet in closed session at the Pentagon on March 9, 2006 from 0900 to 1800 and March 10, 2006 from 0830 to 1400.

The purpose of the meeting is to provide the Secretary of Defense, Deputy Secretary of Defense and Under Secretary of Defense for Policy with independent, informed advice on major matters of defense policy. The Board will hold classified discussions on national security matters.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended [5 U.S.C. App II (1982)], it has been determined that the meeting concerns matters listed in 5 U.S.C. 552B(c)(1)(1982), and that accordingly this meeting will be closed to the public.

Dated: February 13, 2006.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 06–1578 Filed 2–21–06; 8:45 am]

BILLING CODE 5000–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Strategic Environmental Research and Development Program, Scientific Advisory Board

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: This Notice is published in accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463). The topic of the meeting on March 14–15, 2006 are to review new start and continuing research and development projects requesting Strategic Environmental Research and Development Program funds in excess of $1M. This meeting is open to the public. Any interested person may attend, appear before, or file statements with the Scientific Advisory Board at the time and in the manner permitted by the Board.

DATES: March 14–15, 2006 from 8 a.m. to 5 p.m.

ADDRESSES: SERDP Program Office, 901 North Stuart Street, Suite 804, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Ms. Misa Jensen, SERDP Program Office, 901 North Stuart Street, Suite 303, Arlington, VA or by telephone at (703) 696–2126.

L.M. Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–1574 Filed 2–21–06; 8:45am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board Task Force on VTOL/STOL will meet in closed session on February 22, 2006; at Strategic Analysis Inc., 3601 Wilson Boulevard, Arlington, VA. This meeting continues the task force's work and will consist of classified and FOUO briefings on current technologies and programs.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Defense Science Board Task Force will: Assess the features and capabilities VTOL/STOL aircraft should have in order to support the nation's defense needs through at least the first half of the 21st century.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. II), it has been determined that these Defense Science Board Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, the meetings will be closed to the public.

FOR FURTHER INFORMATION CONTACT: LCDR Clifton Phillips, USN, Defense Science Board, 3140 Pentagon, Room 3C553, Washington, DC 20301–3140, via e-mail at *clifton.phillips@osd.mil,* or via phone at (703) 571–0083.

Due to scheduling difficulties, there is insufficient time to provide timely notice required by Section 10(a) of the Federal Advisory Committee Act and Subsection 102–3.150(b) of the GSA Final Rule on Federal Advisory Committee Management, 41 CFR 102–3.150(b), which further requires publication at least 15 calendar days prior to the meeting.

Dated: February 15, 2006.

L.M. Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–1604 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Uniform Formulary Beneficiary Advisory Panel

AGENCY: Department of Defense, Assistant Secretary of Defense (Health Affairs).

ACTION: Notice of meeting.

SUMMARY: This notice announces a meeting of the Uniform Formulary Beneficiary Advisory Panel. The panel will review and comment on recommendations made to the Director, TRICARE Management Activity, by the Pharmacy and Therapeutics Committee regarding the Uniform Formulary. The meeting will be open to the public. Seating is limited and will be provided only to the first 220 people signing in. All persons must sign in legibly. Notice of this meeting is required under the Federal Advisory Committee Act.

DATES: Thursday, March 30, 2006, from 8 a.m. to 4 p.m.

ADDRESSES: Naval Heritage Center Theater, 701 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Mr. Rich Martel, TRICARE Management Activity, Pharmacy Operations, Beneficiary Advisory Panel, Suite 810, 5111 Leesburg Pike, Falls Church, VA 22041, telephone 703–681–0064 ext. 3672, fax 703–681–1242, or e-mail at *richard.martel.ctr@tma.osd.mil.*

SUPPLEMENTARY INFORMATION: The Uniform Formulary Beneficiary Advisory Panel will only review and comment on the development of the Uniform Formulary as reflected in the recommendations of the DoD Pharmacy and Therapeutics (P&T) Committee coming out of that body's meeting in February 2006. The P&T Committee information and subject matter concerning drug classes reviewed for that meeting are available at *http://pec.ha.osd.mil*. Any private citizen is permitted to file a written statement with the advisory panel. Statements must be submitted electronically to *richard.martel.ctr@tma.osd.mil* no later than March 23, 2006. Any private citizen is permitted to speak at the Beneficiary Advisory Panel meeting, time permitting. One hour will be reserved for public comments, and speaking times will be assigned only to the first twelve citizens to sign up at the meeting, on a first-come, first-served basis. The amount of time allocated to a speaker will not exceed five minutes.

February 15, 2006.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, DoD.

[FR Doc. 06–1575 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to Alter a System of Records.

SUMMARY: The Office of the Secretary of Defense is altering a system of records to its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on March 24, 2006, unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the OSD Privacy Act Coordinator, Records Management Section, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Ms. Juanita Irvin at (703) 696–4940.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the Federal Register and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted (date) to the House Committee on Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–310, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: February 14, 2006.

L.M. Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

DWHS P43

SYSTEM NAME:

Emergency Personnel Locator Records (February 22, 1993, 58 FR 10227).

CHANGES:

* * * * *

SYSTEM LOCATION:

Add the following addresses to entry: ''Washington Headquarters Services, Information Technology Management Directorate, Pentagon Room 1C1065A, Washington, DC 20301–1155.

Washington Headquarters Services, Information Technology Management Directorate, Crystal Gateway 3, Suite 1204, 1215 South Clark Street, Arlington, VA 22202–4387.

AT&T Internet Date Center (IDC), 480 Arsenal Street, Watertown, MA 02472–2805.

Qwest, 350 East Cermak Road, Suite 700, Chicago, IL 60616–1568.''

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with: ''5 U.S.C. 301, Departmental Regulation; 10 U.S.C Chapter 2, Secretary of Defense; Executive Order 12656, Assignment of Emergency Preparedness Responsibilities, November 18, 1988, as amended; Presidential Decision Directive 67, Enduring Constitutional Government and Continuity of Government Operations, October 21, 1998; Federal Preparedness Circular 65, Federal Executive Branch Continuity of Operations, June 15, 2004; Deputy Secretary of Defense Memorandum, Implementation of National Security Policy Direction of Enduring Constitutional Government and Continuity of Operations, February 17, 1999; DoD Directive 3020.26, Defense Continuity Program, September 8, 2004; DoD Directive 3020.36, Assignment of National Security Emergency Preparedness (NSEP) Responsibilities to DoD Components, November 2, 1988; and DoD Directive 5110.4, Washington Headquarters Services, October 19, 2001.''

* * * * *

SAFEGUARDS:

Add the following sentence: ''Access to personal information is further restricted by lock and key in secure containers, and in a computer system with intrusion safeguards.''

RETENTION AND DISPOSAL:

Delete entry and replace with: ''Records are retained until information is no longer current and then destroyed. Obsolete paper information is destroyed by tearing into pieces, shredding, pulping, macerating, or burning. Obsolete computer records are erased or overwritten.''

SYSTEMS MANAGER(S) AND ADDRESS:

Add the following addresses: ''Program Manager, Washington Headquarters Services, Information Technology Management Directorate, Crystal Gateway #1, Suite 940, 1235 South Clark Street, Arlington, VA 22202–3283

Program Manager, Washington Headquarters Services, Information Technology Management Directorate, Crystal Gateway #3, Suite 1204, 1215 South Clark Street, Arlington, VA 22202–4387.''

NOTIFICATION PROCEDURE:

Delete first paragraph and replace with: ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquires to the Administration & Program Support Directorate (APSD), Attn: COOP Program Manager, Crystal Gateway #1, Suite 940, 1235 South Clark Street, Arlington, VA 22202–3283.''

RECORD ACCESS PROCEDURES:

Delete first paragraph and replace with: ''Individuals seeking access to records about themselves should address written inquires to the Administration & Program Support Directorate (APSD), Attn: COOP Program Manager, Crystal Gateway #1, Suite 940, 1235 South Clark Street, Arlington, VA 22202–3283.''

* * * * *

DWHS P43

SYSTEM NAME:

Emergency Personnel Locator Records.

SYSTEM LOCATION(S):

Segments are maintained within the Office of the Secretary of Defense (OSD), The Joint Staff, and all other activities deriving administrative support from Washington Headquarters Services.

Washington Headquarters Services, Information Technology Management Directorate, Pentagon Room 1C1065A, Washington, DC 20301–1155.

Washington Headquarters Services, Information Technology Management Directorate, Crystal Gateway 3, Suite 1204, 1215 South Clark Street, Arlington, VA 22202–4387.

AT&T Internet Data Center (IDC), 480 Arsenal Street, Watertown, MA 02472–2805.

Qwest, 350 East Cermak Road, Suite 700. Chicago, IL 60616–1568.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Civilian employees and military personnel, and in some instances, their dependents, consultants, contractors, both in and out of government, with whom the Office of the Secretary of Defense, The Joint Staff, and all other activities deriving administrative support from Washington Headquarters Services (WHS) conduct official business. Inclusion is at the discretion of the maintaining office.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's Social Security Number and/or name, organizational address, home address or unit of assignment, work and home telephone numbers and related information. Emergency personnel rosters, contact listing files, organizational telephone directories, and listings of office personnel.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulation; 10 U.S.C Chapter 2, Secretary of Defense; Executive Order 12656, Assignment of Emergency Preparedness Responsibilities, November 18, 1988, as amended; Presidential Decision Directive 67, Enduring Constitutional Government and Continuity of Government Operations, October 21, 1998; Federal Preparedness Circular 65, Federal Executive Branch Continuity of Operations, June 15, 2004; Deputy Secretary of Defense Memorandum, Implementation of National Security Policy Direction of Enduring Constitutional Government and Continuity of Operations, February 17, 1999; DoD Directive 3020.26, Defense Continuity Program, September 8, 2004; DoD Directive 3020.36, Assignment of National Security Emergency Preparedness (NSEP) Responsibilities to DoD Components, November 2, 1988; and DoD Directive 5110.4, Washington Headquarters Services, October 19, 2001.

PURPOSE(S):

Records support agency requirements for emergency notification of personnel; establishment of locator listings, and all other official management functions where personnel and organizational point of contact information is required.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' set forth at the beginning of OSD's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records are maintained in file folders, index cards, Rolodex-type files, loose-leaf and bound notebooks. Computer files are maintained on magnetic tape, diskette, or other machine-readable media.

RETRIEVABILITY:

Files are retrieved by Social Security Number and/or name of employee or individual.

SAFEGUARDS:

Facilities where the systems are maintained are locked when not occupied. Paper records are kept in filing cabinets and other storage places which are locked when office is not occupied. Electronic records are on computer terminals in supervised areas using a system with software access control safeguards. Only persons on a need-to-know basis and trained in the handling of information protected by the Privacy Act have access to the system. Access to personal information is further restricted by lock and key in secure containers, and in a computer system with intrusion safeguards.

RETENTION AND DISPOSAL:

Records are retained until information is no longer current and then destroyed. Obsolete paper information is destroyed by tearing into pieces, shredding, pulping, macerating, or burning. Obsolete computer records are erased or overwritten.

SYSTEM MANAGER(S) AND ADDRESS:

Office of the Secretary of Defense Privacy Act Officer, OSD Records Management and Privacy Act Branch, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

Program Manager, Washington Headquarters Services, Information Technology Management Directorate, Crystal Gateway #1, Suite 940, 1235 South Clark Street, Arlington, VA 22202–3283.

Program Manager, Washington Headquarters Services, Information Technology Management Directorate, Crystal Gateway #3, Suite 1204, 1215 South Clark Street, Arlington, VA 22202–4387.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Administration & Program Support Directorate (APSD), Attn: COOP Program Manager, Crystal Gateway #1, Suite 940, 1235 South Clark Street, Arlington, VA 22202–3283.

The individual should make reference to the office where he/she is/was assigned or affiliated and include address and telephone number applicable to the period during which the record was maintained. Social Security number should be included in the inquiry for positive identification.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves should address written inquiries to the Administration & Program Support Directorate (APSD), Attn: COOP Program Manager, Crystal Gateway #1, Suite 940, 1235 South Clark Street, Arlington, VA 22202–3283.

The individual should make reference to the office where he/she is/was assigned or affiliated and include address and telephone number applicable to the period during which the record was maintained. Social Security Number should be included in the inquiry for positive identification.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is obtained from the subject individual, and official personnel office documents.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 06–1576 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to add a system of records.

SUMMARY: The Office of the Secretary of Defense proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on March 24, 2006 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to OSD Privacy Act Coordinator, Records Management Section, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Ms. Juanita Irvin at (703) 696–4940.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on February 7, 2006, to the House Committee on Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: February 14, 2006.

L.M. Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

NSLRB 01

SYSTEM NAME:

The National Security Labor Relations Board (NSLRB).

SYSTEM LOCATION:

National Security Labor Relations Board (NSLRB), 1401 Wilson Boulevard, Arlington, VA 22209–2325.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former civilian Federal Government employees who have filed unfair labor practice charges, negotiability disputes, exceptions to arbitration awards, and impasses with the National Security Labor Relations Board (NSLRB) pursuant to the National Security Personnel System (NSPS).

CATEGORIES OF RECORDS IN THE SYSTEM:

Documents relating to the proceedings before the Board, including the name of the individual initiating NSLRB action, statements of witnesses, reports of interviews and hearings, examiner's findings and recommendations, a copy of the original decision, and related correspondence and exhibits.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The National Defense Authorization Act for FY 2004, Pub. Law 108–136, Section 1101; 5 U.S.C. 9902(m), Labor Management Relations in the Department of Defense; and 5 CFR 9901.907, National Security Labor Relations Board.

PURPOSE(S):

To establish a system of records that will document adjudication of unfair labor practice charges, negotiability disputes, exceptions to arbitration awards, and impasses filed with the National Security Labor Relations Board.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To The Federal Labor Relations Authority (FLRA) or the Equal Employment Opportunity Commission, when requested, for performance of functions authorized by law.

To disclose, in response to a request for discovery or for appearance of a witness, information that is relevant to the subject matter involved in a pending judicial or administrative proceeding.

To provide information to officials of labor organizations recognized under 5 U.S.C. 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting work conditions.

The DoD 'Blanket Routine Uses' set forth at the beginning of OSD's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on electronic storage media and paper.

RETRIEVABILITY:

Records will be retrieved in the system by the following identifiers: Assigned case number; individual's name; labor organizations filing the unfair labor practice charges; negotiability disputes; exceptions to arbitration awards; date, month, year or filing; complaint type; and the organizational component from which the complaint arises.

SAFEGUARDS:

Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Access to records is limited to person(s) responsible for servicing the record in performance of their official duties and who are properly screened and cleared for need-to-know. Access to computerized data is restricted by passwords, which are changed periodically.

RETENTION AND DISPOSAL:

Records are disposed of 5 years after final resolution of case.

SYSTEM MANAGER(S) AND ADDRESS:

Executive Director, National Security Personnel System, Program Executive Office, 1401 Wilson Boulevard, Arlington, VA 22209–2325.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Executive Director, National Security Personnel System, Program Executive Office, 1401 Wilson Boulevard, Arlington, VA 22209–2325.

Request should contain name; assigned case number; approximate case date (day, month, and year); case type; the names of the individuals and/or labor organizations filed the unfair labor practice charges; negotiability disputes; exceptions to arbitration awards; and impasses.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address

written inquiries to the Executive Director, National Security Personnel System, Program Executive Office, 1401 Wilson Boulevard, Arlington, VA 22209–2325.

Request should contain name; assigned case number; approximate case date (day, month, and year); case type; the names of the individuals and/or labor organizations filed the unfair labor practice charges; negotiability disputes; exceptions to arbitration awards; and impasses.

CONTESTING RECORD PROCEDURES:

The OSD's rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction No. 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individual; other officials or employees; and department and other records containing information pertinent to the NSLRB action.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 06–1577 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Office of the Secretary of Defense is altering a system of records to its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on March 24, 2006 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the OSD Privacy Act Coordinator, Records Management Section, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Ms. Juanita Irvin at (703) 696–4940.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted (date) to the House Committee on Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: February 14, 2006.

L.M. Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

DPR 32

SYSTEM NAME:

Employer Support of the Guard and Reserve Ombudsman and Outreach Programs (October 6, 2005, 70 FR 58393).

CHANGES:

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with: ''Information includes, but is not limited to, name, Social Security Number, home address, phone number, branch of service, and assigned military unit of Armed Forces personnel; name, home address, and phone number of NDMS members; name of employer, as well as phone number and, if applicable, employer point of contact, and nature of employment/reemployment conflict; any notes and documentation prepared as a consequence of assisting the servicemember, NDMS member, or the employer.''

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Add the following to the end of the entry: ''and E.O. 9397 (SSN).''

* * * * *

NOTIFICATION PROCEDURE:

Delete second paragraph and replace with: ''Requests should include the name, Social Security Number, address, telephone number, military unit and branch of service of the servicemember or the name, address, and telephone number of the NDMS member; the request also should include the name, address, and telephone number of the employer and a brief description of the problem and date of occurrence.''

RECORD ACCESS PROCEDURE:

Delete second paragraph and replace with: ''Requests should include the name, Social Security Number, address, telephone number, military unit and branch of service of the servicemember or the name, address, and telephone number of the NDMS member; the request also should include the name, address, and telephone number of the employer and a brief description of the problem and date of occurrence.''

* * * * *

DPR 32

SYSTEM NAME:

Employer Support of the Guard and Reserve Ombudsman and Outreach Programs.

SYSTEM LOCATION:

Oracle On-Demand Advanced Data Center, Austin, TX 78753–2663.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Members of the Armed Forces, to include Reserve and National Guard personnel, and members of the National Disaster Medical System (NDMS).

CATEGORIES OF RECORDS IN THE SYSTEM:

Information includes, but is not limited to name, Social Security Number, home address, phone number, branch of service, and assigned military unit of Armed Forces personnel; name, home address, and phone number of NDMS members; name of employer, as well as phone number and, if applicable, employer point of contact, and nature of employment/reemployment conflict; any notes and documentation prepared as a consequence of assisting the servicemember, NDMS member, or the employer.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

38 U.S.C.. Chapter 43, Employment and Reemployment Rights of Members of the Uniformed Services; 42 U.S.C. 300hh–11(e)(3)(A), and Employment Reemployment Rights; DoD Instruction 1205.22, Employer support of the Guard and Reserve; DoD Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services; DoD Directive 1250.1, National Committee for Employer Support of the Guard and Reserve; and E.O. 9397 (SSN).

PURPOSE(S):

The purpose of the system is to support the Employer Support of the Guard and Reserve (ESGR) Ombudsman and Outreach Program in providing assistance to servicemembers and members of the National Disaster

Medical System in resolving employment-reemployment conflicts and in providing information to employers regarding the requirements of the Uniform Services Employment and Reemployment Act.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C.. 552a(b)(3) as follows:

To Federal, State, and local governmental agencies, as well as to private employers, in furtherance of informal mediation efforts to resolve employment-reemployment conflicts.

To the Department of Labor and the Department of Justice for investigation of, and possible litigation involving, potential violations of the Uniformed Services Employment and Reemployment Rights Act.

The DoD 'Blanket Routine Uses' set forth at the beginning of OSD's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are automated and are maintained in computers and computer output media.

RETRIEVABILITY:

Records may be retrieved by name, Company, zip codes, case numbers, problems/resolution codes, and/or e-mail address.

SAFEGUARDS:

Access to personnel information will be maintained in a secure, password protected electronic system that will utilize security hardware and software to include: multiple firewalls, active intruder detection, and role-based access controls. Paper records will be maintained in a controlled facility where physical entry is restricted by the use of locks, guards, or administrative procedures. Access to records is limited to those officials who require the records to perform their official duties consistent with the purpose for which the information was collected. All personnel whose official duties require access to the information are trained in the proper safeguarding and use of the information.

RETENTION AND DISPOSAL:

Records are treated as permanent pending a determination by the National Archives and Records Agency of authority for disposition of the records.

SYSTEM MANAGER(S) AND ADDRESS:

National Committee, Employer Support of the Guard and Reserve, ATTN: Information Technology, Executive Office, 1555 Wilson Boulevard, Suite 319, Arlington, VA 22209–2405.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the National Committee, Employer Support of the Guard and Reserve, ATTN: Case Manager, 1555 Wilson Boulevard, Suite 319, Arlington, VA 22209–2405.

Requests should include the name, Social Security Number, address, telephone number, military unit and branch of service of the servicemember or the name, address, and telephone number of the NDMS member; the request also should include the name, address, and telephone number of the employer and a brief description of the problem and date of occurrence.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to National Committee, Employer Support of the Guard and Reserve, ATTN: Case Manager, 1555 Wilson Boulevard, Suite 319, Arlington, VA 22209–2405.

Requests should include the name, Social Security Number, address, telephone number, military unit and branch of service of the servicemember or the name, address, and telephone number of the NDMS member; the request also should include the name, address, and telephone number of the employer and a brief description of the problem and date of occurrence.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are contained in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is obtained from the individual, the employer, and other DoD record systems.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 06–1579 Filed 2–21–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF EDUCATION

Office of Safe and Drug-Free Schools; Overview Information; Elementary and Secondary School Counseling Program; Notice Inviting Applications For New Awards For Fiscal Year (FY) 2006

Catalog of Federal Domestic Assistance (CFDA) Number: 84.215E.

Dates: Applications Available: February 22, 2006. Deadline for Transmittal of Applications: April 10, 2006. Deadline for Intergovernmental Review: June 7, 2006.

Eligible applicants: Local educational agencies (LEAs).

Estimated available funds: $17,000,000. Contingent upon the availability of funds, the Secretary may make additional awards in FY 2007 from the rank-ordered list of unfunded applicants from this competition.

Estimated Range of Awards: $250,000–$400,000.

Maximum Award: Section 5421(a)(5) of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, 20 U.S.C. 7245 (ESEA), limits the amount of a grant under this program in any one year to a maximum of $400,000.

Estimated Number of Awards: 45.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Full Text of Announcement

Purpose of Program: The purpose of the Elementary and Secondary School Counseling program is to support efforts by LEAs to establish or expand elementary and secondary school counseling programs.

Priority: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from Section 5421 of the ESEA, 20 U.S.C. 7245.

Absolute Priority: For FY 2006 and any subsequent year in which we make awards based on the rank-ordered list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is: The establishment or expansion of elementary school counseling programs. Under 34 CFR part 77, an elementary school is a day

or residential school that provides elementary education, as determined under State law. Applicants must also address the requirements in Section 5421(c)(2) of the ESEA. A copy of the statute authorizing this competition is included in the application package.

Program Authority: 20 U.S.C. 7245.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 97, 98, 99, and 299.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $17,000,000. Contingent upon the availability of funds, the Secretary may make additional awards in FY 2007 from the rank-ordered list of unfunded applicants from this competition.

Estimated Range of Awards: $250,000—$400,000.

Maximum Award: Section 5421(a)(5) of the ESEA limits the amount of a grant under this program in any one year to a maximum of $400,000.

Estimated Number of Awards: 45.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* LEAs.

2. *Cost Sharing or Matching:* This program does not involve cost sharing or matching but does involve supplement-not-supplant funding provisions. Section 5421(b)(2)(G) of the ESEA requires applicants under the program to assure that program funds will be used to supplement, and not supplant, any other Federal, State, or local funds used for providing school-based counseling and mental health services to students.

3. *Other:* Section 5421(g)(2) of the ESEA requires that for any fiscal year in which the amount available for this program is less than $40,000,000 the Secretary makes grants to LEAs only to establish or expand counseling programs in elementary schools. The FY 2006 appropriation for this program is $34,650,000. Therefore, under this notice applicants must propose projects that establish or expand counseling programs only in elementary schools.

IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827 or FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.215E. The application package for this program is also available at: *http://www.ed.gov/about/offices/list/osdfs/programs.html.*

Individuals with disabilities may obtain a copy of the application package for this program in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under *For Further Information Contact* in section VII. of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

3. *Submission Dates and Times:* Application Available: February 22, 2006. Deadline for Transmittal of Applications: April 10, 2006. Applications for grants under this program may be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants system or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery, please refer to section IV.6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements. Deadline for Intergovernmental Review: June 7, 2006.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* Section 5421(d) of the ESEA requires that no more than four percent of a grant award may be used for administrative costs to carry out the project.

6. *Other Submission Requirements:* Applications for grants under this program may be submitted electronically or in paper format by mail or hand delivery.

a. Electronic Submission of Applications

If you choose to submit your application to us electronically, you must use e-Application available through the Department's e-Grants system, accessible through the e-Grants portal page at: *http://e-grants.ed.gov/.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- Your participation in e-Application is voluntary.
- You must complete the electronic submission of your grant application by 4:30 p.m., Washington, DC time, on the application deadline date. The e-Application system will not accept an application for this program after 4:30 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The regular hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until midnight Saturday, Washington, DC time. Please note that the system is unavailable on Sundays, and between 7 p.m. on Wednesdays and 6 a.m. on Thursdays, Washington, DC time, for maintenance. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- You must submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. If you choose to submit your application electronically, you must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified above or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After you electronically submit your application, you will receive an

automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the ED 424 to the Office of Safe and Drug-Free Schools after following these steps:

(1) Print ED 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the ED 424.

(4) Fax the signed ED 424 to the Office of Safe and Drug-Free Schools at (202) 205–5722.

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of System Unavailability: If you are prevented from electronically submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system is unavailable for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If the system is down and therefore the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application.

Extensions referred to in this section apply only to the unavailability of the Department's e-Application system. If the e-Application system is available, and, for any reason, you are unable to submit your application electronically or you do not receive an automatic acknowledgment of your submission, you may submit your application in paper format by mail or hand delivery in accordance with the instructions in this notice.

b. Submission of Paper Applications by Mail

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.215E), 400 Maryland Avenue, SW., Washington, DC 20202–4260, or

By mail through a commercial carrier: U.S. Department of Education, Application Control Center—Stop 4260, Attention: (CFDA Number 84.215E), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.215E), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of the ED 424 the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210 of EDGAR and are listed in the application package.

2. *Review and Selection Process:* Additional factors we consider in selecting an application for an award are the requirements in Section 5421(c)(2) of the ESEA. Applicants must address each of these requirements.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Application Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* The Secretary has established the following

performance measures for assessing the effectiveness of the Elementary and Secondary School Counseling Program: (1) The percentage of grantees closing the gap between their student/mental health professional ratios and the student/mental health professional ratios recommended by the statute; and (2) the median percentage decrease among grantees in the number of student disciplinary referrals in the schools participating in the program. These two measures constitute the Department's indicators of success for this program. Consequently, applicants for a grant under this program are advised to give careful consideration to these two outcomes in conceptualizing the design, implementation, and evaluation of their proposed project. If funded, applicants will be asked to collect and report data in their annual performance reports about progress toward these goals. The Secretary will also use this information to respond to reporting requirements concerning this program established in Section 5421(f) of the ESEA.

VII. Agency Contact

For Further Information Contact: Loretta McDaniel, U.S. Department of Education, 400 Maryland Ave., SW., room 3E214, Washington, DC 20202–6450. Telephone: (202) 260–2661 or by e-mail: *loretta.mcdaniel@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–888–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed in this section.

VIII. Other Information

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 Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

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 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: February 16, 2006.

Deborah A. Price,

Assistant Deputy Secretary for Safe and Drug-Free Schools.

[FR Doc. E6–2506 Filed 2–21–06; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Elementary and Secondary Education; Overview Information; Migrant Education Program (MEP) Consortium Incentive Grants Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2006

Catalog of Federal Domestic Assistance (CFDA) Number: 84.144.

Dates:

Applications Available: February 22, 2006.

Deadline for Transmittal of Applications: May 19, 2006.

Deadline for Intergovernmental Review: July 18, 2006.

Eligible Applicants: State educational agencies (SEAs) receiving MEP Basic State Formula grants.

Estimated Available Funds: $3,000,000.

Estimated Range of Awards: $50,000–$110,000.

Estimated Average Size of Awards: $76,923.

Maximum Award: By statute, the maximum amount that we may award under this program is $250,000.

Estimated Number of Awards: 39.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the MEP Consortium Incentive Grants program is to provide incentive grants to State educational agencies (SEAs) that participate in high-quality consortia with another SEA or other appropriate entity to improve the delivery of services to migrant children whose education is interrupted. Through this program, the Department provides financial incentives to SEAs to participate in high-quality consortia that improve the intrastate and interstate coordination of migrant education programs by addressing key needs of migratory children who have their education interrupted.

Priorities: The priorities for this competition are from the notice of final requirements for this program, published in the **Federal Register** on March 3, 2004 (69 FR 10110).

Absolute Priorities: For FY 2006, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet one or more of these absolute priorities. In order for SEAs to be considered for incentive grants, a proposed consortium in which an SEA would participate must address one or more of the following absolute priorities:

1. Services designed to improve the proper and timely identification and recruitment of eligible migratory children whose education is interrupted;
2. Services designed (based on a review of scientifically based research) to improve the school readiness of pre-school-aged migratory children whose education is interrupted;
3. Services designed (based on a review of scientifically based research) to improve the reading proficiency of migratory children whose education is interrupted;
4. Services designed (based on a review of scientifically based research) to improve the mathematics proficiency of migratory children whose education is interrupted;
5. Services designed (based on a review of scientifically based research) to decrease the dropout rate of migratory students whose education is interrupted and improve their high school completion rate;
6. Services designed (based on a review of scientifically based research) to strengthen the involvement of migratory parents in the education of migratory students whose education is interrupted; and
7. Services designed (based on a review of scientifically based research) to expand access to innovative educational technologies intended to increase the academic achievement of migratory students whose education is interrupted.

Program Authority: 20 U.S.C. 6398(d).

Applicable Regulations: (a) The Education Department General Regulations (EDGAR) in 34 CFR parts 75 (except 75.232), 76, 77, 79, 80 (except 80.40(b)), 82, 84, 85 and 99; and (b) the notice of final requirements published in the **Federal Register** on March 3, 2004 (69 FR 10110).

II. Award Information

Type of Award: Formula grants.

Estimated Available Funds: $3,000,000.

Estimated Range of Awards: $50,000–$110,000.

Estimated Average Size of Awards: $76,923.

Maximum Award: By statute, the maximum amount that we may award under this program is $250,000.

Estimated Number of Awards: 39.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

III. Eligibility Information

1. *Eligible Applicants:* State educational agencies (SEAs) receiving MEP Basic State Formula grants.

2. *Cost Sharing or Matching:* This program does not involve cost sharing or matching but does involve supplement-not-supplant funding provisions. Pursuant to the notice of final requirements published in the **Federal Register** on March 3, 2004 (69 FR 10110) the supplement-not-supplant provisions in sections 1120A(b) and 1304(c)(2) of the Elementary and Secondary Education Act of 1965, as amended, are applicable to this program.

IV. Application and Submission Information

1. *Address to Request Application Package:* Lisa Gillette, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E253, FOB–6, Washington, DC 20202–6135. Telephone: (202) 205–0316, or by e-mail: *lisa.gillette@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms an applicant must submit, are in the application package for this program.

Page Limit: The application narrative (Part IV of the application) is where you, the applicant, describe the proposed consortium, including how the consortium meets the Application Requirements listed in the notice of final requirements published in the **Federal Register** on March 3, 2004 (69 FR 10110) and one or more of the absolute priorities, and address the selection criteria that reviewers use to evaluate your application. You must limit Part IV to the equivalent of no more than 30 double-spaced pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a consistent font that is either 12-point or larger or no smaller than 10 pitch (characters per inch).
- For charts, tables, and graphs, use a font that is either 12-point or larger or no smaller than 10 pitch.

The page limit applies only to Part IV of the application. It does not apply to Parts I through III or Parts V through VII, or to any appendices, resumes, bibliography, or letters of support. However, an applicant must include all of the application narrative in Part IV.

Department reviewers will not read any pages of the Part IV narrative that:

- Exceed the page limit if you apply these standards, or
- Exceed the equivalent of the page limit if you apply other standards.

3. *Submission Date and Times:*

Applications Available: February 22, 2006.

Deadline for Transmittal of Applications: May 19, 2006.

Applications for grants under this competition must be submitted in paper format by mail or by hand delivery. For information (including dates and times) about how to submit your application by mail or by hand delivery, please refer to section IV.6. *Other Submission Requirements* in this notice.

The Department does not consider an application that does not comply with the deadline requirements.

Deadline for Intergovernmental Review: July 18, 2006.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted in paper format by mail or hand delivery.

a. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service: Lisa Gillette, Office of Migrant Education, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E253, Washington, DC 20202–6135; or

By mail through a commercial carrier: U.S. Department of Education, ATTN: Lisa Gillette, OESE, 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

b. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: Lisa Gillette, Office of Migrant Education, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E253, Washington, DC 20202–6135.

Note: A person delivering an application must show identification to enter the U.S. Department of Education building.

V. Application Review Information

Selection Criteria: The selection criteria for this program are from 34 CFR 75.210 and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If a consortium application is successful, the Department will send the applicant a Grant Award Notice (GAN). The Department will also notify Congress

regarding grant awards. The Department may also notify successful applicants informally.

If an application is not evaluated or not selected for funding, the Department will notify the applicant.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* Grant recipients under this program must submit the annual and final performance and financial reports specified in the notice of final requirements for this grant program published in the **Federal Register** on March 3, 2004 (69 FR 10110).

4. *Performance Measures:* Currently, the Government Performance and Results Act (GPRA) indicator established by the Department for the Migrant Education Program, of which the Consortium Incentive Grants are a component, is that an increasing number of States will show:

a. Increasing percentages of migrant students at the elementary school level who meet or exceed the proficient level on State assessments in reading.

b. Increasing percentages of migrant students at the middle school level who meet or exceed the proficient level on State assessments in reading.

c. Increasing percentages of migrant students at the elementary school level who meet or exceed the proficient level on State assessments in mathematics.

d. Increasing percentages of migrant students at the middle school level who meet or exceed the proficient level on State assessments in mathematics.

e. Decreasing percentages of migrant students who drop out from secondary school (grades 7–12).

f. Increasing percentages of migrant students who graduate from high school.

The Department will be collecting data from States on these performance measures.

VII. Agency Contacts

For Further Information Contact: Lisa Gillette, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E253, FOB–6, Washington, DC 20202–6135. Telephone: (202) 205–0316, or by e-mail: *lisa.gillette@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed in this section.

VIII. Other Information

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 Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available for free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

You may also view this document in text at the following site: *http://www.ed.gov/about/offices/list/oese/ome/index.html*

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: February 15, 2006.

Henry Johnson,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. E6–2514 Filed 2–21–06; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; Computer Matching Program

AGENCY: Department of Education.

ACTION: Notice—Computer Matching between the U.S. Department of Education and the Social Security Administration.

SUMMARY: Pursuant to the Computer Matching and Privacy Protection Act of 1988, Pub. L. 100–503, and the Office of Management and Budget (OMB) guidelines on the conduct of computer matching programs, notice is hereby given of the renewal of the computer matching program between the U.S. Department of Education (ED) (recipient agency), and the Social Security Administration (SSA) (the source agency). This renewal of the computer matching program between SSA and ED will become effective as explained below.

In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), the OMB guidelines on the conduct of computer matching programs (see 54 FR 25818, June 19, 1989), and OMB Circular A–130, we provide the following information:

1. Names of Participating Agencies

The U.S. Department of Education and the Social Security Administration.

2. Purpose of the Match

The purpose of this matching program between ED and SSA is to assist the Secretary of Education in her obligation to verify immigration status and social security numbers (SSN) under 20 U.S.C. 1091(g) and (p). The SSA will verify the issuance of an SSN to, and the citizenship status of, those students and parents who provide their SSNs in the course of applying for aid under a student financial assistance program authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). Verification of this information by SSA will help ED satisfy its obligation to ensure that individuals applying for financial assistance meet eligibility requirements imposed by the HEA.

Verification by this computer matching program effectuates the purpose of the HEA because it provides an efficient and comprehensive method of verifying the accuracy of each individual's SSN and claim to a citizenship status that permits that individual to qualify for Title IV, HEA assistance.

3. Authority for Conducting the Matching Program

ED is authorized to participate in the matching program under sections 484(p) (20 U.S.C. 1091(p)); 484(g) (20 U.S.C. 1091(g)); 483(a)(7) (20 U.S.C. 1090(a)(7)); and 428B(f)(2) (20 U.S.C. 1078–2(f)(2)) of the HEA.

The SSA is authorized to participate in the matching program under section 1106(a) of the Social Security Act (42 U.S.C. 1306(a)) and the regulations promulgated pursuant to that section (20 CFR part 401).

4. Categories of Records and Individuals Covered by the Match

The Federal Student Aid Application File (18–11–01), which contains the information to determine an applicant's eligibility for Federal student financial assistance, and the ED PIN Registration

System of Records (18–11–12), which contains the applicant's information to receive an ED PIN, will be matched against SSA's Master Files of Social Security Number Holders and SSN Applications System, SSA/OEEAS, 60–0058, which maintains records about each individual who has applied for and obtained an SSN.

5. Privacy Impact Assessment

Section 208 of the E-Government Act of 2002 (44 U.S.C. 3501 note) requires ED to conduct the following privacy impact assessment of this information collection:

The information collected by ED under this computer matching agreement is the verification of SSNs and citizenship by SSA, for the purpose of assisting ED to satisfy its obligation to ensure that an individual applying for financial assistance meets the requirements imposed under the HEA. This verification is mandated by the HEA. The information obtained from SSA by ED will only be used as provided for under Section X of the agreement. Notice that ED verifies an individual's SSN through a computer matching agreement with agencies such as SSA is provided to individuals in the Privacy and Security section of the Free Application for Federal Student Aid (FAFSA), and in Federal student loan program forms; submission of a FAFSA and participation in the Federal student loan programs are voluntary. The information obtained from SSA under this computer matching agreement will be secured pursuant to the procedures described in Section IX of the agreement. No new system of records is being created for this collection because, as noted above, routine uses permitting the disclosure of records to allow for the verification of SSNs are already included in the Systems of Records Notices for Federal student aid programs. Thus, this collection comports with applicable Privacy Act standards and Section 208.

6. Effective Dates of the Matching Program

This matching program must be approved by the Data Integrity Board of each agency. This matching agreement will become effective on: (1) April 10, 2006; (2) 40 days after the approved agreement is sent to Congress and OMB (or later if OMB objects to some or all of the agreement); or (3) 30 days after publication of this notice in the **Federal Register**, whichever date is last.

The matching program will continue for 18 months after the effective date and may be extended for an additional 12 months thereafter, if the conditions specified in 5 U.S.C. 552(o)(2)(D) have been met.

7. Address for Receipt of Public Comments or Inquiries

Individuals wishing to comment on this matching program, or to obtain additional information about the program, including a copy of the computer matching agreement between ED and SSA, should contact Ms. Marya Dennis, Management and Program Analyst, U.S. Department of Education, Union Center Plaza, 830 First Street, NE., Washington, DC 20202–5454. Telephone: (202) 377–3385. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape or computer diskette) on request to the contact person listed in the preceding paragraph.

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You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html.*

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 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

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Dated: February 15, 2006.

Theresa S. Shaw,

Chief Operating Officer, Federal Student Aid.

[FR Doc. E6–2504 Filed 2–21–06; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2005–0203; FRL–7764–4]

Ethylene Oxide (ETO) Revised Risk Assessments; Notice of Availability, and Solicitation of Risk Reduction Options (Phase 5 of 6-Phase Process)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's revised risk assessments for the fumigant/sterilant pesticide ethylene oxide (ETO). In addition, this notice solicits public comment on risk reduction options for ETO. The public is encouraged to suggest risk management ideas or proposals to address the risks identified. EPA is developing a Reregistration Eligibility Decision (RED), for ETO through the full, 6-Phase public participation process that the Agency uses to involve the public in developing pesticide reregistration and tolerance reassessment decisions. Through these programs, EPA is ensuring that all pesticides meet current health and safety standards.

DATES: Comments must be received on or before April 24, 2006.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0203, by one of the following methods:

- *http://www.regulations.gov/.* Follow the on-line instructions for submitting comments.
- *Mail.* Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

Hand delivery. Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID number EPA–HQ–OPP–2005–0203. The docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket facility is (703) 305–5805. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to docket ID number EPA–HQ–OPP–2005–0203. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity

or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be captured automatically 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/docket.htm/*.

Docket. All documents in the docket are listed in the regulation.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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov/* or in hard copy at the Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. The docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket facility is (703) 305– 5805.

FOR FURTHER INFORMATION CONTACT: Susan Bartow, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 603–0065; fax number: (703) 308–8041; e-mail address: *bartow.susan@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; the medical industry; the spice industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others may also 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 www.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 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

A. What Action is the Agency Taking?

EPA is making available the Agency's revised risk assessments, initially issued for comment through a **Federal Register** notice published on August 3, 2005 (70 FR 44632) (FRL–7729–2); a response to comments; and related documents for ETO. EPA is also soliciting public comment on risk reduction options for ETO. EPA developed the risk assessments for ETO as part of its public process for making pesticide reregistration eligibility and tolerance reassessment decisions. Through these programs, EPA is ensuring that pesticides meet current standards under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

ETO is a fumigant/sterilant used to sterilize medical or laboratory equipment, pharmaceuticals, and aseptic packaging, or to reduce microbial load on cosmetics, whole and ground spices or other seasoning materials, and artifacts, archival material or library objects.

EPA is providing an opportunity, through this notice, for interested parties to provide risk management proposals or otherwise comment on risk management for ETO. Risks of concern associated with the use of ETO are as follows: The dietary risk assessment indicates that for all supported commodities, the acute dietary exposure estimates for ethylene chlorohydrin (a reaction product of ETO) are above the Agency's level of concern. In addition, the Agency's occupational exposure assessment for ETO's use as a sterilant for the spice and medical industries indicates that cancer risk are of concern at the current regulatory levels established by the Occupational Safety and Health Administration (OSHA) and recommended by the National Institute of Occupational Safety and Health (NIOSH). Non-cancer worker exposure/risk is estimated to be of concern at the OSHA permissible exposure limit (PEL), but not of concern at the NIOSH recommended exposure limit. Based on available data, the Agency anticipates the following spice and medical industry-related activities to result in potential worker exposure to ETO: Inhalation exposure to ETO during sterilization activities; inhalation exposure to off-gassed ETO from treated items during post-sterilization activities.

A summary of these potential risks of concern as well as specific questions for which the Agency is requesting input, are provided in a separate document titled *Request for Additional Information and Risk Management Suggestions for the Reregistration of Ethylene Oxide.* In targeting these risks of concern, the Agency solicits

information on effective and practical risk reduction measures. In addition, a paper outlining benefits of various ETO uses is also included as a separate document. The Agency is interested in information related to these benefits.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004, (69 FR 26819) (FRL–7357–9) explains that in conducting these programs, EPA is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of issues, and degree of public concern associated with each pesticide. Due to its uses, risks, and other factors, ETO is being reviewed through the full 6-Phase public participation process.

All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. Comments and proposals will become part of the Agency Docket for ETO. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

After considering comments received, EPA will develop and issue the ETO RED.

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

Section 4(g)(2) of FIFRA as amended directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

Section 408(q) of the FFDCA, 21 U.S.C. 346a(q), requires EPA to review tolerances and exemptions for pesticide residues in effect as of August 2, 1996, to determine whether the tolerance or exemption meets the requirements of section 408(b)(2) or (c)(2) of FFDCA. This review is to be completed by August 3, 2006.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: February 15, 2006.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E6–2463 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP–2005–0062;FRL–7760–9]

Boric Acid/Sodium Borate Salts Risk Assessment; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's risk assessment, and related documents for the pesticide boric acid/sodium borate salts, and opens a 60 day public comment period on these documents. The public is encouraged to suggest risk management ideas or proposals to address the risks identified. EPA is developing a tolerance reassessment decision (TRED) for boric acid/sodium borate salts through a modified, 4–Phase public participation process that the Agency uses to involve the public in developing pesticide reregistration and tolerance reassessment decisions. Through these programs, EPA is ensuring that all pesticides meet current health and safety standards.

DATES: Comments must be received on or before April 24, 2006.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0062, by one of the following methods:

- *http://www.regulations.gov/*. Follow the on-line instructions for submitting comments.
- *Mail*: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

Hand Delivery: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID number EPA–HQ–OPP–2005–0062. The docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket facility is (703) 305–5805. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2005–0062. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be captured automatically 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/docket.htm/*.

Docket: All documents in the docket are listed in the regulation.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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov/* or in hard copy at the Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. The docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket facility is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Nathan Mottl, Special Review and Reregistration Division (7508C), Office

of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460—-0001; telephone number: (703) 305–0208; fax number: (703) 308–8041; e-mail address: *mottl.nathan@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 www.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 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

A. What Action is the Agency Taking?

EPA is releasing for public comment its human health risk assessment and related documents for boric acid/sodium borate salts, and soliciting public comment on risk management ideas or proposals. EPA developed the risk assessment for boric acid/sodium borate salts through a modified version of its public process for making pesticide reregistration eligibility and tolerance reassessment decisions. Through these programs, EPA is ensuring that pesticides meet current standards under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

Boric acid and sodium borate salts are used as acaricides, algaecides, fungicides, herbicides, and insecticides. Boric acid and sodium borate salts are frequently used for control of insects such as ants or roaches by application in non-agricultural food and feed areas. Other uses include use in animal housing, turf, wood preservatives, forests, sewage systems, transportation and storage facilities, medical/veterinary institutions, uncultivated agricultural/nonagricultural areas, refuse/solid waste sites, swimming pool algae control, ornamental lawns and turf, paved areas and aquatic structures.

EPA is providing an opportunity, through this notice, for interested parties to provide comments and input on the Agency's risk assessment for boric acid/sodium borate salts. Such comments and input could address, for example, the availability of additional data to further refine the risk assessments, or could address the Agency's risk assessment methodologies and assumptions as applied to this specific pesticide.

Through this notice, EPA also is providing an opportunity for interested parties to provide risk management proposals or otherwise comment on risk management for boric acid/sodium borate salts. Risks of concern associated with the use of boric acid/sodium borate salts are: Potential risks to children from swimming pool incidental oral exposure, hand to mouth transfer from indoor surfaces, and hand to mouth transfer from wood pressure treated decks. In targeting these risks of concern, the Agency solicits information on effective and practical risk reduction measures.

EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical, unusually high exposure to boric acid/sodium borate salts, compared to the general population.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004 (69 FR 26819) (FRL–7357–9), explains that in conducting these programs, the Agency is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of the issues, and degree of public concern associated with each pesticide. For boric acid/sodium borate salts, a modified, 4–Phase process with one comment period and ample opportunity for public consultation seems appropriate in view of its refined risk assessment. However, if as a result of comments received during this comment period EPA finds that additional issues warranting further discussion are raised, the Agency may lengthen the process and include a second comment period, as needed.

All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. Comments will become part of the Agency Docket for boric acid/sodium borate salts. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

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

Section 4(g)(2) of FIFRA as amended directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine

whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product-specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

Section 408(q) of the FFDCA, 21 U.S.C. 346a(q), requires EPA to review tolerances and exemptions for pesticide residues in effect as of August 2, 1996, to determine whether the tolerance or exemption meets the requirements of section 408(b)(2) or (c)(2) of FFDCA. This review is to be completed by August 3, 2006.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: February 10, 2006.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E6–2471 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2005–0505; FRL–7762–9]

Tridemorph; Tolerance Reassessment Decision for Low Risk Pesticide; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's Tolerance Reassessment Decision (TRED) for tridemorph, and opens a public comment period on this document, related risk assessments, and other support documents. EPA has reviewed the low risk pesticide tridemorph through a modified, streamlined version of the public participation process that the Agency uses to involve the public in developing pesticide tolerance reassessment and reregistration decisions. Through the tolerance reassessment program, EPA is ensuring that all pesticides meet current health and food safety standards.

DATES: Comments must be received on or before March 24, 2006.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0505, by one of the following methods:

- *http://www.regulations.gov/*. Follow the on-line instructions for submitting comments.
- *Mail*: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

Hand Delivery: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA.

Attention: Docket ID number EPA–HQ–OPP–2005–0505. The docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket facility is (703) 305–5805. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2005–0505. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be captured automatically 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/docket.htm/*.

Docket: All documents in the docket are listed in the regulation.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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov/* or in hard copy at the Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. The docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket facility is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Molly Clayton, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 603–0522; fax number: (703) 308–8041; e-mail address: *clayton.molly@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 www.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 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

A. What Action is the Agency Taking?

EPA has reassessed the uses of tridemorph, reassessed one existing tolerance or legal residue limit, and on January 11, 2006, reached a tolerance reassessment decision for this low risk pesticide. Tridemorph is a systemic fungicide used to control yellow and black sigatoka on imported bananas and plantain. There are no U.S. registrations for tridemorph. The Agency is now issuing for comment the resulting Report on Food Quality Protection Act (FQPA) Tolerance Reassessment Progress and Risk Management Decision for tridemorph, known as a TRED, as well as related risk assessments and technical support documents.

EPA developed the tridemorph TRED through a modified, streamlined version of its public process for making tolerance reassessment and reregistration eligibility decisions. Through these programs, the Agency is ensuring that pesticides meet current standards under the Federal Food, Drug, and Cosmetic Act (FFDCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended by FQPA. EPA must review tolerances and tolerance exemptions that were in effect when the FQPA was enacted, to ensure that these existing pesticide residue limits for food and feed commodities meet the safety standard established by the new law. Tolerances are considered reassessed once the safety finding has been made or a revocation occurs. EPA has reviewed and made the requisite safety finding for the tridemorph tolerances included in this notice.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** of May 14, 2004 (69 FR 26819) (FRL–7357–9) explains that in conducting these programs, the Agency is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of issues, and degree of public concern associated with each pesticide. EPA can expeditiously reach decisions for pesticides like tridemorph, which pose no risk concerns and require no risk mitigation. Once EPA assesses uses and risks for such low risk pesticides, the Agency may go directly to a decision and prepare a document summarizing its findings, such as the tridemorph TRED.

The tolerance reassessment program is being conducted under Congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public in finding ways to effectively mitigate pesticide risks. Tridemorph, however, poses no risks that require mitigation. The Agency therefore is issuing the tridemorph TRED, its risk assessments, and related support documents simultaneously for public comment. The comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the TRED. All comments should be submitted using the methods in Unit I of the **SUPPLEMENTARY INFORMATION**, and must be received by EPA on or before the closing date. These comments will become part of the Agency Docket for tridemorph. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

EPA will carefully consider all comments received by the closing date and will provide a Response to Comments Memorandum in the Docket and electronic EDOCKET. If any comment significantly affects the document, EPA also will publish an amendment to the TRED in the **Federal Register**. In the absence of substantive comments requiring changes, the decisions reflected in the TRED will be implemented as presented.

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

Section 408(q) of the FFDCA, 21 U.S.C. 346a(q), requires EPA to review tolerances and exemptions for pesticide residues in effect as of August 2, 1996, to determine whether the tolerance or exemption meets the requirements of section 408(b)(2) or (c)(2) of FFDCA. This review is to be completed by August 3, 2006.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: February 13, 2006.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E6–2509 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0091; FRL–7761–4]

Pesticide Product Registrations; Conditional Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of applications submitted by AgraQuest, Inc., to conditionally register the pesticide products *Muscodor albus* strain QST 20799, (manufacturing use product) and its end-use products, Arabesque, Andante, and Glissade containing the new active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(7)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially

affected entities may include, but are not limited to:

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

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

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under Docket identification number (ID) EPA–HQ–OPP–2006–0091. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Information and Records Integrity Branch, Information Technology and Resources Management Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA (703) 305–5805. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Such requests should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

Agency Website: EDOCKET, EPA's electronic public docket and comment system was replaced on November 25, 2005, by an enchanced Federal-wide electronic docket management and comment system located at *http://www.regulations.gov/*. Follow the on-line instructions.

II. Did EPA Conditionally Approve the Application?

A conditional registration may be granted under section 3(c)(7)(C) of FIFRA for a new active ingredient where certain data are lacking, on condition that such data are received by the end of the conditional registration period and do not meet or exceed the risk criteria set forth in 40 CFR 154.7; that use of the pesticide during the conditional registration period will not cause unreasonable adverse effects; and that use of the pesticide is in the public interest. The Agency has considered the available data on the risks associated with the proposed use of *Muscodor albus* QST 20799, and information on social, economic, and environmental benefits to be derived from such use. Specifically, the Agency has considered the nature and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of Muscodor albus QST 20799 during the period of conditional registration will not cause any unreasonable adverse effect on the environment, and that use of the pesticide is, in the public interest.

Consistent with section 3(c)(7)(C) of FIFRA, the Agency has determined that these conditional registrations are in the public interest. Use of the pesticides are of significance to the user community, and appropriate labeling, use directions, and other measures have been taken to ensure that use of the pesticides will not result in unreasonable adverse effects to man and the environment.

III. Conditionally Approved Registrations

EPA issued a notice, published in the **Federal Register** of April 14, 2004 (69 FR 19845) (FRL–7352–7), which announced that AgraQuest, Inc., 1530 Drew Avenue, Davis, CA 95616, had submitted an application to conditionally register the pesticide product, *Muscodor albus* strain QST 20799, biofumigant (EPA File Symbol 69592–RU), containing *Muscodor albus* QST 20799, a microbial fungal active ingredient at 2.1%, an active ingredient not included in any previously registered product.

This application also included registration of three end-use products (EPs), each containing 0.35% of *Muscodor albus* QST 20799. The EPs are: Arabesque (EPA File Symbol 69592–RL); Andante (EPA File Symbol 69592–RT; and Glissade (EPA File Symbol 69592–RI).

The applications were conditionally approved on September 22, 2005 for three end-use products each containing 0.35% of *Muscodor albus* QST 20799 and a manufacturing use product containing this microbial active ingredient at 2.1%.

The conditionally approved products are:

1. *Muscodor albus* strain QST 20799: For manufacturing use; for formulating into end-use products. (EPA Registration Number 69592–14).

2. Arabesque: For the control of post harvest diseases of food and non-food commodities, and preplant control of seed, bulb, and tuber borne diseases of food and non-food commodities (EPA Registration Number 69592–15).

3. Andante: For use as a methyl bromide replacement to control soil fungi and nematodes (EPA Registration Number 69592–17).

4. Glissade: For control of soil diseases for food and non-food commodities (EPA Registration Number 69592–18).

As a condition of registration, the registrant is required to provide a rodent study to confirm that the volatiles produced on rehydration of the pesticide do not pose an inhalation hazard. These volatiles occur naturally as flavors and fragrances in foods and beverages. Neither the parent microbe nor the volatile will have adverse effects on humans and the environment via dietary, cumulative and aggregate exposure as based on the evaluation of toxicological studies submitted by the registrant.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: February 7, 2006.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 06–1566 Filed 2–21–06; 8:45 am

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0079; FRL–7762–1]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Comments must be received on or before March 24, 2006.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2006–0079, by one of the following methods:

- *http://www.regulations.gov/*. Follow the on-line instructions for submitting comments.
- *Mail*: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery*: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID number EPA–HQ–OPP–2006–0079. The docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket facility is (703) 305–5805. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2006–0079. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be captured automatically 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/docket.htm/*.

Docket: All documents in the docket are listed in the regulation.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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov/* or in hard copy at the Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. The docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the docket facility is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Mary L. Waller, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9354; e-mail address:*waller.mary@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through www.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 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. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

1. *File Symbol:* 66330–AN. *Applicant:* Arysta LifeSciences, North America, 100 First St., Suite 1700, San Francisco, CA 94105. *Product name:* Midas EC Gold. *Active ingredients:* Iodomethane at 33% and Chloropicrin at 62%. *Proposed classification/Use:* For pre-plant fumigation onto fields intended for commercial production of strawberries, tomatoes, peppers and ornamental flowers, plants and bushes, and for the control of soil-borne pests, including nematodes, insects, weed and grass seeds, and diseases.

2. *File Symbol:* 66330–LI. *Applicant:* Arysta LifeSciences, North America, 100 First St., Suite 1700, San Francisco, CA 94105. *Product name:* Midas EC Bronze. *Active ingredients:* Iodomethane at 50% and Chloropicrin at 45%. *Proposed classification/Use:* For pre-plant fumigation onto fields intended for commercial production of strawberries, tomatoes, peppers and ornamental flowers, plants and bushes, for the control of soil-borne pests, including nematodes, insects, weed and grass seeds, and diseases.

3. *File Symbol:* 66330–LO. *Applicant:* Arysta LifeSciences, North America, 100 First St., Suite 1700, San Francisco, CA 94105. *Product name:* Midas 33:67. *Active ingredients:* Iodomethane at 33% and Chloropicrin at 67%. *Proposed classification/Use:* For pre-plant fumigation onto fields intended for commercial production of strawberries, tomatoes, peppers and ornamental flowers, plants and bushes, and for the control of soil-borne pests, including nematodes, insects, weed and grass seeds, and diseases.

4. *File Symbol:* 66330–LT. *Applicant:* Arysta LifeSciences, North America, 100 First St., Suite 1700, San Francisco, CA 94105. *Product name:* Midas 50:50. *Active ingredients:* Iodomethane at 50% and Chloropicrin at 50%. *Proposed classification/Use:* For pre-plant fumigation onto fields intended for commercial production of strawberries, tomatoes, peppers and ornamental flowers, plants and bushes, and for the control of soil-borne pests, including nematodes, insects, weed and grass seeds, and diseases.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: February 7, 2006.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 06–1458 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0084; FRL–7762–4]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

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 request by registrants to voluntarily cancel certain pesticide registrations.

DATES: Unless a request is withdrawn by August 21, 2006, orders will be issued canceling these registrations. The Agency will consider withdrawal requests postmarked no later than August 21, 2006.

FOR FURTHER INFORMATION CONTACT: John Jamula, Information Technology and Resource Management Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6426; e-mail address: *jamula.john@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to persons who produce or use pesticides, 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 information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number EPA–HQ–OPP–2006–0084. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

EDOCKET, EPA's electronic public docket and comment system was replaced on November 25, 2005, by an enhanced Federal-wide electronic docket management and comment system located at *http://www.regulations.gov/*. Follow the on-line instructions.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. What Action is the Agency Taking?

This notice announces receipt by the Agency of applications from registrants

to cancel 90 pesticide products registered under section 3 or 24(c) of FIFRA. These registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit:

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration no.	Product Name	Chemical Name
000100–01074	Cyclone Concentrate Herbicide	Paraquat dichloride
000100 CA 91–0022	Gramoxone Extra Herbicide	Paraquat dichloride
000100 CA 92–0006	Gramoxone Extra Herbicide	Paraquat dichloride
000100 ID 01–0007	Cyclone Concentrate/Gramoxone Max	Gas cartridge (as a device for burrowing animal control)
		Paraquat dichloride
000228–00202	Riverdale Dibro Granular Weed Killer	Bromacil
		Diuron
000228–00233	Dibro 1 Granular Weed Killer	Bromacil
		Diuron
000228–00234	Riverdale Dibro 2+4	Bromacil
		Diuron
000228–00235	Riverdale Dibro 4+4 Granular Weed Killer	Bromacil
		Diuron
000228–00236	Riverdale Dibro 5+4	Bromacil
		Diuron
000228–00273	Riverdale Diuron 80 WP Weed Killer	Diuron
000228–00308	Topsite 2.5G Herbicide	Diuron
		Imazapyr
000241–00268	Prowl DG Herbicide	Pendimethalin
000241–00321	Scepter O.T. Herbicide	Benzoic acid, 5-(2-chloro-4-(trifluoromethyl)phenoxy)-2-nitro-, sodium salt
		3-Quinolinecarboxylic acid, 2-(4,5-dihydro-4-methyl-4-(1-methylethyl)-5-oxo-1H-imidazol-2-yl
000241–00338	Pentagon 60 DG Herbicide	Pendimethalin
000264 OR 80–0063	Nemacur 3 Emulsifiable Nematicide	Fenamiphos
000264 OR 81–0039	Sencor 4 Flowable Herbicide	Metribuzin
000264 OR 81–0040	Sencor 75 Wettable Granular Herbicide	Metribuzin
000264 OR 84–0032	Di-Syston 8	Disulfoton
000264 OR 85–0019	Sencor 4 Flowable Herbicide	Metribuzin
000264 OR 91–0027	Di - Syston 8	Disulfoton
000264 OR 93–0012	Bayleton 50% Wettable Powder	Triadimefon

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration no.	Product Name	Chemical Name
000264 OR 99–0049	Guthion Solupak 50% Wettable Powder Insecticide	Azinphos-Methyl
000270–00260	Farnam Turbo	Diazinon
		Piperonyl butoxide
000352 CA 00–0007	Dupont Oust Herbicide	Sulfometuron
000352 ID 00–0019	Dupont Oust Herbicide	Sulfometuron
000352 MN 95–0006	Dupont Oust Herbicide	Sulfometuron
000352 NV 99–0009	Dupont Oust Herbicide	Sulfometuron
000352 SC 95–0001	Dupont Oust Herbicide	Sulfometuron
000352 WA 00–0008	Dupont Oust Herbicide	Sulfometuron
000352 WA 93–0002	Dupont Krovar I DF Herbicide	Bromacil
		Diuron
000352 WA 95–0021	Dupont Oust Herbicide	Sulfometuron
000352 WI 96–0001	Dupont Oust Herbicide	Sulfometuron
000829–00142	SA-50 Brand Sevin 50W Insecticide	Carbaryl
002749–00059	Diuron 80 WP Weed Killer	Diuron
004787–00037	Cyren MUC	Chlorpyrifos
004787–00039	Cyren 150 Concentrate	Chlorpyrifos
004787–00047	Griffin Methyl Parathion MUP	Methyl parathion
007501 OK 93–0001	Tops 90	Thiophanate-methyl
007501 TX 93–0006	Tops 90 Peanut Seed Treatment	Thiophanate-methyl
007969–00077	Galaxy Herbicide	3-Isopropyl-1H-2,1,3-benzothiadiazin-4(3H)-one-2,2-dioxide, sodium salt
		Benzoic acid, 5-(2-chloro-4-(trifluoromethyl)phenoxy)-2-nitro-, sodium salt
007969–00080	Blazer 2S Herbicide	Benzoic acid, 5-(2-chloro-4-(trifluoromethyl)phenoxy)-2-nitro-, sodium salt
007969–00168	Conclude Ultra Herbicide	3-Isopropyl-1H-2,1,3-benzothiadiazin-4(3H)-one-2,2-dioxide, sodium salt
		Benzoic acid, 5-(2-chloro-4-(trifluoromethyl)phenoxy)-2-nitro-, sodium salt
		Sethoxydim
007969–00179	Conclude Xact	3-Isopropyl-1H-2,1,3-benzothiadiazin-4(3H)-one-2,2-dioxide, sodium salt
		Benzoic acid, 5-(2-chloro-4-(trifluoromethyl)phenoxy)-2-nitro-, sodium salt
		Sethoxydim
008999–00004	Aquarium Algae Clear Liquid	Copper sulfate pentahydrate
		Diuron

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration no.	Product Name	Chemical Name
008999–00005	Algae Clear	Copper sulfate pentahydrate
		Diuron
009198–00106	The Andersons Tee Time Fertilizer with Sevin (r)	Carbaryl
010163 WA 98–0015	Gowan Endosulfan 3EC	Endosulfan
010163 WA 99–0025	Gowan Endosulfan 3EC	Endosulfan
010163 WA 99–0032	Gowan Endosulfan 3EC	Endosulfan
011715–00006	Speer Insect Killer (with .35% SBP-1382)	Resmethrin
011715–00023	Speer Equine Spray	2,5-Pyridinedicarboxylic acid, dipropyl ester
		4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-
		Piperonyl butoxide
		Pyrethrins
011715–00047	Speer Aircraft Insecticide Aerosol	Piperonyl butoxide
		Pyrethrins
011715–00091	Magic Guard Automatic Sequential Insecticide	Piperonyl butoxide
		Pyrethrins
011715–00119	Better World Dairy Spray	Piperonyl butoxide
		Pyrethrins
011715–00148	Magic Guard Automatic Room Fogger Formula II	2-Methyl-4-oxo-3-(2-propenyl)-2-cyclopenten-1-yl d-trans-2,2-dimethyl-3-(2-methyl-1-propenyl
		Piperonyl butoxide
		Resmethrin
011715–00158	Magic Guard with Rotenone/pyrethrins	Pyrethrins
		Rotenone
		Cube Resins other than rotenone
011715–00159	Speer E-Z Way Residual Crack & Crevice Injection Sy	Tetramethrin
		Fenvalerate
011715–00165	Better World Residual Roach and Flea Spray	2-Methyl-4-oxo-3-(2-propenyl)-2-cyclopenten-1-yl d-trans-2,2-dimethyl-3-(2-methyl-1-propenyl
		4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-
		Piperonyl butoxide
		Fenvalerate
011715–00169	Better World Insecticide	Resmethrin
011715–00173	Speer Stable Spray	2,5-Pyridinedicarboxylic acid, dipropyl ester
		4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration no.	Product Name	Chemical Name
		Piperonyl butoxide
		Pyrethrins
011715–00177	Magic Guard Non-Flammable Wasp Spray	4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-
		Piperonyl butoxide
		Pyrethrins
011715–00180	Speer E-Z II Residual Spray	4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-
		Pyrethrins
		Fenvalerate
011715–00230	Farnam Super-Sheen Wipe-Plus	Bioallethrin
		Butoxypolypropylene glycol
		2,5-Pyridinedicarboxylic acid, dipropyl ester
		Piperonyl butoxide
011715–00234	Farnam Wipe II Fly Protectant	Butoxypolypropylene glycol
		2,5-Pyridinedicarboxylic acid, dipropyl ester
		Tetramethrin
		Phenothrin
011715–00235	Faram Wipe-P Fly Protectant	2,5-Pyridinedicarboxylic acid, dipropyl ester
		Piperonyl butoxide
		Pyrethrins
019713–00052	Drexel Carbaryl 50-W	Carbaryl
019713–00334	Aldex Sevin-10G 10% Sevin Granular Insecticide	Carbaryl
019713–00369	Drexel Carbaryl 50% Manufacturing Concentrate	Carbaryl
033955–00462	Acme Sevin 5% Dust	Carbaryl
033955–00533	Acme Liquid Sevin Spray	Carbaryl
034704–00694	Clean Crop Acephate 80 DF Seed Protectant	Acephate
045735–00024	Carbaryl 99% Technical Grade Insecticide	Carbaryl
045735–00025	Carbaryl 4L Flowable	Carbaryl
051036–00310	Thiophanate-Methyl Technical	Thiophanate-methyl
051036 MS 02–0021	Acephate 90SP	Acephate
054705–00012	Hose'em Yard Insect Spray	Permethrin
055431–00001	Termiticide T/C	Chlorpyrifos
059623 CA 77–0078	Geigy Diazinon 50W (50% Wettable Powder) Insecticide	Diazinon
061282 OR 05–0021	Prozap Zinc Phosphide Pellets	Zinc phosphide (Zn3P2)

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration no.	Product Name	Chemical Name
062719–00312	Drexel Atrazine 4F	Atrazine
062719–00313	Atrazine 90	Atrazine
066222–00081	Pendimethalin Technical	Pendimethalin
066222–00082	Repose	Pendimethalin
066222–00088	Prodiamine Technical	1,3-Benzenediamine, 2,6-dinitro-N1,N1-dipropyl-4-(trifluoromethyl)-
068688–00022	Elite Residual Mist Plus	Butoxypolypropylene glycol
		2,5-Pyridinedicarboxylic acid, dipropyl ester
		4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-
		Piperonyl butoxide
		Pyrethrins
		Permethrin
068688–00026	Elite Residual Mist Plus Concentrate	2,5-Pyridinedicarboxylic acid, dipropyl ester
		4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-
		Piperonyl butoxide
		Pyrethrins
		Permethrin
068688–00030	Elite Flea and Tick Spray #8	2,5-Pyridinedicarboxylic acid, dipropyl ester
		4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-
		Piperonyl butoxide
		Pyrethrins
068688–00031	Elite Aloe Repellent Lotion #8	2,5-Pyridinedicarboxylic acid, dipropyl ester
		4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-
		Piperonyl butoxide
		Pyrethrins
068688–00050	Heartland Freeze Brand Wasp and Hornet Killer	Resmethrin
080697–00002	Krop-Max	Cyanamide

Unless a request is withdrawn by the registrant within 180 days of publication of this notice, orders will be issued canceling all of these registrations. Users of these pesticides or anyone else desiring the retention of a registration should contact the applicable registrant directly during this 180-day period.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number:

TABLE 2.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA Company no.	Company Name and Address
000100	Syngenta Crop Protection, Inc., Attn: Regulatory Affairs, PO Box 18300, Greensboro, NC 274198300.

TABLE 2.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION—Continued

EPA Company no.	Company Name and Address
000228	Nufarm Americas Inc., 1333 Burr Ridge Parkway, Suite 125A, Burr Ridge, IL 605270866.
000241	BASF Corp., PO Box 13528, Research Triangle Park, NC 277093528.
000264	Bayer Cropscience LP, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709.
000270	Farnam Companies Inc., PO Box 34820, Phoenix, AZ 85067.
000352	E.I. Du Pont De Nemours, Inc., Dupont Crop Protection (S300/427), PO Box 30, Newark, DE 197140030.
000829	Southern Agricultural Insecticides, Inc., PO Box 218, Palmetto, FL 34220.
002749	Aceto Agriculture Chemicals Corp., One Hollow Lane, Lake Success, NY 110421215.
004787	Cheminova Inc., Agent For: Cheminova A/S, 1620 Eye Street Nw, Suite 615, Washington, DC 20006.
007501	Gustafson LIC, PO Box 660065, Dallas, TX 75266.
007969	BASF Corp., Agricultural Products, PO Box 13528, Research Triangle Park, NC 277093528.
008999	Interpet LIC, d/b/a Aquarium Products, 180 L Penrod Ct., Glen Burnie, MD 21061.

TABLE 2.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION—Continued

EPA Company no.	Company Name and Address
009198	The Andersons Lawn Fertilizer Division, Inc., dba/ Free Flow Fertilizer, PO Box 119, Maumee, OH 43537.
010163	Gowan Co, POBox 5569, Yuma, AZ 853665569.
011715	Speer Products Inc., 4242 B.F. Goodrich Blvd., Memphis, TN 381810993.
019713	Drexel Chemical Co, PO Box 13327, Memphis, TN 381130327.
033955	PBI/gordon Corp., Attn: James L. Kunstman, PO Box 014090, Kansas City, MO 641010090.
034704	Loveland Products, Inc., PO Box 1286, Greeley, CO 80632.
045735	Burlington Scientific Corp., 71 Carolyn Blvd., Farmingdale, NY 11735.
051036	Micro-Flo Co. LIC, 530 Oak Ct. Drive, Memphis, TN 38117.
054705	Lynne Zahigian Regulatory Consulting, Agent For: Lawn and Garden Products, Inc., PO Box 1566, Fallon, NV 89407.
055431	Rusty Millar, Agent For: Arizona Chemical Group Inc., 850 Micheltorena Street, Los Angeles, CA 900262702.
059623	California Dept of Food and Agriculture, Office of Pesticide Consultation and Analysis, 1220 N Street, Sacramento, CA 95814.
061282	Hacco, Inc., 110 Hopkins Drive, Randolph, WI 539561316.

TABLE 2.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION—Continued

EPA Company no.	Company Name and Address
062719	Dow Agrosciences LIC, 9330 Zionsville Rd 308/2e225, Indianapolis, IN 462681054.
066222	Makhteshim-Agan of North America Inc., 4515 Falls of Neuse Rd Ste 300, Raleigh, NC 27609.
068688	Speer Products Inc., 4242 B.F. Goodrich Blvd., Memphis, TN 38181.
080697	Tide International USA Inc., Agent For: Zhejiang Tide Cropscience Co., Ltd, 21 Hubble, Irvine, CA 92618.

III. 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. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, the Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked before August 21, 2006. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. The withdrawal request must also include a commitment to pay any reregistration fees due, and to fulfill any applicable unsatisfied data requirements.

V. Provisions for Disposition of Existing Stocks

The effective date of cancellation will be the date of the cancellation order. The orders effecting these requested

cancellations will generally permit a registrant to sell or distribute existing stocks for 1 year after the date the cancellation request was received. This policy is in accordance with the Agency's statement of policy as prescribed in the **Federal Register** of June 26, 1991, (56 FR 29362) (FRL–3846–4). Exceptions to this general rule will be made if a product poses a risk concern, or is in noncompliance with reregistration requirements, or is subject to a data call-in. In all cases, product-specific disposition dates will be given in the cancellation orders.

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Unless the provisions of an earlier order apply, existing stocks already in the hands of dealers or users can be distributed, sold, or used legally until they are exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product. Exception to these general rules will be made in specific cases when more stringent restrictions on sale, distribution, or use of the products or their ingredients have already been imposed, as in a Special Review action, or where the Agency has identified significant potential risk concerns associated with a particular chemical.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: February 6, 2006.

Robert Forrest,

Acting Director, Information Technology and Resource Management Division, Office of Pesticide Programs.

[FR Doc. E6–2492 Filed 2–21–06; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

February 8, 2006.

SUMMARY: The Federal Communications Commission, as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13, and as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before March 24, 2006. 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 contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Leslie F. Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov* or Kristy L. LaLonde, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3087 or via the Internet at *Kristy_L._LaLonde@omb.eop.gov*.

If you would like to obtain or view a copy of this revised information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Leslie F. Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0584.

Title: Administration of U.S. Certified Accounting Authorities in Maritime Mobile and Maritime Mobile-Satellite Radio Services, FCC Forms 44 and 45.

Form Number: FCC 44 and 45.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 25 respondents; 100 responses/annum.

Estimated Time per Response: 1–3 hours.

Frequency of Response: Recordkeeping; On occasion, semi-annual, and annual reporting requirements; third party disclosure.

Total Annual Burden: 150 hours.

Total Annual Cost: $375,000.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The FCC has standards for accounting authorities in the maritime mobile and maritime-satellite radio services under 47 CFR Part 3. The Commission uses these standards to determine the eligibility of applicants for certification as a U.S. accounting authority, to ensure compliance with the maritime mobile and maritime-satellite radio services, and to identify accounting authorities to the International Telecommunications Union (ITU). Respondents are entities seeking certification or those already certified to be accounting authorities.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 06–1527 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval

February 9, 2006.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents,

including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before March 24, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your comments by email or U.S. mail. To submit your comments by email send them to *PRA@fcc.gov*. To submit your comments by U.S. mail send them to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 and Kristy L. LaLonde, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3087 or via the Internet at *Kristy_L._LaLonde@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an email to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918. If you would like to obtain a copy of this revised information collection, you may do so by visiting the FCC PRA web page at: *http://www.fcc.gov/omd/pra*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0703.

Title: Determining Cost of Regulated Cable Equipment and Installation.

Form Number: FCC Form 1205.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 4,000.

Estimated Time per Response: 4–12 hours.

Frequency of Response: Recordkeeping requirement; Annual reporting requirement; Third party disclosure requirement.

Total Annual Burden: 52,000 hours.

Total Annual Cost: $900,000.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Cable operators file FCC Form 1205 to calculate costs associated with regulated equipment and installation for the basic service tier and the maximum permitted charges for such equipment and installations and to comply with 47 CFR 76.923(m). Information derived from FCC Form 1205 filings is used to facilitate the review of equipment and installation rates. This information is then reviewed by each cable system's respective local franchising authority. 47 CFR 76.923 records are kept by cable operators in order to demonstrate that charges for the sale and lease of equipment for installation have been developed in accordance with the Commission's rules.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 06–1528 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval

February 15, 2006.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before March 24, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your comments by email or U.S. mail. To submit your comments by email send them to *PRA@fcc.gov*. To submit your comments by U.S. mail send them to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 and Kristy L. LaLonde, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3087 or via the Internet at *Kristy_L._LaLonde@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918. If you would like to obtain a copy of this revised information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

SUPPLMENTARY INFORMATION:

OMB Control Number: 3060–0685.

Title: Updating Maximum Permitted Rates for Regulated Services and Equipment, FCC Form 1210; Annual Updating of Maximum Permitted Rates for Regulated Cable Services, FCC Form 1240.

Form Number: FCC Form 1210 and FCC Form 1240.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; State, Local or Tribal Government.

Number of Respondents: 3,400.

Estimated Time per Response: 1 hour to 15 hours.

Frequency of Response: Annual reporting requirement; Quarterly reporting requirement; Third party disclosure requirement.

Total Annual Burden: 44,800 hours.

Total Annual Cost: $1,162,500.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Cable operators use FCC Form 1210 to file for adjustments in maximum permitted rates for regulated services to reflect external costs. Regulated cable operators submit this form to local franchising authorities (''LFAs''). FCC Form 1240 is filed by cable operators seeking to adjust maximum permitted rates for regulated cable services to reflect changes in external costs. Cable operators submit FCC Form 1240 to their respective local franchising authorities to justify rates for the basic service tier and related equipment or with the Commission (in situations where the Commission has assumed jurisdiction).

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 06–1627 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

February 15, 2006.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 24, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your all Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to *PRA@fcc.gov.* To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0506.

Title: Applications for FM Broadcast Station.

Form Number: FCC Form 302–FM.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents: 925.

Estimated Time per Response: 1–2 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 3,135 hours.

Total Annual Cost: $620,000.

Privacy Impact Assessment: No impact(s).

Needs and Uses: FCC Form 302–FM is required to be filed by licensees and permittees of FM broadcast stations to request and obtain a new or modified station license and/or to notify the Commission of certain changes in the licensed facilities of these stations. Data is used by FCC staff to confirm that the station is built to the terms specified in the outstanding construction permit and to ensure that any changes made to the station will not have any impact on other stations and the public. Data is extracted from FCC Form 302–FM for inclusion in the license to operate the station.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E6–2485 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

February 13, 2006.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before March 24, 2006. 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 contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.* If you would like to obtain or view a copy of this information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–XXXX.

Title: Order and Implementing Public Notices Requiring BRS Channels 1 and/or 2/2A Licensees to File Data on the Construction Status and/or Operational Parameters of Each System.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 150.

Estimated Time per Response: .50–1.25 hours.

Frequency of Response: On occasion and one-time reporting requirements, recordkeeping requirement and third party disclosure requirement.

Total Annual Burden: 131 hours.

Total Annual Cost: $8,000.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission is submitting this information collection to OMB as a new collection in order to obtain the full three-year clearance from them. The Commission seeks OMB approval contained in an *Order* (FCC 05–172) which requires licensees of Broadband Radio Service (BRS) Channels 1 and/or 2/2A to file information on the construction status

and/or operational parameters of each system. The Commission is seeking information on non-subscriber locations and operating characteristics of BRS receivers and other system characteristics of BRS incumbents (including operations by lessees) not currently collected on FCC Form 601 for this service. The Commission does not plan on incorporating this reporting requirement into the FCC Form 601 because it is a one-time collection. Respondents would submit the information as a separate attachment to their FCC 601 application.

This one-time collection is necessary because BRS Channels 1 and/or 2/2A are currently licensed at 2150–2150/62 MHz, which the Commission has designated for Advanced Wireless Services (AWS). The Commission also has announced that it intends to auction AWS licenses for 2150–2155 MHz, among other bands, as early as June 2006. Future AWS licensees will be obligated to relocate incumbent BRS operations in the 2150–2160/62 MHz band to comparable facilities, most likely within the newly restructured 2.5 GHz band. The Commission is currently reviewing comments filed in response to the *Fifth Notice* and considering the details of this relocation process in ET Docket No. 00–258 (FCC 05–172). However, in the *Order*, the Commission concluded that reliable, public data on each incumbent BRS system that will be subject to relocation is essential well in advance of this planned spectrum auction and that neither the Commission nor the public has reliable, up-to-date information on the construction status and/or operational parameters of these BRS systems. Accordingly, the Commission ordered licensees of BRS Channels 1 and/or 2/2A to submit information, listed in the *Order*, after the staff issued Public Notice(s) setting forth the specific data required, deadlines, and the procedures for filing this information electronically on the Commission's Universal Licensing System (ULS), where it will be available to the public. To assist in determining the scope of the new AWS entrants' relocation obligations, the Commission ordered BRS licensees in the 2150–2160/62 MHz band to provide the required data within 60 days and 120 days of the effective date of its *Order*, noting that these dates would correspond to OMB approval of the information collection, *i.e.*, PRA requirements for the ULS.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E6–2486 Filed 2–21–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 17, 2006.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Security Bank Corporation, Macon, Georgia; to merge with Neighbors Bancshares, Inc., and thereby indirectly acquire Neighbors Bank, both of Alpharetta, Georgia.

B. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. American Founders Bancorp, Inc., Frankfort, Kentucky; to become a bank holding company by acquiring 100 percent of the voting shares of American Founders Bank, Inc., Frankfort, Kentucky. American Founders Bancorp, Inc., also proposes to acquire 100 percent of the voting shares of First Security Bancorp, Inc., Lexington, Kentucky, and thereby indirectly acquire First Security Bank of Lexington, Inc., Lexington, Kentucky.

In connection with this application, Applicant also has applied to acquire 50 percent of the voting shares of Peoples Secure, LLC, Lexington, Kentucky, and thereby indirectly engage in data processing activities, pursuant to section 225.28(b)(14)(i) of Regulation Y.

C. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. Westbrand, Inc., Minot, North Dakota; to acquire 100 percent of the voting shares of First Western Bank, Eden Prairie, Minnesota, a *de novo* bank.

D. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. KansasLand Bancshares, Inc., Quinter, Kansas; to become a bank holding company by acquiring 87 percent of the voting shares of Flint Hills Financial Services Corporation, and thereby indirectly acquire Americus State Bank (to be known as KansasLand Bank), both of Americus, Kansas.

Board of Governors of the Federal Reserve System, February 16, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–2458 Filed 2–21–06; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The FTC has submitted to the Office of Management and Budget (''OMB'') for review under the Paperwork Reduction Act, 44 U.S.C. 3501–3520 (''PRA'') information collection requirements contained in its proposed revision of the Pay-Per-Call Rule (''Rule'').[1] The FTC is seeking

[1] The FTC is seeking an extension of approval for the Rule's existing requirements and for the proposed amendments in advance of their adoption.

public comments on the proposal to extend through December 31, 2009 the current PRA clearance. That clearance expires on February 28, 2006.

DATES: Comments must be submitted on or before March 24, 2006.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Pay-Per-Call Rule: FTC File No. R611016'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope and should be mailed or delivered, with two complete copies, to the following address: Federal Trade Commission, Room H 135 (Annex J), 600 Pennsylvania Ave., NW., Washington, DC 20580. Because paper mail in the Washington area and at the Commission is subject to delay, please consider submitting your comments in electronic form, (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to e-mail messages directed to the following e-mail box: *paperworkcomment@ftc.gov.* However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled ''Confidential.'' [2]

All comments should additionally be submitted to: Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–6974 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments will be considered by the Commission and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at *http://www.ftc.gov/ftc/privacy.htm.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information requirements should be sent to Elizabeth Hone, Attorney, Division of Marketing Practices, Bureau of Consumer Protection, FTC, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3207.

SUPPLEMENTARY INFORMATION: On October 30, 1998, the Commission published a Notice of Proposed Rulemaking (''NPRM''), 63 FR 58524, to amend its Pay-Per-Call Rule 16 CFR part 308.[3] The Rule, which implements Titles II and III of the Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. 5711–14, 5721–24, requires the disclosure of cost and other information with regard to pay-per-call services and establishes dispute resolution procedures for telephone-billed purchases (*i.e.*, charges for pay-per-call services or other charges appearing on a telephone bill other than telecommunications charges). As explained in the NPRM, the Rule contains certain reporting and disclosure requirements that are subject to OMB review under the PRA.[4] Accordingly, the FTC submitted the Rule with proposed amendments to OMB (*see* 64 FR 70031, Dec. 15, 1999) for its approval, which was granted until December 31, 2002 (OMB control number 3084–0102). Upon expiration of OMB's approval, the FTC again submitted these information collection requirements for an extension of the clearance (*see* 67 FR 77066, Dec. 16, 2002), including the proposed revisions of these requirements, which was granted through February 28, 2006. At this time, because the Commission has not yet adopted the proposed rule changes, the FTC is requesting an extension of the clearance for the Rule and the proposed rule changes through February 28, 2009.

As required by the PRA, the Commission's NPRM, 63 FR at 58556–57, invited public comment on the Rule's information collection requirements and proposed amendments prior to submission to OMB. The Commission received no comments directly responding to the Commission's specific PRA questions. However, the Commission received one comment, from US West, Inc., stating that its current cost for making an annual disclosure of dispute resolution procedures under the Rule was $53,000 and that this annual cost would increase to $819,000 if the disclosures were required with every billing cycle under a proposed amendment to § 308.20(m)(1). The FTC staff is considering this comment and others (available on the FTC's Web site, *http://www.ftc.gov*) in determining whether to recommend the adoption of some or all of the proposed amendments.

Pursuant to the OMB regulations that implement the PRA (5 CFR Part 1320), the FTC is providing this opportunity for public comment while seeking OMB approval to extend the existing paperwork clearance for the Rule. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before March 24, 2006.

Brief description of the need for and proposed use of the information: The reporting and disclosure requirements are mandated by statute to help prevent unfair and deceptive acts and practices in the advertising and operation of pay-per-call services and in the collection of charges for telephone-billed purchases. The information obtained by the Commission pursuant to the reporting requirement is used for law enforcement purposes. The disclosure requirements ensure that consumers are adequately informed of the costs they can expect to incur in using a pay-per-call service, that they will not be liable for unauthorized non-toll charges on their telephone bills, and that they have certain dispute resolution rights and obligations with respect to such telephone-billed purchases.

Likely respondents, including estimated number and proposed frequency of response: Respondents are: telecommunications common carriers (subject to the reporting requirement only, unless acting as a billing entity); information providers (vendors) offering one or more pay-per-call services or programs; and billing entities. In its submission in 2002, the FTC staff estimated that it would request information pursuant to the reporting requirement from no more than approximately 29 common carriers per year, and that the disclosure requirements would apply to 23,250 information vendors and 1646 billing entities. *See* 67 FR 77,066–68 (Dec. 16, 2002). In the present submission, the

[2] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

[3] The Rule was originally promulgated as the ''Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992'' and was known as the ''900–Number Rule.'' In its NPRM, the Commission refers to the Rule as the ''Trade Regulation Rule Concerning Pay-Per-Call Services and Other Telephone-Billed Purchases'' and in this document it will be referred to as the ''Pay-Per-Call Rule.''

[4] Neither the Rule nor the proposed amendments contain any recordkeeping requirements that would be subject to the PRA.

FTC staff is decreasing its burden estimates to account for changes in the industry since 2002.[5]

Estimated annual reporting and disclosure burden: The total estimated annual hours burden of the information collection requirements of the Rule, including the proposed amendments, is 4,401,000 (rounded to the nearest thousand). This burden consists entirely of reporting and disclosure requirements; as explained earlier (n. 4), there are no recordkeeping requirements. As detailed below, the burden hour estimate for each reporting and disclosure requirement has been multiplied by a ''blended'' wage rate (expressed in dollars per hour), based on the particular skill mix needed to carry out that requirement, to determine the total annual cost of that requirement. The blended rate calculations are based on the following skill categories and average wage rates: $250/hour for professional (attorney) services; $20/hour for skilled clerical workers; $25/hour for computer programmers; and $50/hour for management time. Annual burden hour estimates (and the estimated total cost of those hours) have been provided below.

The burden estimates do not contain a separate set of figures for other annual ''cost'' burdens, if any—*i.e.*, (a) capital and start-up costs or (b) operation, maintenance and purchase of outside services not already reflected in the above burden hour estimates and associated annual costs. Capital or start-up costs are generally subsumed in activities otherwise undertaken in the ordinary course of business (e.g., business records from which only existing information must be reported to the Commission, pay-per-call advertisements or audiotexts to which cost or other disclosures are added, etc.). To the extent that entities incur operating or maintenance expenses, or purchase outside services to satisfy the Rule's requirements, staff believe those expenses are also included in (or, if contracted out, would be comparable to) the burden hours and estimated annual burden estimates provided below (where such expenses are labor-related), or are otherwise included in the ordinary cost of doing business (where the expenses are other than labor-related).

Reporting requirement: The Rule provides that common carriers must make available to the Commission, upon written request, any records and financial information maintained by such carrier relating to the arrangements between the carrier and any vendor or service bureau. *See* proposed § 308.19(a); current § 308.6. FTC staff is reducing the estimated annual cost of this requirement by more than half because of the infrequency with which the Commission has sought the subject information from common carriers and because of a decrease in the use of pay-per-call services. Accordingly, the previous estimated hours burden for this reporting requirement (*i.e.*, to provide certain information to the Commission upon request), 147 hours annually (based on 29 common carriers each spending 5 hours annually), is being reduced to 70 hours annually (based on 14 common carriers each spending 5 hours annually), at a blended wage rate of $73.50/hour (30 percent computer programming, 20 percent attorney services, 30 percent skilled clerical workers, 20 percent for management time) for a total annual cost of $5,145.

Disclosure requirements: (1) *Advertising.* The advertising disclosure requirements of the current Rule would be consolidated into §§ 308.3, 308.4 and 308.7 of the Rule, as amended. FTC staff estimates that the annual burden on the industry for these requirements is 84,084 hours. Due to a recent reduction in the use of pay-per-call services, this figure reflects a 35% reduction from the staff's 2002 estimate of 129,360 burden hours. The estimate reflects the burden on approximately 15,571 vendors who must make additional disclosures if the advertisement is directed to individuals under 18 (50 percent of the ads) or relates to certain pay-per-call services (30 percent of the ads). The total estimated annual cost of these burden hours is $6,054,048 using a blended wage rate of $72/hour (20 percent attorney services, 60 percent skilled clerical workers, and 20 percent for management time).

Two proposed amendments, §§ 308.4(a)(1)(iii)(B) and 308.6(b),[6] would add 20,639 annual burden hours to the total, or a total annual cost of $1,486,008 using the $72/hour blended wage rate discussed above. The first of these amendments, requiring disclosures when a call is billed on a variable time rate basis, assumes that 20 percent of the estimated 45,864 advertised pay-per-call services would need to contain such a disclosure, thereby accounting for 9,173 burden hours at an annual cost of $660,456. The burden associated with the second amendment, requiring an audio signal to indicate (*i.e.*, disclose) the end of free time used to advertise certain pay-per-call services, is estimated at 11,466 burden hours, assuming this requirement applies to 25 percent of advertised pay-per-call services, or an annual cost of $825,552.

(2) *Preamble.* The Rule's existing preamble disclosure requirement, set forth in § 308.9, imposes an estimated burden of 10 hours annually per service, for an annual burden of 458,640 burden hours based on 45,864 advertised pay-per-call services. The cost associated with these burden hours is $33,022,080, using a blended wage rate of $72/hour (*i.e.*, similar to the blended rate used for advertising disclosures). As explained in the NPRM, the estimated burden of a proposed amendment requiring additional disclosures, § 308.9(a)(2)(iii)(B), is one additional hour for approximately 30 percent of the advertised pay-per-call services, or an estimated 13,759 burden hours at $72/hour, for a total annual cost of $990,648.

(3) *Telephone-billed charges in billing statements.* This requirement is currently set forth in § 308.5(j) of the Rule, which the Commission has proposed to redesignate and incorporate into § 308.18, as amended. The blended rate used to calculate the cost of these disclosures is $61.75/hour (15 percent attorney services, 40 percent skilled clerical workers, 25 percent computer programming, and 20 percent for management time). The estimated annual burden of this disclosure requirement is 23,990 hours (*i.e.*, 10 percent of 19,992 vendors making spot checks at 12 hours per spot check), with an annual cost of $1,481,382.50. As explained in the NPRM, no additional burden is anticipated from any proposed amendments of this requirement.

(4) *Dispute resolution procedures in billing statements.* This disclosure requirement is currently set forth in § 308.7(c), to be redesignated § 308.20, as amended. The blended rate being used for these disclosures is $51/hour (40 percent computer programming, 10 percent attorney services, 30 percent skilled clerical workers, and 20 percent for management time). The estimated

[5] Since 2002, the number of registered 900 numbers has decreased by approximately 35%. Accordingly, the FTC staff reduced its estimate of the number of affected information vendors by 35%. The staff reduced its estimate of the number of affected billing entities by only 15%, however, because (1) billing statement disclosures are used for all telephone-billed purchases and not exclusively pay-per-call services and (2) because of a recent increase in the direct billing of such services. The staff reduced its estimate of affected common carriers by more than half because of the 35% decrease in pay-per-call services as well as the infrequency with which the FTC has sought the subject information from common carriers in the past. The FTC seeks public comment or data on these estimates.

[6] The PRA discussion in the NPRM erroneously referred to this provision as ''308.7(b).'' *See* 63 FR at 58556.

hour burden for the annual notice component of this requirement is 7,000 burden hours (based on 1,400 billing entities taking 5 hours to review, revise and provide disclosures annually), or a total cost of $357,000. An additional 2,499,000 burden hours would be associated with specific notices in those cases where a customer reports a billing error (*i.e.*, 5 percent of approximately 49,980,000 calls), or $127,449,000 annually. The additional burden hours for proposed amendments to § 308.2(i) and (j), requiring new disclosures of certain information regarding personal identification numbers issued to customers for access and billing purposes, have been estimated at 44,625 hours or an annual cost of $2,275,875 (44,625 audiotext services spending one burden hour each). The additional burden hours for proposed amendments to require certain new disclosures in connection with billing dispute resolution, § 308.20(n)(2) and § 308.20(n)(4), would entail 1,249,500 hours for an annual cost of $63,724,500 (5 percent of approximately 49,980,000 calls require responses to billing errors; 30 minutes of time per call required to comply with both disclosure requirements).

William Blumenthal,

General Counsel.

[FR Doc. 06–1649 Filed 2–21–06; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–0129] [30-day notice]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Regular Clearance, Extension of a currently approved collection;

Title of Information Collection: HHS Acquisition Regulation HHSAR Part 370, Special Programs Affecting Acquisition

Form/OMB No.: OS–0990–0129;

Use: This request for clearance covers the requirement of the Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities clause. It is the policy at the Health and Human Services, as a result of a Secretarial initiative, that all meetings, conferences, and seminar sites be accessible to individuals with disabilities.

Frequency: Recordkeeping, Reporting, on occasion;

Affected Public: Business or other for-profit, not-for-profit institutions, and Federal government;

Annual Number of Respondents: 1,242.

Total Annual Responses: 1,420;

Average Burden per Response: 2 hours;

Total Annual Hours: 10,556;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/ocio/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be received within 30 days of this notice directly to the Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB 0990–0129), New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: February 10, 2006.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E6–2462 Filed 2–21–06; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–0130] [60-day notice]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Regular Clearance, Extension of a currently approved collection;

Title of Information Collection: HHS Acquisition Regulation HHSAR Part 352, Solicitation Provisions and Contract Clauses

Form/OMB No.: OS–0990–0130;

Use: This request for clearance covers the Key Personnel clause in HHSAR 352.270–5. This clause requires contractors to obtain approval before substituting key personnel which are specified in the contract.

Frequency: Reporting, on occasion;

Affected Public: Business or other for-profit, not-for-profit institutions, and Federal government;

Annual Number of Respondents: 1,921.

Total Annual Responses: 1,921;

Average Burden per Response: 8 hours;

Total Annual Hours: 3,842;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/ocio/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov,* or call the Reports

Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be received within 30 days of this notice directly to the Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB #0990–0130), New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: February 10, 2006.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E6–2464 Filed 2–21–06; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–0131] [30-day notice]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Regular Clearance, Extension of a currently approved collection;

Title of Information Collection: HHS Acquisition Regulation HHSAR Part 342 Contract Administration

Form/OMB No.: OS–0990–0131;

Use: This request for clearance covers the requirement at Health and Human Services Acquisition Regulation (HHSAR) 342.7101 regarding notification required of contractors when a cost overrun is anticipated. The information is necessary to determine the factors responsible for the cost overrun as well as the detailed costs associated with it.

Frequency: Reporting, on occasion;

Affected Public: Business or other for-profit, not-for-profit institutions, Federal government and state, local, or tribal government;

Annual Number of Respondents: 110.

Total Annual Responses: 1;

Average Burden per Response: 8 hours;

Total Annual Hours: 2,200;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/ocio/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be received within 30 days of this notice directly to the Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB #0990–0131), New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: February 10, 2006.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E6–2465 Filed 2–21–06; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–0133] [30-day notice]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Regular Clearance, Extension of a currently approved collection;

Title of Information Collection: HHS Acquisition Regulation HHSAR Part 333, Disputes and Appeals;

Form/OMB No.: OS–0990–0133;

Use: This request for clearance covers the requirement at Health and Human Services Acquisition Regulation (HHSAR) 352.233–70, Litigation and Claims. The clause provides that contractors for cost-reimbursement contracts report any proceedings before an administrative agency, filed against the contractor arising out of the performance of the contract.

Frequency: Reporting, on occasion;

Affected Public: Business or other for-profit, not-for-profit institutions, and Federal government;

Annual Number of Respondents: 80;

Total Annual Responses: 1;

Average Burden per Response: 20 hours.

Total Annual Hours: 40;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/ocio/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be received within 30 days of this notice directly to the Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB #0990–0133), New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: February 10, 2006.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E6–2467 Filed 2–21–06; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–0136]

30-Day Notice; Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Regular Clearance, Extension of a currently approved collection;

Title of Information Collection: HHS Acquisition Regulation HHSAR Part 324, Protection of Privacy and Freedom of Information;

Form/OMB No.: OS–0990–0136;

Use: This request for clearance covers the reporting requirements for the Confidentiality of Information Clause at Health and Human Services Acquisition Regulation (HHSAR) 35.224–70. This requirement is used to protect personal interest of individuals, corporate interests of non-governmental organizations, and the capacity of the Government to provide public services when information from or about individuals, organizations, or Federal agencies is provided to or obtained by contractors in performance of Departmental contracts.

Frequency: Recordkeeping, Reporting, on occasion;

Affected Public: Business or other for-profit, not-for-profit institutions, and Federal government;

Annual Number of Respondents: 430;

Total Annual Responses: 430;

Average Burden per Response: 30 minutes;

Total Annual Hours: 3,440;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/ocio/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be received within 30 days of this notice directly to the Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB #0990–0136), New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: February 10, 2006.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E6–2469 Filed 2–21–06; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–New; 30-day Notice]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary, Assistant Secretary for Health, Office of Public Health and Science, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: New Collection;

Title of Information Collection: Blood Availability and Safety Information System;

Form/OMB No.: OS–0990–New;

Use: To assure blood supplies in the United States are safe and adequate to meet the needs of man-made and natural disasters as well as seasonal shortages a statistically accurate monitoring program is proposed;

Frequency: Reporting daily;

Affected Public: Not-for-profit institutions;

Annual Number of Respondents: 1,000;

Total Annual Responses: 36,500;

Average Burden per Response: 30 minutes;

Total Annual Hours: 30,416;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB #0990–New), New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: February 10, 2006.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E6–2544 Filed 2–21–06; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Surgeon General's Call to Action on Preventing Underage Drinking

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science, Office of the Surgeon General.

ACTION: Notice and request for comments.

SUMMARY: On November 1, 2005 Surgeon General Richard H. Carmona, M.D., M.P.H., F.A.C.S. announced his intent to issue a Call to Action on Preventing Underage Drinking. Issuance of this Call to Action is planned for the

Spring of 2006. The purpose of this notice is to provide individuals and organizations with the opportunity to identify issues and areas of need for consideration in the development of the Call to Action. Comments must be in writing and should not exceed 500 words. All comments will receive careful consideration. However, persons and organizations submitting comments will not receive individual responses.

DATES: Comments must be submitted on, or before, March 15, 2006. Comments received after this date will not be considered.

ADDRESSES: Comments may be sent by mail or hand delivered to Ron Schoenfeld, Ph.D., Office of the Surgeon General, Department of Health and Human Services, 5600 Fishers Lane, Room 18–66, Rockville, MD 20852, or sent by e-mail to *ctacomments@osophs.dhhs.gov*.

FOR FURTHER INFORMATION CONTACT: Ron Schoenfeld, Ph.D., Office of the Surgeon General, e-mail: *rschoenfeld@osophs.dhhs.gov*.

Dated: February 13, 2006.

Stephen W. Long,

Executive Officer, NIAAA, National Institutes of Health.

[FR Doc. E6–2513 Filed 2–21–06; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency Healthcare Research and Quality

Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

A Special Emphasis Panel is a group of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ), and agree to be available, to conduct on an as needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not attend regularly-scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications for the Announcement of Availability of Funds for Grants regarding Adolescent Family Life (AFL) Research are to be reviewed and discussed at this meeting. This program is sponsored by the Office of Population Affairs. These discussions are likely to reveal personal information concerning individuals associated with the applications. This information is exempt from mandatory disclosure under the above-cited status.

SEP Meeting on: Announcement of Availability of Funds for Grants regarding Adolescent Family Life (AFL) Research.

Date: March 9, 2006 (Open on March 9 from 8 a.m. to 8:15 a.m. and closed for the remainder of the meeting).

Place: John M. Eisenberg Building, AHRQ Conference Center, 540 Gaither Road, Rockville, Maryland 20850.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the non-confidential portions of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Room 2038, Rockville, Maryland 20850, Telephone (301) 427–1554.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: February 10, 2006.

Carolyn M. Clancy,

Director

[FR Doc. 06–1580 Filed 2–21–06; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–06–0670]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Evaluation of Efficacy of Household Water Filtration/Treatment Devices in Households with Private Wells (OMB No. 0920–0670)—Extension—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Approximately 42.4 million people in the United States are served by private wells. Unlike community water systems, private wells are not regulated by the U.S Environmental Protection Agency's (EPA) Safe Drinking Water Act (SDWA). Under the SDWA, EPA sets maximum contaminant levels (MCLs) for contaminants in drinking water. A 1997 U.S. General Accounting Office (GAO) report on drinking water concluded that users of private wells may face higher exposure levels to groundwater contaminants than users of community water systems. Increasingly, the public is concerned about drinking water quality, and the public's use of water treatment devices rose from 27% in 1995 to 41% in 2001 (Water Quality Association, 2001 National Consumer Water Quality Survey). Studies evaluating the efficacy of water treatment devices on removal of pathogens and other contaminants have assessed the efficacy of different treatment technologies.

The purpose of the proposed study is to evaluate how water treatment device efficacy is affected by user behaviors such as maintenance and selection of appropriate technologies. Working with public health authorities in Colorado, Maine, Missouri, Nebraska, North Carolina, and Wisconsin, NCEH will recruit 600 households to participate in a study to determine whether people using water treatment devices are protected from exposure to contaminants found in their well water. We plan to recruit households on private well water that use water filtration/treatment devices to treat tap

water for drinking and cooking. Study participants will be selected from geographical areas of each state where groundwater is known or suspected to contain contaminants of public health concern. We will administer a questionnaire at each household to obtain information on selection of water treatment type, adherence to suggested maintenance, and reasons for use of treatment device. We will also obtain samples of treated water and untreated well water at each household to analyze for contaminants of public health concern. There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Types of data collection	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Participant Solicitation Telephone Questionnaire	1200	1	5/60	100
Household Questionnaire	600	1	20/60	200
Total				300

Dated: February 14, 2006.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E6–2451 Filed 2–21–06; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; NCCAM Customer Service Data Collection

Summary: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Center for Complementary and Alternative Medicine (NCCAM), at the National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: NCCAM Customer Service Data Collection. Type of Information Collection Request: Renewal. Need and Use of Information Collection: NCCAM provides the public, patients, families, health care providers, complementary and alternative medicine (CAM) practitioners, and others with the latest scientifically based information on CAM and information about NCCAM's programs through a variety of channels, including its toll-free telephone information service and its quarterly newsletter. To ensure that NCCAM is effectively serving all audiences, NCCAM needs to continue to measure customer satisfaction with NCCAM telephone interactions and the NCCAM newsletter and to assess which audiences are being reached through these channels. This effort involves a telephone survey consisting of 10 questions, which are asked of 25 percent of all callers, for an annual total of approximately 1,210 respondents; a print newsletter survey consisting of 10 questions, which is sent to all print newsletter subscribers, for an annual total of approximately 339 respondents; and an online newsletter survey consisting of 14 questions, which all visitors to the newsletter page on the NCCAM Web site have the option of completing until an annual total of 500 responses are received. NCCAM uses the data collected from the surveys to characterize NCCAM users and help program staff measure user satisfaction, assess impact of their communication efforts, tailor services to the public and health care providers, measure service use among special populations, and assess the most effective media and messages to reach these audiences. Frequency of Response: Once for the telephone survey, and three times for the newsletter survey (once every year to measure any changes in customer satisfaction and/or audience profile). Affected Public: Individuals and households. Type of Respondents: For the telephone survey, patients, spouses/family/friends of patients, health care providers, physicians, CAM practitioners, or other individuals contacting the NCCAM Clearinghouse; for the print newsletter survey, subscribers to the print NCCAM newsletter; and for the online newsletter survey, visitors to the newsletter page on NCCAM's Web site.

The annual reporting burden is as follows.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Telephone survey:				
Individuals or households	1,210	1	0.075	91
Newsletter survey (print):				
Individuals or households	339	1	0.050	17
Newsletter survey (online):				
Individuals or households	500	1	0.050	25
Annualized totals	2,049			133

The annualized cost to respondents is estimated at $1,770 for the telephone survey, $507 for the print newsletter survey, and $714 for the online newsletter survey. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on 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; (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.

For Further Information Contact: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Christy Thomsen, Director, Office of Communications and Public Liaison, NCCAM, 31 Center Drive, Room 2B11, Bethesda, MD 20892–2182; or fax your request to 301–402–4741; or e-mail *thomsenc@mail.nih.gov.* Ms. Thomsen can be contacted by telephone at 301–451–8876.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: February 14, 2006.

Christy Thomsen,

Director, Office of Communications and Public Liaison, National Center for Complementary and Alternative Medicine, National Institutes of Health.

[FR Doc. E6–2507 Filed 2–21–06; 8:45 am]

BILLING CODE 4167–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Statement of Organization, Functions, and Delegations of Authority

Part N, National Institutes of Health, of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (HHS) (40 FR 22859, May 27, 1975, as amended most recently at 69 FR 64081, November 3, 2004, and redesignated from Part HN as Part N at 60 FR 56606, November 9, 1995), is amended as set forth below to reflect the reorganization of the National Human Genome Research Institute, Division of Intramural Research, by establishing (1) the Molecular Neurogenetics Section in the Medical Genetics Branch and (2) the Vascular Biology Section in the Genome Technology Branch. The sections are transferring from, respectively, the National Heart, Lung, and Blood Institute and the National Institute of Mental Health.

Section N–B, Organization and Functions, under the heading National Human Genome Research Institute (N4, formerly HN4), Division of Intramural Research (N45, formerly HN45) is amended as follows:

(1) In the Genome Technology Branch (N455, formerly HN455), immediately after the paragraph on Genomic Functional Analysis Section (N4556, formerly HN 4556), insert the following:

Vascular Biology Section (N4557, formerly HN 4557). Conducts clinical and laboratory investigations in the molecular mechanisms of cardiovascular disease including vascular cell biology, gene therapy, and cell cycle regulation of vascular cells.

(2) In the Medical Genetics Branch (N456, formerly HN456), immediately after the paragraph on Vertebrate Embryology Section (N4567, formerly HN4567), insert the following:

Molecular Neurogenetics Section (N4568, formerly HN 4568). (1) Conducts clinical and basic research into the factors contributing to the phenotypic variation observed in monogenic diseases, using Gaucher disease as a prototype disorder; (2) investigates the relationship between Gaucher disease and parkinsonism; and (3) explores new therapeutic approaches for Gaucher disease.

Delegations of Authority

All delegations and redelegations of authority to officers and employees of NIH that were in effect immediately prior to the effective date of this amendment and are consistent with this amendment shall continue in effect, pending further redelegation.

Dated: February 8, 2006.

Elias A. Zerhouni,

Director, National Institutes of Health.

[FR Doc. 06–1642 Filed 2–21–06; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Mandatory Guidelines for Federal Workplace Drug Testing Programs (OMB NO. 0930–0158)—Revision

SAMHSA's Mandatory Guidelines for Federal Workplace Drug Testing Programs will request OMB approval for the Federal Drug Testing Custody and Control Form for Federal agency and federally regulated drug testing programs which must comply with the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs (69 FR 19644) dated April 13, 2004, and for the information provided by laboratories for the National Laboratory Certification Program (NLCP).

The Federal Drug Testing Custody and Control Form is used by all Federal agencies and employers regulated by the Department of Transportation to document the collection and chain of custody of urine specimens at the collection site, for laboratories to report results, and for Medical Review Officers to make a determination. The Federal Drug Testing Custody and Control Form approved by OMB three years ago is being resubmitted for OMB approval without any revision.

Prior to an inspection, a laboratory is required to submit specific information regarding its laboratory procedures. Collecting this information prior to an inspection allows the inspectors to thoroughly review and understand the laboratory's testing procedures before arriving at the laboratory.

The NLCP application form has not been revised compared to the previous form.

The annual total burden estimates for the Federal Drug Testing Custody and Control Form, the NLCP application, the NLCP inspection checklist, and NLCP recordkeeping requirements are shown in the following table.

Form/respondent	Burden/ response (hrs.)	Number of responses	Total annual burden (hrs.)
Custody and Control Form:			
Donor	.08	7,096,000	567,680
Collector	.07	7,096,000	496,720
Laboratory	.05	7,096,000	354,800
Medical Review Officer	.05	7,096,000	354,800
Laboratory Application	3.00	3	9
Laboratory Inspection Checklist	3.00	100	300
Laboratory Recordkeeping	250.00	50	12,500
Total			1,786,809

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 7–1044, One Choke Cherry Road, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: February 14, 2006.

Anna Marsh,

Director, Office of Program Services.

[FR Doc. 06–1597 Filed 2–21–06; 8:45 am]

BILLING CODE 4162–20–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4912–N–17]

Notice of Availability of a Final Environmental Impact Statement for the Development of Stillwater Business Park, City of Redding, CA

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: HUD gives notice to the public, agencies, and Indian tribes that the City of Redding, CA, makes available to the public for comment the Final Environmental Impact Statement/ Final Environmental Impact Report (FEIS/FEIR) for the Stillwater Business Park project located in Redding CA. The City of Redding, CA has prepared the FEIS/FEIR under its authority as the Responsible Entity for compliance with the National Environmental Policy Act (NEPA) in accordance with 24 CFR 58.4, and under its authority as lead agency in accordance with the California Environmental Quality Act (CEQA). This notice is given in accordance with the Council on Environmental Quality regulations at 40 CFR parts 1500–1508. A HUD Economic Development Initiative (EDI) special purpose grant would be used for the project. Environmental Protection Agency (EPA) State and Tribal Assistance Grants (STAG) will also fund water and wastewater related infrastructure. EPA is acting as a cooperating agency for this process.

DATES: *Comments Due Date:* Comments due no later than March 24, 2006. Comments on the FEIS/FEIR should be addressed to the contact person listed below.

FOR FURTHER INFORMATION CONTACT: Nathan Cherpeski, City of Redding, 777 Cypress Ave., Redding, CA 96001, at (530) 225–4519 or *ncherpeski@ci.redding.ca.us.* The FEIS/ FEIR is available on the Internet and can be viewed or downloaded at: *http://ci.redding.ca.us/cm/major_pr/still_buspk.html.* Copies of the DEIS and Draft EIS/EIR are also available for viewing at the following locations:

City of Redding, Permit Center, 777 Cypress Ave., Redding, CA 96001.

City of Anderson Planning Department, 1887 Howard Street, Anderson, CA 96007.

Shasta County Library—Anderson Branch, 3200 West Center, Anderson, CA 96007.

Shasta County Department of Resource Management, Planning Division, 1855 Placer Street, Redding, CA 96001.

Shasta County Library, 1855 Shasta Street, Redding, CA 96001.

SUPPLEMENTARY INFORMATION: A Notice of Intent to prepare a draft EIS was published May 11, 2004. Scoping meetings were held on April 4, 2001, August 12, 2003, and June 2, 2004, to determine the issues for the EIS/EIR. A DEIS/DEIR was completed in May 2005. The DEIS/DEIR was the subject of public comments, both oral and written, provided by agencies, interested groups, and individuals, at a public hearing on April 12, 2005, and during the DEIS public comment period which extended from March 18, 2005, through May 2, 2005.

As a result of comments received and after meetings with EPA, USFWS, USACOE, and the California Department of Fish and Game, the City of Redding circulated a Supplemental Draft Environmental Impact Statement (SDEIS/DEIR) with a comment period from September 30, 2005, through November 14, 2005. A public open house was held October 26, 2005. Significant changes were made to the preferred alternative in the SDEIR/DEIR. Those changes are reflected in the preferred alternative described in the FEIS/FEIR. Developable acreage has been reduced and the size of the open space preserve has increased.

The preferred alternative is the development of a medium-to-large parcel business park through the acquisition of land, construction of major infrastructure components, and the provision of public services and utilities to serve the development. The City of Redding is proposing the development of the area east and northeast of the Municipal Airport in Redding, California. The proposed action study area is located on the *Enterprise and Cottonwood, California* 7.5-minute USGS quadrangles, Township 31 North, Range 4 West, Sections 2, 3, 10, 14, 15, 22, 23, 26, 34, and 35. A portion of the proposed location is classified as industrial and a portion as park under the Redding General Plan, adopted in 2000. The purpose and need for this project is to increase the activity of contributory economic sectors by constructing a medium to large parcel business park within the City of Redding sphere of influence capable of attracting and accommodating diverse business and industrial users.

The original proposal called for an approximate 687-acre business park consisting of 383 acres of developable land for a total of 4,410,400 sq. ft. of improvements for professional offices and industrial users. The preferred

alternative calls for an approximate 687-acre business park consisting of 343 acres of developable land for a total of 4,323,000 sq. ft. of improvements for professional offices and industrial users.

Discussion of Mitigation Measures: Comments received focused on impacts to wetlands, endangered species, growth inducing impacts, and cumulative effects. The FEIS/FEIR contains mitigation measures to address these and other areas. Impacts to wetlands and sensitive species will be mitigated on site in the nearly 300-acre open space preserve area. The preferred alternative was redesigned in the supplement to remove all impacts to the adjoining Stillwater Plains Mitigation Bank from surface hydrology. Buffer areas and set-backs have been incorporated into the project description. Impacts to traffic and other areas have also been addressed.

Questions may be directed to the individual named above under the heading **FOR FURTHER INFORMATION CONTACT.**

Dated: February 10, 2006.

Pamela H. Patenaude,

Assistant Secretary for Community, Planning and Development.

[FR Doc. E6–2429 Filed 2–21–06; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5033–FA–02]

Announcement of Funding Awards for Fiscal Year (FY) 2005 for the Katrina Disaster Housing Assistance Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with HUD's regulations implementing the Department of Housing and Urban Development Reform Act of 1989, this document notifies the public of Fiscal Year (FY) 2005 funding awards made noncompetitively to public housing agencies (PHAs) under the Katrina Disaster Housing Assistance Program (KDHAP). The purpose of the KDHAP is to support a joint temporary housing assistance program between HUD and the Federal Emergency Management Agency (FEMA). KDHAP was funded using FEMA FY2005 assistance. The notice identifies the PHA recipients, and the amount of their awards.

FOR FURTHER INFORMATION CONTACT: David A. Vargas, Director, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4226, Washington, DC 20410–5000, telephone (202) 708–2815. Hearing- or speech-impaired individuals may call HUD's TTY number at (800) 927–7589. (Only the ''800'' telephone number is toll-free.)

SUPPLEMENTARY INFORMATION: In late August 2005, Hurricane Katrina hit the Gulf Coast area of the United States causing unprecedented and catastrophic damage to property, significant loss of life, and the displacement of tens of thousands of individuals from their homes and communities. President Bush called upon all Federal agencies to do everything in their power to assist the victims of Hurricane Katrina. Recognizing that moving displaced families out of temporary shelters into more permanent housing is a key element in helping families return to some degree of normalcy, the Federal Emergency Management Agency (FEMA), through a Mission Assignment, tasked HUD to assume a major role in this relief effort by administering the Katrina Disaster Housing Assistance Program (KDHAP).

On September 23, 2005, HUD and FEMA jointly announced the establishment of KDHAP, a housing assistance program funded using FEMA FY2005 assistance. KDHAP was a temporary program designed to streamline the processing of families who lost housing as a result of Hurricane Katrina, and relocate families already in the HUD rental assistance programs. The temporary program took effect on October 1, 2005.

KDHAP provides a temporary monthly rent subsidy to assist certain families displaced by Hurricane Katrina in obtaining decent, safe, and sanitary housing in the privately owned rental market. It was determined that PHAs are uniquely positioned to help displaced families lease privately owned rental units throughout the country. Through the administration of HUD's Housing Choice Voucher Program, PHAs are familiar with their rental markets and available housing stock. These PHAs work with private landlords and assist families in finding decent, safe, and sanitary housing in the privately owned rental market on a regular basis. It is important, however, not to confuse KDHAP with the regular Housing Choice Voucher Program. HUD provides separate funding for KDHAP. Although there are many common principles and the general structure of the relationship between owner, family, and PHA remain the same, there are also significant differences in program requirements.

In order to participate, a PHA must already be administering a housing choice voucher program. Family eligibility is dependent on several criteria. The family must be displaced by Hurricane Katrina and must be registered with FEMA no later than March 11, 2006. Furthermore, the family must have either been previously assisted under certain HUD assisted housing programs or must qualify as pre-disaster homeless families.

More detailed information about this program can be found in KDHAP's User Guide, located at *http://www.hud.gov/offices/pih/systems/pic/docs/kdhapappguide.pdf* and in the notice of the Office of Public and Indian Housing titled ''Katrina Disaster Housing Assistance Program (KDHAP) Operating Requirements, Notice PIH 2005–36,'' and located at *http://www.hud.gov/offices/pih/publications/notices/05/pih2005–36.pdf.*

With respect to funding participating PHAs, KDHAP provides that when a unit is selected by the family and is approved by the PHA, the owner and the PHA enter into a KDHAP rent subsidy contract and the family and the owner execute a lease and the KDHAP lease addendum. For certain previously HUD-assisted families, the PHA will receive a one-time fee of $1,000 for successfully placing the family in addition to an on going monthly administrative fee. Under the KDHAP rent subsidy contract, the PHA pays security deposit assistance and a monthly rent subsidy directly to the owner on behalf of the family. The PHA also pays assistance for deposits for utilities directly to the utility companies on behalf of the family. HUD provides the PHA with funding for the security deposit assistance, utility deposit assistance, and monthly rent subsidy directly to the PHA. This funding is in addition to the $1,000 placement fee and the on going monthly administrative fee. The monthly rent subsidy is based on the FMR. Family income is not considered in calculating the monthly rent subsidy. KDHAP is temporary assistance for a term not to exceed 18 months.

A total of $8,288,753 in budget authority for KDHAP for 2,148 units was awarded to KDHAP participating PHAs.

In accordance with 24 CFR 4.7 of HUD's regulations in 24 CFR part 4 implementing the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and

amounts of those awards to KDHAP participating PHAs as shown in Appendix A.

Dated: February 14, 2006.

Orlando J. Cabrera,

Assistant Secretary for Public and Indian Housing.

KATRINA DISASTER HOUSING ASSISTANCE PROGRAM ANNOUNCEMENT OF FUNDING AWARDS FOR FISCAL YEAR 2005

Housing agency	Address	Units	Award
HA OF BIRMINGHAM DIST	1826 3RD AVE. SOUTH, BIRMINGHAM, AL 35233	47	163,420
CITY OF LOS ANGELES HSG AUTH	2600 WILSHIRE BLVD, 3RD FL, LOS ANGELES, CA 90057.	31	150,387
HA OF AUGUSTA	P O BOX 3246, AUGUSTA, GA 30914	63	234,024
HA OF JONESBORO	P O BOX 458, JONESBORO, GA 30237	62	271,472
COLLEGE PARK HA	1620 VIRGINIA AVE, ATLANTA, GA 30337	48	209,831
HA OF DE KALB COUNTY	P O BOX 1627, DECATUR, GA 30031	124	545,013
HA OF FULTON COUNTY	10 PARK PLACE, SE, STE 550, ATLANTA, GA 30303	29	124,775
SHREVEPORT HA	2500 LINE AVE, SHREVEPORT, LA 71104	6	23,244
LAFAYETTE CITY HA	100 C O CIRCLE, LAFAYETTE, LA 70501	161	623,711
WEST BATON ROUGE PH. COUNCIL	213 EAST BLVD, BATON ROUGE, LA 70802	33	129,454
BATON ROUGE CITY HA	P O BOX 1471, BATON ROUGE, LA 70821	28	108,471
HA OF MISSISSIPPI REGIONAL NO 7	P O BOX 886, MC COMB, MS 39648	36	118,625
MISSISSIPPI REGIONAL HA VI	P O DRAWER 8746, JACKSON, MS 39284	85	302,617
HA OF MEMPHIS	700 ADAMS AVE, MEMPHIS, TN 38105	48	172,141
AUSTIN HA	P O BOX 6159, AUSTIN, TX 78762	78	344,200
FORT WORTH HA	1201 E. 13TH ST, FORT WORTH, TX 76101	22	80,488
SAN ANTONIO HA	818 S. FLORES ST, SAN ANTONIO, TX 78295	365	1,299,233
DALLAS HA	3939 N. HAMPTON RD, DALLAS, TX 75212	769	2,979,091
GALVESTON HA	4700 BROADWAY, GALVESTON, TX 77551	76	278,771
DE KALB HA	400 HERITAGE LANE, DE KALB, TX 75559	36	129,785
Total for Katrina Disaster Housing Assistance Program.		2,148	$8,288,753

[FR Doc. E6–2508 Filed 2–21–06; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Fiscal Year 2006 Landowner Incentive Program (Non-Tribal Portion) for States, Territories, and the District of Columbia

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of request for proposals and response to comments on National Review Team Ranking Criteria Guidance.

SUMMARY: The Service is requesting proposals for Fiscal Year 2006 funding under the Landowner Incentive Program (LIP) for conservation grants to States, the District of Columbia, Puerto Rico, Guam, the United States Virgin Islands, the Northern Mariana Islands, and American Samoa (hereafter referred to collectively as States), and Tribes. Also, this notice provides an analysis of public comments and changes made to the Landowner Incentive Program National Review Team Ranking Criteria Guidance for Tier 2 Proposals. The Service has addressed the Tribal component of LIP under a separate **Federal Register** notice.

DATES: The Service must receive your grant proposal no later than April 24, 2006.

ADDRESSES: States must submit their proposals in electronic format (*e.g.* Word, Word Perfect or PDF files). The electronic files should be sent to *Kim_Galvan@fws.gov.* In addition, hard copy grant proposals must be submitted to the Service's Regional Offices of the Division of Federal Assistance at the addresses listed below in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Kim Galvan or Genevieve Pullis LaRouche, U.S. Fish and Wildlife Service, Division of Federal Assistance, 4401 North Fairfax Drive—Mailstop MBSP 4020, Arlington, VA 22203–1610; telephone 703–358–2420; e-mail *kim_galvan@fws.gov* or *Genevieve_LaRouche@fws.gov.*

SUPPLEMENTARY INFORMATION: The Service will award grants on a competitive basis to State fish and wildlife agency programs to enhance, protect, or restore habitats that benefit federally listed, proposed, or candidate species, or other at-risk species on private lands. A copy of the FY 2006 LIP Guidelines can be obtained at *http://federalaid.fws.gov/lip/lipguidelines.html* or from the following Regional Offices:

Region 1. Hawaii, Idaho, Oregon, Washington, American Samoa, Guam, and Commonwealth of the Northern Mariana Islands

Regional Director, Division of Federal Assistance, U.S. Fish and Wildlife Service, 911 NE., 11th Avenue, Portland, Oregon 97232–4181. LIP Contact: Dan Edwards, 503–231–6128; *dan_edwards@fws.gov.*

Region 2. Arizona, New Mexico, Oklahoma, and Texas

Regional Director, Division of Federal Assistance, U.S. Fish and Wildlife Service, 500 Gold Avenue, SW., Suite 9019, P.O. Box 1306, Albuquerque, New Mexico 87103–1306, LIP Contact: Penny Bartnicki, (505) 248–7465; *penny_bartnicki@fws.gov.*

Region 3. Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin

Regional Director, Division of Federal Assistance, U.S. Fish and Wildlife Service, Bishop Henry Whipple Federal Building, One Federal Drive, Fort Snelling, Minnesota 55111–4056. LIP Contact: Ann Schneider, (612) 713–5146; *ann_schneider@fws.gov.*

Region 4. Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, and the U.S. Virgin Islands

Regional Director, Division of Federal Assistance, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345. LIP Contact: Bob Gasaway, (404) 679–4169; *bob_gasaway@fws.gov.*

Region 5. Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia

Regional Director, Division of Federal Assistance, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035–9589. LIP Contact: Colleen Sculley, (413) 253–8509; *colleen_sculley@fws.gov.*

Region 6. Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming

Regional Director, Division of Federal Assistance, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225–0486. LIP Contact: Otto Jose, (303) 236–8156; *otto_jose@fws.gov.*

Region 7. Alaska

Regional Director, Division of Federal Assistance, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503–6199. LIP Contact: Nancy Tankersley, (907) 786–3631; *nancy_tankersley@fws.gov.*

California/Nevada Office (CNO). California, Nevada

Regional Director, Division of Federal Assistance, U.S. Fish and Wildlife Service, 2800 Cottage Way, W–2606, Sacramento, CA 95825. LIP Contact: Becky Miller, (916) 978–6185; *becky_a_miller@fws.gov.*

The Service will distribute any LIP funds made available in the FY 2006 budget in the same manner as that described in this notice. The Service requests that the States number the pages in their proposals and limit each proposal to no more than 50 pages, inclusive of attachments. We will not accept facsimile grant proposals, and all parts of the grant proposal must be received by the deadline listed in **DATES**. Submit electronic copies to the e-mail address identified in **ADDRESSES** and hard copies to the appropriate regional office listed above.

Background

On September 16, 2005, the Service published a notice in the **Federal Register** (70 FR 54765) requesting comments on the proposed revisions to the National Review Team Ranking Criteria Guidance for Tier 2 LIP Grant Proposals. The Service received 28 written responses by the close of the comment period on October 31, 2005. The responses came from 25 State Fish and Wildlife Agencies, one nongovernmental organization, and two private citizens. We received a total of 21 substantive comments regarding the ranking criteria guidance. Based on these substantive comments, we made a few additional revisions to the ranking criteria. Overall, we believe these changes to the ranking criteria guidance will allow reviewers to more fairly assess the merit of Tier 2 LIP grant proposals. We provide below the Final National Review Team Ranking Criteria Guidance for Tier 2 LIP Grant Proposals, and responses to the substantive comments that we received.

Landowner Incentive Program (LIP) National Review Team Ranking Criteria Guidance for Tier 2 Grant Proposals

*State:*_____

1. *Overall*—Proposal provides clear and sufficient detail to describe the State's use of awarded funds from the LIP, and the State's program has a high likelihood for success. (5 points total).

a. Proposal is easy to understand and contains all elements described in 522 FW 1.3C: Need; Objective; Expected Results and Benefits; Approach; and Budget. (0–2 pts).

b. Proposal, taken as a whole, demonstrates that the State can implement a Landowner Incentive Program that has a high likelihood for success in conserving at-risk species on private lands (for example, agency support for program, dedicated staff in place to implement program, priorities clearly identified, processes in place to implement program, past successes, etc.). (0–3 pts).

2. *Need*—Proposal describes the urgency for implementing a LIP. States should describe how their LIP is a part of a broader scale conservation effort at the State or regional level. (5 points total).

a. Proposal clearly describes the urgency of need for a LIP to benefit at-risk species in the State. (0–2 pts).

b. Proposal clearly describes conservation needs for targeted at-risk species that relate directly to objectives and conservation actions described in other sections of the proposal. (0–3 pts).

3. *Objectives*—Proposal provides clear objectives that specify fully what is to be accomplished. (6 points total).

a. The objectives of the proposal describe discrete obtainable and quantifiable outputs to be accomplished (for example, the proposal identifies the number of acres of wetlands or other types of habitat, the number of stream miles to be restored, the number of landowners served, the number of management plans developed, etc.) (0–3 pts).

b. The objectives of the proposal describe discrete, obtainable and quantifiable outcomes to be accomplished (for example, the proposal identifies the number of at-risk species whose habitat within the State will be improved; the percentage increase in a population(s) of one or more at-risk species on LIP project sites; the increase in number of individuals of one or more at-risk species on LIP project sites, etc). (0–3 pts).

4. *Expected Results and Benefits*—Proposal clearly describes how the activities will benefit targeted at-risk species. (13 points total).

a. Proposal describes by name the species-at-risk to benefit from the proposal. (0–2 pts).

b. Proposal identifies habitat requirements for these targeted at-risk species. (0–3 pts).

c. Proposal makes clear connections between the conservation actions proposed and expected benefits for species and habitats (*i.e.*, describes how conservation actions will result in benefits). (0–3 pts).

d. Proposal describes the short-term benefits for at-risk species to be achieved within a 5- to 10-year period. (0–2 pts).

e. Proposal describes the long-term benefits for at-risk species to be achieved beyond 10 years. (0–3 pts).

5. *Approach*—Proposal clearly describes how program objectives, contractual and fiscal management, and fund distribution will be accomplished and monitored. (24 points total).

Program Implementation—(6 points total).

a. Proposal describes the conservation priorities for the State's LIP. (0–2 pts).

b. Proposal describes the types of conservation projects and/or activities to be undertaken to address these priorities. (0–2 pts).

c. Proposal describes how conservation projects and/or activities will implement portions of conservation plans at a local, state, regional, or national scale, including the State's Comprehensive Wildlife Conservation Strategy. (0–2 pts).

Fiscal Administrative Procedures—Proposal describes adequate management systems for fiscal and contractual accountability. (3 points total).

d. Processes to ensure contractual and fiscal accountability between the State and participating landowners. (0–2 pts).

e. Proposal indicates that the State has an approved legal instrument to enter into agreements with landowners. (0–1 pt).

System for Fund Distribution—Proposal describes the State's fair and equitable system for fund distribution. (9 points total).

f. System described is inherently fair and free from bias. (0–2 pts).

g. Proposal describes State's selection or ranking criteria and process to select projects (include copies of any relevant ranking or selection forms). (0–3 pts).

h. State's ranking or selection criteria are adequate to select projects based on conservation priorities identified in the proposal. (0–2 pts).

i. Project proposals will be (or were) subject to an objective selection procedure (for example, internal ranking panel, diverse ranking panel comprising external agency members and/or members of the public, computerized ranking model, or other non-ranking selection process). (0–2 pts).

Monitoring—Proposal describes State's biological and compliance monitoring plan for LIP including annual monitoring and evaluation of progress toward desired program objectives, results, and benefits. (6 points total).

j. Proposal describes *compliance monitoring* that will ensure accurate and timely evaluation to determine if landowners have completed agreed-upon practices in accordance with landowner agreement, including the process for addressing landowners who fail to comply with agreements. (0–3 pts).

k. Proposal describes *biological monitoring* that will ensure species and habitats are monitored and evaluated adequately to determine the effectiveness of LIP-sponsored activities and progress towards accomplishment of short- and long-term benefits (Monitoring items may entail approaches for developing monitoring protocols and establishing baselines, monitoring standards, timeframes for conducting monitoring activities, and expectations for monitoring.) (0–3 pts).

6. *Budget*—Proposal clearly identifies funds for use on private lands, identifies percentage of non-federal cost match, and identifies past funding awards. (7 points total).

a. Proposal describes the percentage of the State's total LIP Tier-2 program funds identified for use on private lands as opposed to staff and related administrative support. (4 points total).

0 point if this is not addressed or admin is >35%
1 point if admin is >25 to 35%
2 points if admin is >15 to 25%
3 points if admin is >5 to 15%
4 points if admin is 0 to 5%

Use on private lands includes all costs directly related to implementing on-the-ground projects with LIP funds. Activities considered project use include: technical guidance to landowner applicants; habitat restoration, enhancement, or management; purchase of conservation easements (including costs for appraisals, land survey, legal review, etc.); biological monitoring of Tier 2 project sites; compliance monitoring of Tier 2 projects. Staffing costs should only be included in this category when the staff-time will directly relate to implementation of a Tier 2 project. Standard Indirect rates negotiated between the State and Federal Government should also be included under Project Use.

Staff and related administrative support includes all costs related to administration of LIP. Activities considered administrative include outreach (presentations, development or printing of brochures, etc.); planning; research; administrative staff support; staff supervision; overhead charged by subgrantees unless the rate is an approved negotiated rate for Federal grants.

b. Proposal identifies the percentage of nonfederal cost sharing (3 points total).

(**Note:** I.T. = Insular Territories)
0 point if nonfederal cost share is 25%
1 point if nonfederal cost share is > 25 to 30% (>0 to 25% I.T.)
2 points if non federal cost share is > 30 to 35% (>25 to 30% I.T.)
3 points if nonfederal cost share is > 35 % (>30 % I.T.)

c. Proposal identifies percentage of previously awarded funds (exclude last fiscal year's awarded funds) that have been expended or encumbered. (Expended or encumbered funds are those Tier 2 funds that a State has either spent or has dedicated to a landowner through a signed contract between the landowner and the State. Funds must be expended/encumbered on or before the due date for submittal of the Tier 2 grant proposal to the USFWS) (subtract maximum of 3 points total.).

3 points subtracted if < 25% funds expended/encumbered
2 points subtracted if > 25 to 50% funds expended/encumbered
1 point subtracted if > 50 to 75% funds expended/encumbered
0 point subtracted if > 75 to 100% funds expended/encumbered

Total Score Possible = 60 Points

Total Score____

Analysis of Public Comments Received Regarding National Review Team Ranking Criteria Guidance for Tier 2 LIP Grant Proposals

Comments Addressing Criterion 1: Overall

Comment 1. Criteria 1a and 1b are subjective and should be removed.

Response: Based on our experience with ranking Tier 2 LIP proposals in the past, we believe a criterion that evaluates the overall quality of a proposal and of the proposed program is extremely useful. We expect that proposal reviewers will use their sound professional judgment to assign points for these criteria in a fair and consistent manner.

Comments Addressing Criterion 2: Need

Comment 2: Criterion 2a should be removed because urgency is implied whenever focusing conservation actions on species designated to be at-risk.

Response: We believe there is merit in clearly describing the urgency facing at-risk species within a State and the overall need for a LIP to address this urgency. In our experience reviewing proposals, this description of urgency of need is a good foundation for the remaining components of the proposal.

Comment 3: Criterion 2c is redundant with criterion 5b; one of the criteria should be removed.

Response: We agree with this comment and have removed criterion 2c from the ranking criteria guidance.

Comments Addressing Criterion 3: Objectives

Comment 4: Criterion 3 will result in proposals with a more narrow focus receiving lower scores than proposals with a broader focus due to the fact that points will be assigned based on the actual quantities of outcomes identified (for example, numbers of acres restored, etc.).

Response: We will not assign points under this criterion based on the quantity of outcomes proposed. Rather, points will be assigned based on whether the objectives are in a quantifiable format. In other words, a proposal that identifies 100 acres of wetlands to be restored would receive equal points under this criterion as a proposal that identifies 200 acres of

wetlands to be restored. Proposals with objectives that are not quantified would receive reduced points under this criterion. States are encouraged to provide as many types of quantifiable objectives as possible (for example, number of acres, number of at-risk species, number of landowners, etc.).

Comment 5: Criterion 3 should identify other, less-biological outcomes as potential objectives (for example, number of management plans developed and number of landowners served).

Response: We have included a new criterion (3a) under Objectives that requests non-biological outputs such as those suggested.

Comments Addressing Criterion 4: Expected Results and Benefits

Comment 6: To receive full points under this criterion, a proposal would have to include highly specific results for specific species, habitats, and activities. These specific results could only be described if actual projects were already selected before submitting the proposal.

Response: We recognize the challenge of developing a proposal for a state-wide LIP that provides flexibility for implementation and adequate detail to address the ranking criteria. However, LIP is a competitive program, and we must use ranking criteria that can distinguish merit among proposals. Clearly, the expected benefits to at-risk species are a vital component of a LIP, and should be evaluated when determining merit of a proposal. In previous years, we have seen many examples of Tier 2 LIP proposals that describe adequately the expected benefits to at-risk species without actually selecting projects. For instance, the proposal can list the targeted at-risk species, identify the major habitats upon which these species depend, describe a suite of activities that may be employed, and describe the general types of benefits (short and long term) to be achieved as a result of the potential activities.

Comment 7: Criterion 4c is redundant with criterion 5a. One of these criteria should be removed.

Response: We have removed Criterion 4c (proposal describes conservation actions to be undertaken that will address current threats to the at-risk species and their habitats) from the ranking criteria guidance.

Comment 8: Criterion 4c (previously 4d) should be removed because it is redundant with criteria 4e and 4f.

Response: We do not think that criterion 4c is redundant with criteria 4e and 4f (now 4d and 4e). The first criterion evaluates whether the connections between actions and benefits are clearly described; whereas, the second two criteria evaluate whether short- and long-term benefits are clearly described. We have reworded the criteria to make this distinction more clear.

Comment 9: Awarding points for criterion 4e (previously 4f) would favor programs focused on purchasing conservation easements, or conservation activities occurring on permanently protected private lands. ''Long term'' should be defined as greater than 5 years.

Response: Given that this is a competitive grant program, we believe that it is reasonable to provide additional points to those proposals that identify benefits for at-risk species that will be greater than 10 years. We do not agree that only proposals identifying conservation easements or working on already protected properties will qualify for points under this criterion. Based on our review of previous proposals, we expect that some States can successfully negotiate agreements with landowners to manage, maintain, or restore habitat for 10 years or longer. This criterion provides an incentive to encourage (not require) longer term commitments from the State and landowners. If a State cannot commit to these longer term benefits, it will still be eligible for points for shorter term benefits under criterion 4d.

Comments Addressing Criterion 5: Approach

Comment 10: Ranking criteria guidance should evaluate whether the proposal clearly identifies the conservation priorities for at-risk species and describes how LIP will address these priorities.

Response: We have included a new criterion 5a (proposal describes the conservation priorities for the State's LIP) to address this comment.

Comment 11: Criteria 5c and 5d are redundant. One of these criteria should be removed.

Response: We have combined criteria 5c and 5d together under criterion 5c and reduced the criterion to 2 points.

Comment 12: Criteria 5g, 5h, 5i favor programs that employ a ranking system to select projects. Several States are successfully implementing programs that do not use ranking systems to select projects. These States would be penalized under these criteria.

Response: We have reworded Criteria 5g, 5h, and 5i to address a broader array of project selection procedures.

Comment 13: Criterion 5k indicates that proposals should describe specific biological monitoring protocols and plans. States cannot develop these specific plans and protocols for monitoring species until specific projects are selected. Also, biological monitoring of species can be very expensive and might require significant amounts of Tier 2 funds to accomplish.

Response: We recognize the challenges associated with biological monitoring of at-risk species and habitats. However, we believe that monitoring to ensure the effectiveness of grant activities on species and habitats is an essential component of LIP. We do not expect that proposals will describe highly specific monitoring protocols for species and habitats. Rather criterion 5k will be used to evaluate whether proposals have identified the need for, and general approach to, biological monitoring to ensure that conservation actions are effective. This monitoring can address species, or habitat surrogates, as necessary and based on funding available.

Comment 14: Criterion 6c should be removed as it favors States that have submitted unsuccessful proposals in the past.

Response: We have removed criterion 6c.

Comment 15: Criterion 6c (previously criterion 6d) favors States that have received Tier 2 funds in the past. States that have not received funds previously are ineligible for points under this criterion. The terms ''expended,'' ''encumbered,'' and ''on-the-ground projects'' should be defined more clearly. Five points is too great to assign to this criterion. The criterion does not award points to States that have successfully spent portions of last fiscal year's funds. The 50 percent benchmark is too high for this criterion.

Response: We have revised this criterion (now criterion 6c) to be deductive so that States having not received Tier 2 funds will not be penalized. Points will be subtracted from proposals, rather than added. The greater the percentage of Tier 2 funds that a State has not encumbered or expended, the greater the number of points that will be deducted. The points assigned to this criterion have been reduced from five to three, and the benchmark has been reduced to 25 percent. The terms ''expended'' and ''encumbered'' have been further defined, and references to ''on-the-ground project'' have been removed.

Comments Addressing Funding Levels Available to the States

Comment 16: The maximum funding that a single State may receive should remain at 5 percent of the total awarded to the States in a fiscal year. The

majority of commenters supported a 5 percent cap, and many of these commenters recommended that partial funding of proposals based on their merit be allowable.

Response: For fiscal year 2006, the funding cap will remain at 5 percent, and we will consider partial funding of proposals based on merit on an as-needed basis. In the future, if the total amount of LIP funds continues to decline and the quality of many proposals remains high, we may consider lowering the cap to 3 percent.

Comment 17: For the Landowner Incentive Program to succeed, the level of the national funding must increase. Some commenters felt that the program should remain competitive, while others stated that it should not be competitive.

Response: The Service is not responsible for determining the annual appropriation for the program, nor can it decide whether it is competitive or not. Any change from a competitive to a non-competitive program needs congressional authorization.

Other Comments

Comment 18: The guidelines and ranking criteria guidance for the Landowner Incentive Program should remain as flexible as possible to maximize the ability of the States to succeed in conserving at-risk species on private lands.

Response: We have attempted to maintain flexibility in the ranking criteria guidance, while also establishing clear criteria that will allow us to distinguish between the merits of proposals. Clear ranking criteria are essential given the requirement that the program be competitive and given the high demand for this limited funding source.

Comment 19: The combined points allocated to criterion 3 (Objectives) and criterion 4 (Expected Results and Benefits) should be greater or equal to the points allocated to criterion 5 (Approach). The outcomes for at-risk species are equally if not more important than the approach to achieving these outcomes.

Response: We believe that the weight given to criteria related to Approach is reasonable given that we evaluate Landowner Incentive Programs overall, not specific projects. Clearly, the approach taken in implementing these programs will greatly affect whether they are ultimately successful.

Comment 20: States have been delayed in spending previous Tier 2 awards, due to lengthy reviews associated with Federal compliance requirements including Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act, and the National Environmental Policy Act. States undergoing these lengthy compliance reviews should not be penalized in the ranking criteria for slow spending of previously awarded funds.

Response: We are aware of the problems associated with compliance review for Landowner Incentive Program grants. The Division of Federal Assistance is working to fix these problems and quicken the review procedures.

Comment 21: The length of time between proposal submittal and award announcement should be reduced to allow States more quickly to implement their programs.

Response: We will try to reduce these delays in the announcement of LIP awards in the future.

Pamela A. Matthes,

Acting Assistant Director.

[FR Doc. E6–2431 Filed 2–21–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Migratory Bird Permits; Allowed Take of Nestling American Peregrine Falcons

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: We (the U.S. Fish and Wildlife Service) have updated information on nesting of American peregrine falcons (*Falco peregrinus anatum*) in the western United States and have determined the allowed take of nestlings in 12 western States in 2006.

FOR FURTHER INFORMATION CONTACT: Brian Millsap, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 703–358–1714, or Dr. George T. Allen, Wildlife Biologist, 703–358–1825.

SUPPLEMENTARY INFORMATION: In 2004, we completed a Final Revised Environmental Assessment (FEA) considering the take of nestling American peregrine falcons in 12 States in the western United States. Since completion of the FEA, we have consulted with the States in which take of nestlings is allowed, and have considered recent information on the numbers of nesting American peregrine falcon populations and production of young American peregrine falcons in those states, as outlined in the ''Management of Falconry Take'' section of the FEA. Having considered the most recent data available to us, we have updated the population information from the FEA. For states with no new statewide survey data, we assumed no population growth since the last survey.

The allowed take in 2004 was approximately 4.8 percent of the total estimated production of young; actual harvest, however, was approximately 0.5 percent of the estimated production. The allowed take in 2005 was 4.1 percent of the estimated production of young, but the actual harvest was only 0.6 percent of the estimated production. The allowed take of nestling American peregrine falcons in the western U.S. in 2006 is shown in the last column of the data summary. Because the number of nestlings allowed to be taken in each state is rounded down to the next lowest whole number, the allowed take will be approximately 4.4 percent of the total estimated production of young for 2006.

State	Nesting pairs reported in the FEA	Minimum 2005 nesting pairs	Recent productivity (young per nesting pair)	2005 allowed take	2005 actual take	2006 allowed take
Alaska	930	930	0.95	44	1	44
Arizona	167	167	1.02	8	2	8
California	167	167	1.52	11	0	11
Colorado	87	87	1.71	7	0	7
Idaho	24	26	1.47	1	0	1
Montana	41	54	1.89	4	0	4
Nevada	9	24	(1)	0	0	0
New Mexico	37	37	1.47	2	0	2
Oregon	70	76	1.70	6	0	6
Utah	164	164	1.55	12	5	12

State	Nesting pairs reported in the FEA	Minimum 2005 nesting pairs	Recent productivity (young per nesting pair)	2005 allowed take	2005 actual take	2006 allowed take
Washington	46	*104	1.47	3	3	*8
Wyoming	58	65	1.79	5	3	5
Total	1,800	1,826	NA	103	14	108

*Based on calculations of the Washington Department of Fish and Wildlife, as allowed under the FEA.
[1] Insufficient Data.

The states may regulate details of take, consistent with the federal falconry regulations found at 50 CFR 21.28 and 21.29. For example, the state may decide whether to allow take of nestlings, numbers of individuals of each sex that may be taken, timing and location of take of nestlings, restrictions on aerie access, and allocation of take among interested falconers.

Dated: February 1, 2006.

Matt Hogan,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E6–2428 Filed 2–21–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–190–05–1610–DT]

Notice of Availability of Record of Decision for the Clear Creek Management Area Resource Management Plan Amendment and Route Designations

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability of record of decision.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, the Federal Land Policy and Management Act of 1976, and the Bureau of Land Management (BLM) management policies, the BLM announces the availability of the Record of Decision (ROD) for the Clear Creek Management Area (CCMA) Resource Management Plan Amendment (RMPA) and Route Designations. CCMA is located in San Benito and western Fresno counties in California. In accordance with BLM regulations, 43 Code of Federal Regulation 1610.5–2(b), all protests to the Director on planning decisions were resolved prior to approving the ROD. The decision of the Director is the final decision for land use planning decisions of the Department of the Interior. The ROD was signed on January 13, 2006 and was effective immediately.

ADDRESSES: Copies of the ROD are available upon request from the Hollister Field Office, Bureau of Land Management, 20 Hamilton Court Hollister, CA 95023 or e-mail, *George_Hill@ca.blm.gov*. An electronic copy of the ROD is also available on-line at *http://www.ca.blm.gov/hollister.*

FOR FURTHER INFORMATION CONTACT: George Hill, Hollister Field Office Manager, Address: 20 Hamilton Court, Hollister, CA 95023, Telephone: (831) 630–5000 E-mail address: *George_Hill@ca.blm.gov.*

SUPPLEMENTARY INFORMATION: The CCMA ROD/Approved RMPA was developed with broad public participation through a three year collaborative planning process. The CCMA ROD and RMPA address BLM management on approximately 63,000 acres of public land in the planning area. The CCMA ROD/Approved RMPA is designed to achieve or maintain desired future conditions developed through the planning process. It includes a series of management actions to meet the desired resource conditions for recreation resources, watershed resources, and special status species. The CCMA ROD/Approved RMPA is essentially the same as the proposed action in the CCMA Proposed Resource Management Plan/Final Environmental Impact Statement (PRMP/FEIS), published in September 2005. BLM received eleven protests to the PRMP/FEIS. No inconsistencies with State or local plans, policies, or programs were identified during the Governor's consistency review of the PRMP/FEIS. As a result, only minor modifications were made in preparing the CCMA ROD and Approved RMPA. These modifications corrected errors that were noted during review of the PRMP/FEIS and provide further clarification for some of the decisions. The CCMA ROD includes a section titled ''Changes to the Proposed RMP Amendment'' that identifies the location of the corrections in the Clear Creek Management Area Record of Decision and Approved Resource Management Plan Amendment.

Dated: December 30, 2005.

J. Anthony Danna,

Deputy State Director, Resources.

[FR Doc. E6–2425 Filed 2–21–06; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–300–1020–PH]

Notice of Public Meeting, Idaho Falls District Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Idaho Falls District Resource Advisory Council (RAC), will meet as indicated below.

DATES: The meeting will be held March 14–15, 2006 at the BLM Idaho Falls District Office, 1405 Hollipark Drive, Idaho Falls, Idaho 83401. The meeting will start at 1 p.m. on March 14, with the public comment period as the first agenda item. The second day will conclude at or before 3 p.m.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in the BLM Idaho Falls District (IFD), which covers eastern Idaho. At this meeting, the Advisory Council will receive updates on Idaho's proposed Sage Grouse Conservation Strategy, and will review the plan if available. The RAC will also review information from the BLM Idaho State Office on OHV initiatives, information on the Smoky Canyon Mine Draft EIS process, the Pocatello Resource Management Plan, Noxious Weed Management in the Idaho Falls District, and other agenda items and current issue as appropriate.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided below.

FOR FURTHER INFORMATION CONTACT: David Howell, RAC Coordinator, Idaho Falls District, 1405 Hollipark Dr., Idaho Falls, ID 83401. Telephone (208) 524–7559. E-mail: *David_Howell@blm.gov*.

Dated: February 14, 2005.

David Howell,

RAC Coordinator, Public Affairs Specialist.

[FR Doc. 06–1590 Filed 2–21–06; 8:45 am]

BILLING CODE 4310–GG–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1310–01; WYW134998]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from KCS Resources, Inc. of competitive oil and gas lease WYW134998 for lands in Fremont County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals of $10.00 per acre or fraction thereof, per year and royalties of 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $166 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW134998 effective February 1, 2005, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E6–2423 Filed 2–21–06; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1310–01; WYW64845]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Roger E. Canter and CS Oil and Gas, Ltd. of noncompetitive oil and gas lease WYW64845 for lands in Fremont County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessees have agreed to the amended lease terms for rentals of $5.00 per acre or fraction thereof, per year and royalties of 16⅔ percent, respectively. The lessees have paid the required $500 administrative fee and $166 to reimburse the Department for the cost of this **Federal Register** notice. The lessees have met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW64845 effective September 1, 2003, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E6–2424 Filed 2–21–06; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Agency Information Collection Activities: Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of an extension of a currently approved information collection (OMB Control Number 1010–0162).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to OMB an information collection request (ICR) to renew approval of the paperwork requirements in the regulations under the Chief Financial Officers Act of 1990 (CFO). This ICR is titled ''Accounts Receivable Confirmations.'' This notice also provides the public a second opportunity to comment on the paperwork burden of these regulatory requirements.

DATES: Submit written comments on or before March 24, 2006.

ADDRESSES: Submit written comments by either FAX (202) 395–6566 or e-mail (*OIRA_Docket@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior (OMB Control Number 1010–0162). Please also send a copy of your comments to MMS via e-mail at *mrm.comments@mms.gov*. If you do not receive a confirmation that we have received your e-mail, contact Ms. Gebhardt at (303) 231–3211. You may instead submit a copy of your comments by mail to Sharron L. Gebhardt, Lead Regulatory Specialist, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 302B2, Denver, Colorado 80225. If you use an overnight courier service or wish to hand-carry your comments, our courier address is Building 85, Room A–614, Denver Federal Center, West 6th Ave. and Kipling Blvd., Denver, Colorado 80225. Include the title of the information collection and the OMB control number in the ''Attention'' line of your comment. Also include your name and return address.

FOR FURTHER INFORMATION CONTACT: Sharron L. Gebhardt, telephone (303) 231–3211, FAX (303) 231–3781, e-mail *Sharron.Gebhardt@mms.gov.* You may also contact Sharron Gebhardt to obtain, at no cost, a copy of the ICR that was sent to OMB.

SUPPLEMENTARY INFORMATION:

Title: Accounts Receivable Confirmations.

OMB Control Number: 1010–0162.

Bureau Form Number: None.

Abstract: The Secretary of the U.S. Department of the Interior is responsible for collecting royalties from lessees who produce minerals from leased Federal and Indian lands. The Secretary is required by various laws to manage mineral resources production on Federal and Indian lands, collect the royalties due, and distribute the funds in accordance with those laws. The MMS performs the royalty management functions and assists the Secretary in carrying out the Department's trust responsibility for Indian lands.

When a company or an individual enters into a lease to explore, develop, produce, and dispose of minerals from Federal or Indian lands, that company or individual agrees to pay the lessor a share (royalty) of the value received from production from the leased lands. The lease creates a business relationship between the lessor and the lessee. The lessee is required to report various kinds of information to the lessor relative to the disposition of the leased minerals. Such information is similar to data reported to private and public mineral interest owners and is generally available within the records of the lessee or others involved in developing, transporting, processing, purchasing, or selling of such minerals. The information collected includes data necessary to ensure that the royalties are accurately reported and appropriately paid.

The Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1701 *et seq.,* states in Section 101(a) that the Secretary ''* * * shall establish a comprehensive inspection, collection, and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed, and collect and account for such amounts in a timely manner.'' The persons or entities described at 30 U.S.C. 1713 are required to make reports and provide reasonable information as defined by the Secretary.

Every year, under CFO, the Department's Office of Inspector General, or its agent (agent), audits all Department bureaus' financial statements. The Department's goal is for every bureau to receive an unqualified opinion. Accounts receivable confirmations are a common practice in the audit business. Due to continuously increasing scrutiny on financial audits, third-party confirmation on the validity of MMS financial records is necessary. Companies submit financial information on Form MMS–2014, Report of Sales and Royalty Remittance (OMB Control Number 1010–0140, expires October 31, 2006) and on Form MMS–4430, Solid Minerals Production and Royalty Report (OMB control Number 1010–0120, expires October 31, 2007).

As part of CFO audits, the agent requests, by a specified date, third-party confirmation responses confirming that MMS accounts receivable records agree with royalty payor records, for the following items: Customer identification; royalty/invoice number; payor-assigned document number; date received; original amount reported; and remaining balance due MMS as of a specified date. In order to meet this requirement, MMS must mail letters on MMS letterhead, signed by the Deputy Associate Director for Minerals Revenue Management, to royalty payors selected by the agent at random, asking them to confirm back to the agent the accuracy and/or validity of selected royalty receivable items and amounts. Verifying the amounts reported and the balances due will require time for research and analysis by payors. The MMS will send confirmation request letters to all payors selected by the agent. They payors will be asked to submit confirmation response information directly to the agent.

Applicable Citations

Applicable citations include:

1. CFO (Pub. L. 101–576);
2. FOGRMA, 30 U.S.C. 1701 *et seq.*;
3. 30 U.S.C. 189 pertaining to Public Lands;
4. 30 U.S.C 359 pertaining to Acquired Lands;
5. 25 U.S.C. 396d pertaining to Indian Lands;
6. 43 U.S.C. 1334 pertaining to Outer Continental Shelf Lands; and
7. 30 U.S.C. 1713 pertaining to solid minerals and revised geothermal regulations at 30 CFR 210.354.

Relevant Minerals Revenue Management (MRM) regulations are codified at 30 CFR subchapter A—Royalty Management:

1. Part 201, General, *et seq.*;
2. Part 206, Production valuation, subparts F and J;
3. Part 210, Forms and reports, subparts B (§§ 210.52 and 210.53), E, and H; and
4. Part 218, Collection of royalties, rentals, bonuses and other monies due the Federal Government, subparts B and E.

Applicable public laws pertaining to mineral leases on Federal and Indian lands are located on our Web site at *http://www.mrm.mms.gov/Laws_R_D/PublicLawsAMR.htm.*

This collection does not require proprietary, trade secret, or other confidential information not protected by agency procedures, and no items of a sensitive nature are collected. The requirement to respond is voluntary.

OMB Approval

This collection was originally approved under an emergency submission to OMB. The MMS is now requesting OMB's approval to continue to collect this information. Not collecting this information would limit the Secretary's ability to discharge her duties and may also result in loss of royalty payments. Failure to collect this information could be construed as a scope limitation for CFO audits. Also, proprietary information submitted is protected, and there are no questions of a sensitive nature included in this information collection.

Frequency: Annually.

Estimated Number and Description of Respondents: 125 Federal and Indian oil and gas and solid mineral royalty payors.

Estimated Annual Reporting and Recordkeeping ''Hour'' Burden: 32 hours. We estimate that each response will take 15 minutes.

Estimated Annual Reporting and Recordkeeping ''Non-hour Cost'' Burden: We have identified no ''non-hour cost'' burden associated with the collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501 *et seq.*) provides that 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.

Comments: Section 3506(c)(2)(A) of the PRA requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *.'' Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of

the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, we published a notice in the **Federal Register** on November 21, 2005 (70 FR 70095), announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. We receive no comments in response to the notice.

If you wish to comment in response to this notice, you may send your comments to the offices listed under the **ADDRESSES** section of this notice. The OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, to ensure maximum consideration, OMB should receive public comments by March 24, 2006.

Public Comment Policy: We will post all comments in response to this notice on our Web site at *http://www.mrm.mms.gov/Laws_R_D/InfoColl/InfoColCom.htm*. We will also make copies of the comments available for public review, including names and addresses of respondents, during regular business hours at our offices in Lakewood, Colorado. Upon request, we will withhold an individual respondent's home address from the public record, as allowable by law. There also may be circumstances in which we would withhold a respondent's's identity, as allowable by law. If you request that we withhold your name and/or address, state your request prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

MMM Information Collection Clearance Officer: Arlene Bajusz, (202) 208–7744.

Dated: January 26, 2006.

Cathy J. Hamilton,

Acting Associate Director for Minerals Revenue Management.

[FR Doc. 06–1655 Filed 2–21–06; 8:45 am]

BILLING CODE 4310–MR–M

DEPARTMENT OF THE INTERIOR

National Park Service

Dog Management Plan; Golden Gate National Recreation Area, Marin, San Francisco and San Mateo Counties, CA; Notice of Intent To Prepare an Environmental Impact Statement

Summary: Under the provisions of the National Environmental Policy Act of 1969, the National Park Service (NPS) is preparing an environmental impact statement for a Dog Management Plan for Golden Gate National Recreation Area (GGNRA). The purpose of the Dog Management Plan is to provide clear, enforceable guidelines to determine the manner and extent of dog-walking use in appropriate areas of the park. The objectives are to protect and preserve natural and cultural resources; provide a variety of visitor experiences; improve visitor and employee safety; reduce user conflicts; and to maintain park resources and values for future generations. The Dog Management Plan will also address public desire to walk dogs off-leash in certain areas of GGNRA.

Background: A dog management plan is needed at this time because the existing NPS regulation governing dogs in parks, codified at 36 CFR 2.15, has not been effective in resolving longstanding, controversial resource management and public use conflicts and safety issues at GGNRA. If no action is taken, GGNRA resources and values could be compromised to the extent that areas of the park may not be available for enjoyment by future generations. A history of a dog management policy that has been inconsistent with NPS regulations has resulted in controversy and litigation, compromised visitor and employee safety, affected visitor experience and resulted in resource degradation. The conflicts will likely escalate if not addressed in a comprehensive dog management plan.

In order to implement a dog management plan that may allow off-leash dog walking, a special federal regulation would need to be promulgated governing dog walking in GGNRA.

Largely because of intense public interest and debate regarding dog walking, GGNRA has decided to use a negotiated rulemaking process to reach consensus on a proposed regulation for the management of dogs within the park. Although each process has its own separate legal requirements, the negotiated rulemaking process will run concurrently with the preparation of the EIS in order to facilitate informed decision-making. GGNRA intends to create a Negotiated Rulemaking Committee, consistent with the Negotiated Rulemaking Act and the Federal Advisory Committee Act, made up of representatives of interest groups that could be affected by a change to the current regulation governing dogs. The Negotiated Rulemaking Committee will negotiate to reach consensus on concepts and language to use as the basis for a special regulation for dog management at GGNRA. If the Committee reaches a consensus on most or many issues, that consensus would be incorporated into one or more alternatives in the Draft EIS and if selected, would ultimately become the basis of a special regulation for dog-walking within GGNRA.

Scoping Process: To be most helpful to the scoping process necessary to inform preparation of the dog management plan and Draft EIS, comments regarding the scope of the plan/EIS, relevant environmental information, or issues or concerns are encouraged. All comments must be postmarked or transmitted not later than 30 days after publication of this notice in the **Federal Register**; immediately upon confirmation of this date it will be announced on the park's Web site (*http://www.nps.gov/goga*). The NPS intends to conduct public scoping meetings in the GGNRA area in early 2006. Please check the park's Web site, the NPS planning, environment, and public comment (PEPC) Web site (*http://parkplanning.nps.gov/goga*), or telephone the GGNRA Negotiated Rulemaking Information Line (415) 561–4728 for current information on when and where these meetings will be held. To request a sign language interpreter for a meeting, please call Mike Feinstein at (415) 561–4733 a week in advance of the meeting.

Regularly updated information regarding this project can be found on the GGNRA and PEPC websites, and will be available for public review at the park's visitor centers at Fort Mason, Pacifica, Presidio, Marin Headlands and Muir Woods. A public scoping brochure that further explains the purpose, needs, issues, and objectives of the plan/EIS will also be available before the meetings. Copies of the brochure will be sent to those on the Dog Management Plan mailing list, or may be obtained on the GGNRA or PEPC websites, or at the GGNRA visitor centers at Fort Mason, Presidio, Pacifica, Marin Headlands and Muir Woods.

All interested individuals and organizations may submit comments online through the PEPC website (*http://parkplanning.nps.gov/goga*). Click on

''Golden Gate National Recreation Area Dog Management Plan'' and follow the instructions on the website. Detailed written comments may also be sent to the attention of the Superintendent, GGNRA, Fort Mason, Building 201, San Francisco, CA 94123.

Please note that names and addresses of people who comment become part of the public record. If individuals commenting request that their name and/or address be withheld from public disclosure, it will be honored to the extent allowable by law. Such requests must be stated prominently in the beginning of the comments. There also may be circumstances wherein the NPS will withhold from the record a respondent's identity, as allowable by law. As always: The NPS will make available to public inspection all submissions from organizations or businesses and from persons identifying themselves as representatives or officials of organizations and businesses; and, anonymous comments may not be considered.

When using PEPC to comment, if you would like your name and/or address withheld from the public record but would like to receive future mailings on the project, you may fill in the name and address field, and mark ''keep my contact information private''. If you do not want to receive any additional information on the project in the future and are only using PEPC to comment, you may put N/A in the name and address field.

Decision Process: At this time it is anticipated that the draft plan/EIS will be made available for public review in late fall, 2006. Availability of the draft document will be formally announced through the publication of a Notice of Availability in the **Federal Register**, as well as through local and regional news media, the GGNRA and PEPC websites, and direct mailing to the project mailing list. Public meetings on the draft plan/EIS will also be held following its release; as soon as dates and locations are determined these will be announced via local and regional press and direct mailings. As a delegated EIS, the official responsible for approval of the Record of Decision is the NPS Regional Director, Pacific West Region; subsequently the official responsible for implementation is the Superintendent, Golden Gate National Recreation Area.

Dated: November 2, 2005.

George J. Turnbull,

Acting Regional Director, Pacific West Region.

[FR Doc. E6–2488 Filed 2–21–06; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Shoshone National Forest, Cody, WY, and Buffalo Bill Historical Center, Cody, WY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary object in the control of the U.S. Department of Agriculture, Forest Service, Shoshone National Forest, Cody, WY, and in the physical custody of the Buffalo Bill Historical Center, Cody, WY. The human remains and associated funerary object were removed from the Mummy Cave site, Park County, WY.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary object. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Buffalo Bill Historical Center professional staff in consultation with representatives of the Shoshone Tribe of the Wind River Reservation, Wyoming and Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho.

Between 1963 and 1966, human remains representing a minimum of one individual were removed from the Mummy Cave site, west of Cody, Park County, WY, by Harold McCracken. The human remains were removed from lands managed by the U.S. Forest Service and have been curated at the Buffalo Bill Historical Center since their removal. No known individual was identified. The one associated funerary object is a mountain sheep hide that was used to wrap the individual.

The individual was mummified and wrapped in a mountain sheep hide, which provided a radiocarbon date of 110 ± 1251 B.P. A study and report on the human remains was undertaken by Susan Hughes of the University of Washington and a team of physicians from the Paleopathology Association, Toledo, OH. No destructive testing was undertaken.

Mummy Cave contains several levels of human occupation. The human remains, representing an older Native American male, were recovered from an intentional stone-covered burial in level 3 of the cave. Archeological evidence from several levels of the site provides dates that are consistent with occupation of this area by the Plains and Great Basin people. Level 3 has been identified as Great Basin or Sheepeater, and level 1 as Shoshonean. There are historical ties between Sheepeater people and the Shoshonean people. The present-day Shoshonean tribes that consider themselves descendants of the Sheepeater are the Shoshone Tribe of the Wind River Reservation, Wyoming and the Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho.

Officials of the Shoshone National Forest have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of Shoshone National Forest also have determined that, pursuant to 25 U.S.C. 3001(3)(A), the one object described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Shoshone National Forest have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the associated funerary object and the Shoshone Tribe of the Wind River Reservation, Wyoming and Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary object should contact Emma Hansen, Curator, Plains Indian Museum, Buffalo Bill Historical Center, 720 Sheridan Avenue, Cody, WY 82414, telephone (307) 587–4771 extension 4052, before March 24, 2006. Repatriation of the human remains and associated funerary object to the Shoshone Tribe of the Wind River Reservation, Wyoming and Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho may proceed after that date if no additional claimants come forward.

The U.S. Department of Agriculture, Forest Service, Shoshone National Forest is responsible for notifying the Arapaho Tribe of the Wind River Reservation, Wyoming; Crow Tribe of Montana; Shoshone Tribe of the Wind River Reservation, Wyoming; and

Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho that this notice has been published.

Dated: January 31, 2006.

C. Timothy McKeown,

Acting Manager, National NAGPRA Program.

[FR Doc. E6–2445 Filed 2–21–06; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: American Museum of Natural History, New York, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the American Museum of Natural History, New York, NY. The human remains were removed from Newport and Washington Counties, RI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by American Museum of Natural History professional staff in consultation with representatives of the Narragansett Indian Tribe of Rhode Island.

Prior to 1907, human remains representing a minimum of one individual were collected by an unknown person from Prudence Island, Newport County, RI. The American Museum of Natural History received the human remains from Dr. Robert Cushman Murphy as a gift in 1953. No known individual was identified. No associated funerary objects are present.

This individual has been identified as Native American based on geographic and documentary evidence and on information obtained in consultation. The human remains are associated with the culture name ''Narragansett,'' and the Museum has determined that they are likely culturally affiliated with the Narragansett Indian Tribe of Rhode Island. Although museum documentation and visual osteological assessment suggest that this individual is ''European,'' the museum catalog states that the human remains are believed to be from a Narragansett Indian burial. In consultation, representatives of the Narragansett Indian Tribe of Rhode Island have advised that they consider the human remains to be culturally affiliated with the tribe. They further noted that the Narragansett have occupied Prudence Island for thousands of years and had used it as a burial ground. Although no specific archeological information has been found that pertains to the duration of Narragansett use of this island, the archeological record indicates a lengthy period of continuity in the general area.

About 1910, human remains representing a minimum of three individuals were collected by an unknown person one half mile from Ninigret Fort, Dutch Point, near Charlestown, Washington County, RI. The American Museum of Natural History received the human remains as a gift in 1935 from William B. Goodwin, who acquired them from the owner of the land on which they were found. No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on geographic location and historical evidence. Museum records suggest that the human remains date to the postcontact period. Fort Ninigret and the area around Charlestown are associated with the postcontact Niantic Tribe. In 1675, the Narragansett Indians merged with the Niantic Indians living in Charlestown; this combined group took the name Narragansett, now the Narragansett Indian Tribe of Rhode Island. During consultation, the Narragansett Indian Tribe of Rhode Island claimed this area as part of their aboriginal territory.

Officials of the American Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of a minimum of four individuals of Native American ancestry. Officials of the American Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Narragansett Indian Tribe of Rhode Island.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Nell Murphy, Director of Cultural Resources, American Museum of Natural History, Central Park West at 79th Street, New York, NY 10024–5192, telephone (212) 769–5837, before March 24, 2006. Repatriation of the human remains to the Narragansett Indian Tribe of Rhode Island may proceed after that date if no additional claimants come forward.

The American Museum of Natural History is responsible for notifying the Narragansett Indian Tribe of Rhode Island that this notice has been published.

Dated: January 27, 2006.

C. Timothy McKeown,

Acting Manager, National NAGPRA Program.

[FR Doc. E6–2443 Filed 2–21–06; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: American Museum of Natural History, New York, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the American Museum of Natural History, New York, NY. The human remains were removed from Pacific County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by American Museum of Natural History professional staff in consultation with representatives of the Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Reservation, Washington; Confederated Tribes of the Chehalis Reservation, Washington; Confederated Tribes of the Colville Reservation, Washington; Jamestown S'Klallam Tribe of Washington; Lower Elwha Tribal Community of the Lower Elwha Reservation, Washington; Makah Indian Tribe of the Makah Indian Reservation, Washington; Port Gamble Indian Community of the Port Gamble Reservation, Washington; Quinault Tribe of the Quinault Reservation, Washington; Samish Indian Tribe, Washington; Shoalwater Bay Tribe of

the Shoalwater Bay Indian Reservation, Washington; Skokomish Indian Tribe of the Skokomish Reservation, Washington; Stillaguamish Tribe of Washington; Tulalip Tribes of the Tulalip Reservation, Washington; and Upper Skagit Indian Tribe of Washington. The American Museum of Natural History also contacted the following Indian tribes for consultation, but received no response: the Confederated Tribes of the Warm Springs Reservation of Oregon; Hoh Indian Tribe of the Hoh Indian Reservation, Washington; Lummi Tribe of the Lummi Reservation, Washington; Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Nooksack Indian Tribe of Washington; Puyallup Tribe of the Puyallup Reservation, Washington; Quileute Tribe of the Quileute Reservation, Washington; Squaxin Island Tribe of the Squaxin Island Reservation, Washington; and Swinomish Indians of the Swinomish Reservation, Washington.

At an unknown date, human remains representing a minimum of eight individuals were removed from Tokeland, on Shoalwater Bay, Pacific County, WA, by Harlan I. Smith, during the Jesup North Pacific Expedition. The museum has no record of whether Mr. Smith purchased or excavated the human remains. In 1899, the museum accessioned the human remains. No known individuals were identified. No associated funerary objects are present.

According to museum records, the human remains were found in ''camphor boxes'' imported from China during the postcontact period. Published literature and consultation information from the tribe indicate that burial in Chinese boxes is consistent with the postcontact burial practices of the Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington. Based on locale and manner of interment, the human remains have been identified as Native American dating to the postcontact period. The geographic origin of the human remains is consistent with the postcontact territory of the Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington and is within the boundaries of the present-day Shoalwater Bay Indian Reservation.

Although the lands from which the human remains were removed are currently under the jurisdiction of the U.S. Department of the Interior, Bureau of Indian Affairs, the American Museum of Natural History has control of the human remains since their removal from tribal land predates the permit requirements established by the Antiquities Act of 1906.

Officials of the American Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of a minimum of eight individuals of Native American ancestry. Officials of the American Museum of Natural History, also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Nell Murphy, Director of Cultural Resources, American Museum of Natural History, Central Park West at 79th Street, New York, NY 10024–5192, telephone (212) 769–5837, before March 24, 2006. Repatriation of the human remains to the Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington may proceed after that date if no additional claimants come forward.

The American Museum of Natural History is responsible for notifying the Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Reservation, Washington; Confederated Tribes of the Chehalis Reservation, Washington; Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Warm Springs Reservation of Oregon; Hoh Indian Tribe of the Hoh Indian Reservation, Washington; Jamestown S'Klallam Tribe of Washington; Lower Elwha Tribal Community of the Lower Elwha Reservation, Washington; Lummi Tribe of the Lummi Reservation, Washington; Makah Indian Tribe of the Makah Indian Reservation, Washington; Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Nooksack Indian Tribe of Washington; Port Gamble Indian Community of the Port Gamble Reservation, Washington; Puyallup Tribe of the Puyallup Reservation, Washington; Quileute Tribe of the Quileute Reservation, Washington; Quinault Tribe of the Quinault Reservation, Washington; Samish Indian Tribe, Washington; Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington; Skokomish Indian Tribe of the Skokomish Reservation, Washington; Squaxin Island Tribe of the Squaxin Island Reservation, Washington; Stillaguamish Tribe of Washington; Swinomish Indians of the Swinomish Reservation, Washington; Tulalip Tribes of the Tulalip Reservation, Washington; and Upper Skagit Indian Tribe of Washington that this notice has been published.

Dated: January 27, 2006.

C. Timothy McKeown,

Acting Manager, National NAPGRA Program.

[FR Doc. E6–2447 Filed 2–21–06; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, Indian Arts and Crafts Board, Sioux Indian Museum, Rapid City, SD

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Sioux Indian Museum, Indian Arts and Crafts Board. The human remains were removed from an unknown location.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Sioux Indian Museum's professional staff in consultation with representatives of the Pawnee Nation of Oklahoma.

At an unknown date, human remains representing a minimum of one individual were removed from an unknown location. The human remains consist of a scalp lock and were acquired from Turning Bear by John A. Anderson of Rapid City, SD. Mr. Anderson identified the scalp as that of a Pawnee Indian that had been taken by a Sioux Indian. In 1938, the Bureau of Indian Affairs purchased Mr. Anderson's collection of artifacts and photographs for its Sioux Indian Museum. The Sioux Indian Museum was transferred to the Indian Arts and Crafts Board in 1956. No known individual was identified. No associated funerary objects are present.

Officials of the Sioux Indian Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Sioux Indian Museum have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Pawnee Nation of Oklahoma.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Ms. Paulette Montileaux, Curator, Sioux Indian Museum, Post Office Box 1504, Rapid City, SD 57709, telephone (605) 394–2381 before March 24, 2006. Repatriation of the human remains to the Pawnee Nation of Oklahoma may proceed after that date if no additional claimants come forward.

The Sioux Indian Museum is responsible for notifying the Pawnee Nation of Oklahoma that this notice has been published.a

Dated: January 27, 2006.

C. Timothy McKeown,

Acting Manager, National NAGPRA Program.

[FR Doc. E6–2444 Filed 2–21–06; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, National Park Service, Tonto National Monument, Roosevelt, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of the Interior, National Park Service, Tonto National Monument, Roosevelt, AZ. The human remains and cultural items were removed from two sites within the monument's boundaries and one site west of the monument.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the superintendent, Tonto National Monument.

A detailed assessment of the human remains and associated funerary objects was made by Tonto National Monument professional staff in consultation with representatives of the Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico. The Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona, was contacted, but did not attend the consultation meeting and was represented by the Gila River Indian Community of the Gila River Indian Reservation, Arizona.

In 1936 and 1940, human remains representing a minimum of two individuals were removed from the monument's Upper Ruin site in Gila County, AZ, during legally authorized excavations by the National Park Service. No known individuals were identified. The three associated funerary objects are textile fragments.

Diagnostic artifacts found associated with the burials as well as elsewhere on the site indicate that the human remains were buried during the Gila phase of the Classic period (A.D. 1300–1450).

In 1950, human remains representing a minimum of three individuals were recovered from the monument's Lower Ruin site in Gila County, AZ, during legally authorized excavations by the National Park Service. No known individuals were identified. The 25 associated funerary objects are 1 gourd container, 1 Tonto Red bowl, 1 piece of cordage, 1 cradleboard, 1 rattle, 2 twilled baskets, 1 awl, 8 awl fragments, 1 crystal, 1 box containing fragments of blue, red, and green painted staffs, 1 bone tessera, 3 mat fragments, 1 spindle, 1 ring of yucca fiber, and 1 pendant.

Diagnostic artifacts found associated with the burials as well as elsewhere on the site indicate that the human remains were buried during the Gila phase of the Classic period (A.D. 1300–1450).

In 1956, human remains representing a minimum of two individuals were donated to the National Park Service by Dr. Cyril M. Cron. The remains were removed by unknown persons from the monument's Upper Ruin site in Gila County, AZ. No known individuals were identified. The 23 associated funerary objects are 2 blankets, 1 cordage artifact, 1 cradleboard, 1 impression of twilled matting, 1 pillow, 6 textile fragments and 1 box of textile fragments, 8 textile strips, and 2 textiles.

Diagnostic artifacts found on the site indicate that the human remains were buried during the Gila phase of the Classic period (A.D. 1300–1450). These human remains and associated funerary objects are recorded on the NAGPRA inventory of the Western Archeological and Conservation Center (WACC) of National Park Service, where they are stored, but are included here for consistency.

In 1963, human remains representing a minimum of one individual were inadvertently discovered by Arizona State Highway Department workers outside the monument on the west side of Tonto Creek, Gila County, AZ. No known individual was identified. The one associated funerary object is a Salado Red ceramic bowl.

The associated funerary object as well as objects found nearby indicate that the human remains were buried during the Classic period (A.D. 1200–1450). At the time of discovery, the Arizona State Highway Department requested assistance from National Park Service, which was provided. The human remains and associated funerary object were subsequently accessioned into Tonto National Monument's collections. On November 29, 2005, the Arizona Department of Transportation consented to Tonto National Monument taking NAGPRA responsibility for these human remains and associated funerary object.

Tonto Basin is one of several areas in the Southwest associated with the ''Salado,'' a term that has invoked archeological debate since the 1930s. The basin is located between the desert-dwelling Hohokam to the south and ancestral Puebloan groups of the mountain areas to the north and east. The geographic area contains a variety of architectural styles and material culture that represent both the Hohokam and ancestral Puebloan traditions. For example, both architectural styles are sometimes found within single sites, suggesting close mixing between the two groups. Recent research suggests that the intermixing of these two groups may have occurred in the late 13th century to the middle part of the 15th century when the Tonto Basin was depopulated. Site types in the Tonto Basin include fieldhouses, roomblocks, compounds, and platform mounds. In addition, pottery such as Roosevelt Red Ware, Salado Red, and Salado White-on-red represent a key component to Salado material culture. These ceramics were found during excavations of the upper and lower cliff dwellings in Tonto National Monument.

Overall, the archeological evidence, including material culture, architectural styles, and burial practices, indicates affiliation with a number of contemporary indigenous groups both

from the southern and northern Southwest, including the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico. In addition to the archeological evidence, oral traditions of the six tribes support ancestral ties to the Salado cultural tradition.

Officials of Tonto National Monument have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of eight individuals of Native American ancestry. Officials of Tonto National Monument also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 52 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of Tonto National Monument have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Bradley S. Traver, superintendent, Tonto National Monument, HC 02, Box 4602, Roosevelt, AZ 85545, telephone (928) 467–2241, before March 24, 2006. Repatriation of the human remains and associated funerary objects to the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico may proceed after that date if no additional claimants come forward.

Tonto National Monument is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: January 27, 2006.

C. Timothy McKeown,

Acting Manager, National NAGPRA Program.

[FR Doc. E6–2446 Filed 2–21–06; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of Mesa Verde National Park, Mesa Verde, CO; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, Sec. 5, of the completion of an inventory of human remains and associated funerary objects in the possession of the U.S. Department of the Interior, National Park Service, Mesa Verde National Park, Mesa Verde, CO. These human remains and cultural items were removed from sites within and near Mesa Verde National Park.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003, (d)(3). The determinations in this notice are the sole responsibility of the superintendent, Mesa Verde National Park.

This notice corrects the number of human remains and associated funerary objects reported in a Notice of Inventory Completion published in the **Federal Register** on August 27, 1999. During the 2001 storage upgrade project, human remains representing four individuals and one associated funerary object were found. The inclusion of sites from outside park boundaries and the return of human remains to the park in 2005 resulted in an additional eight human remains and 26 associated funerary objects. During the course of developing this correction errors were found in the published counts of associated funerary objects resulting in three fewer associated funerary objects. The net change is 12 additional individuals and 24 additional funerary objects. The human remains and associated funerary objects are culturally affiliated with the same tribes as described in the original notice.

In the **Federal Register** of August 27, 1999, FR Doc. 99–22260, pages 46936 - 46949, the following corrections are made -

The tenth paragraph on page 46939 is corrected by substituting the following paragraph:

In 1955 and 1956, human remains representing 17 individuals were recovered during legally authorized excavations conducted by University of Colorado archeologist Robert Lister at Lister Site No.1 (5MV875), a site within park boundaries. No known individuals were identified. The 31 associated funerary objects include 10 bowls and bowl fragments, five faunal bones, four jars and jar fragments, one ladle bowl fragment, three ladles, seven pitchers, and one worked sherd.

The eighth paragraph on page 46940 is corrected by substituting the following paragraph:

Between 1937 and 1989, human remains representing 211 individuals were recovered during multiple episodes from Long House (5MV1200), a site within park boundaries. In 1937, a park visitor recovered human remains representing two individuals during an unauthorized excavation. From 1958 to 1962, human remains representing 208 individuals were recovered during a legally authorized National Park Service excavation. In 1989, human remains representing one individual were located in the collection by park curatorial staff. No known individuals were identified. The two individuals recovered in 1937 and the one individual found in 1989 had no associated funerary objects. The 208 individuals recovered from 1958 to 1962 had 537 associated funerary objects consisting of four bone awls, two axes, one bead, one bone artifact, 277 botanical specimens (juniper and yucca), 10 bowls and bowl fragments, one concretion, one cone, one feather/yucca cordage fragment, two cores, five corn cobs, three corn kernels, three cylinders, one disk fragment, 93 faunal specimens (bone, hide, claw, and eggshell), 13 flakes, three geologic specimens (barite, quartz, and shale), five gizzard stones, seven hammerstones, six jars and jar fragments, one ladle cup, one ladle, two manos, one miniature ladle, 12 mugs and mug fragments, four pendants, three points, 71 sherds, one drilled stone artifact, one pecked and grooved stone artifact, and one wood artifact. Human

remains representing two individuals and three cores are missing from the original catalogued entry for this site. These human remains and associated funerary objects have not been included in the total counts.

The sixteenth paragraph on page 46942 is corrected by substituting the following paragraph:

In 1963, human remains representing one individual were recovered during a legally authorized National Park Service field collection project conducted at 5MV1575, a site within park boundaries. No known individuals were identified. The 31 associated funerary objects are 30 sherds and 1 jar.

The seventeenth paragraph on page 46943 is corrected by substituting the following paragraph:

In 1966, human remains representing 20 individuals were recovered during a legally authorized excavation conducted by University of Colorado archeologist David Breternitz at 5MV1930, a site within park boundaries. No known individuals were identified. The 240 associated funerary objects include one axe fragment, eight basket fragments (burned), one botanical specimen (reed), one core, 20 faunal bones, five hammerstones, one jar, eight manos, two palette and palette fragments, 187 sherds, five ground stone artifacts, and one battered and ground stone artifact.

After the thirteenth paragraph on page 46944 insert the following paragraph:

In 1995, human remains representing three individuals were found in the Mesa Verde Research Center collection and identified as being from Yellow Jacket. No other documentation was found. No known individuals were identified. No associated funerary objects were present.

After the seventeenth paragraph on page 46947 insert the following paragraphs:

In 1995, human remains representing one individual were found in the Mesa Verde Research Center collection. Documentation found with the human remains indicated that they were recovered at Ignacio, CO, a site outside park boundaries. No known individuals were identified. The 26 associated funerary objects include one bowl, one corn cob, five faunal bones, two jars, and 17 sherds.

Based on ceramic analysis and a physical anthropology examination, this site (Ignacio, CO), these human remains, and the associated funerary objects are dated to Basketmaker III (A.D. 500–700).

In 2001, human remains representing two individuals were found in the Mesa Verde Research Center collection. Based on documentation with the human remains, these individuals were identified as coming from Mesa Verde. These human remains have been identified on the NAGPRA Inventory as No Provenience (1584A). No known individuals were identified. No associated funerary objects were present.

Based on the documentation found on the human remains and on geographic location, these human remains are identified as Ancestral Puebloan (pre A.D. 1300).

In 2001, human remains representing one individual were found in the Mesa Verde Research Center collection. The only identification was the accession number 1081. The accession was used by the Wetherill Mesa Archeological Project in 1961 and 1963 to collect artifacts from various sites within Mesa Verde. Therefore, the exact site from which the human remains originated is unknown. These human remains have been identified on the NAGPRA Inventory as No Provenience (1081). No known individuals were identified. No associated funerary objects were present.

Based on documentation, and the fact that the possible sites from which the human remains are from are all within Mesa Verde, these human remains are identified as Ancestral Puebloan (pre A.D. 1300).

In 2001, human remains representing one individual were found in the Mesa Verde Research Center collection. The only identification was the site number 5MV3678. No known individuals were identified. No associated funerary objects were present.

Based on architectural features (kiva depression, circular rubble mound, and trash area) and archeological context, this site (5MV3678) and these human remains are dated to Pueblo II-Pueblo III (A.D. 900–1300).

In 2005, human remains representing four individuals were returned to Mesa Verde National Park. Documentation indicates that the remains are from a puebloan site and that Ancestral Puebloan pottery was found when the human remains were removed. These human remains have been identified on the NAGPRA Inventory as No Provenience (1586). No known individuals were identified. No associated funerary objects were present.

Based on the documentation found with the human remains and on geographic location, these human remains are identified as Ancestral Puebloan (pre A.D. 1300).

The sixth paragraph on page 46948 is corrected by replacing the first two sentences of the paragraph with the following sentences:

Based on the above information, officials of the National Park Service have determined that pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of at least 1,536 individuals of Native American ancestry. National Park Service officials have also determined that, pursuant to 43 CFR 10.2 (d)(2), the 4,887 associated funerary objects listed above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Larry Wiese, superintendent, Mesa Verde National Park, PO Box 8, Mesa Verde, CO 81733, telephone (970) 529–4600, before March 24, 2006. Repatriation of the human remains and associated funerary objects to the Hopi Tribe of Arizona; Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of San Juan, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Santo Domingo, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; Navajo Nation of Arizona, New Mexico & Utah; Ysleta Del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico may proceed after that date if no additional claimants come forward.

Mesa Verde National Park is responsible for notifying the Hopi Tribe of Arizona; Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of San Juan, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Santo Domingo, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; Navajo Nation of Arizona, New Mexico, & Utah; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Ute Mountain Tribe of the Ute

Mountain Reservation, Colorado, New Mexico & Utah; Ysleta Del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: January 30, 2006.

C. Timothy McKeown,

Acting Manager, National NAGPRA Program.

[FR Doc. E6–2477 Filed 2–21–06; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Saint Martin's Waynick Museum, Lacey, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Saint Martin's Waynick Museum, Lacey, WA. The human remains were removed from King County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Saint Martin's Waynick Museum professional staff in consultation with representatives of the Puyallup Tribe of the Puyallup Reservation, Washington.

In 1938, human remains representing a minimum of two individuals were removed from a cist burial mound on Vashon-Maury Island, King County, WA, by Lynne ''Black Eagle'' Waynick. Mr. Waynick later donated the human remains to the Saint Martin's Waynick Museum. The human remains were found in the museum's collection in 2003. No known individuals were identified. No associated funerary objects are present.

The morphology of the human remains is consistent with that of Native American populations. Archeological and historical documentation identifies Vashon-Maury Island as a site of several Puyallup villages at or before the signing of the Medicine Creek Treaty of 1854. The Vashon-Maury Island is located in the historically documented traditional territory of the Puyallup tribe. Descendants of the Puyallup are members of the Puyallup Tribe of the Puyallup Reservation, Washington.

Officials of Saint Martin's Waynick Museum have determined that to the best of their ability, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of Saint Martin's Waynick Museum also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Puyallup Tribe of the Puyallup Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Brother Luke Devine, Curator, Saint Martin's Waynick Museum, 5300 Pacific Avenue SE, Lacey, WA 98503, telephone (360) 438–4458, before March 24, 2006. Repatriation of the human remains to the Puyallup Tribe of the Puyallup Reservation, Washington may proceed after that date if no additional claimants come forward.

Saint Martin's Waynick Museum is responsible for notifying the Puyallup Tribe of the Puyallup Reservation, Washington that this notice has been published.

Dated: February 9, 2006.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E6–2448 Filed 2–21–06; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate a Cultural Item: The Trustees of Reservations, Beverly, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the possession of The Trustees of Reservations, Beverly, MA, that meets the definition of ''object of cultural patrimony'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The one cultural item is a four-piece pewter communion set. The pieces are one flagon (circa 1825–1854), made by Thomas Danforth Boardman, Hartford, CT (MH.A.E.1); one goblet (circa 1825–1854), made by Sherman Boardman and Thomas Danforth Boardman (MH.A.E.2); one goblet (circa 1820–1850), by an unknown maker (MH.A.E.3); and one charger (circa 1758–1788) possibly made by Joseph Danforth, Middletown, CT (MH.A.E.4).

In the 1730s, the Stockbridge Mohicans, now the Stockbridge Munsee Community, Wisconsin, accepted the Reverend John Sergeant as a Christian missionary in Stockbridge, MA. This communion set was acquired by the tribe's mission church in the early 1800s, when they were living in upstate New York. Around 1911, the communion set was placed in the care of the church by Elder Jamison (Soat) Quinney, for many years the caretaker for objects on behalf of the Stockbridge Munsee Community.

In 1930, Miss Mabel Choate, working through an agent, purchased the communion set, along with a two-volume Bible (returned to the Stockbridge Munsee Community, Wisconsin in 1991), from the John Sergeant Memorial Presbyterian Church in Red Springs, WI., for display at the Mission House Museum in Stockbridge, MA. In 1948, Miss Choate donated the Mission House complete with all its contents, including the communion set, to The Trustees of Reservations.

The cultural item's cultural affiliation with the Stockbridge Munsee Community is established through records held in the archives of the Mission House. Consultation with representatives of the Stockbridge Munsee Community confirmed that no single member nor a group of members of the John Sergeant Memorial Presbyterian Church had the right to sell cultural items owned by the community. The communion set was an integral part of the mission church begun in the 1730s in western Massachusetts and continues to have ongoing historical, traditional, and cultural importance central to the Stockbridge Munsee Community, Wisconsin.

Officials of The Trustees of Reservations have determined that, pursuant to 25 U.S.C. 3001 (3)(D), the cultural item described above has an ongoing historical, traditional, or cultural importance central to the

Native American group or culture itself, rather than property owned by an individual. Officials of The Trustees of Reservations also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the object of cultural patrimony and the Stockbridge Munsee Community, Wisconsin.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the object of cultural patrimony should contact Will Garrison, Historic Resources Manager, The Trustees of Reservations, PO Box 792, Stockbridge, MA 01262, telephone (413) 298–8123, before March 24, 2006. Repatriation of the object of cultural patrimony to the Stockbridge Munsee Community, Wisconsin may proceed after that date if no additional claimants come forward.

The Trustees of Reservations is responsible for notifying the Stockbridge Munsee Community, Wisconsin that this notice has been published.

Dated: February 2, 2006.

C. Timothy McKeown,

Acting Manager, National NAGPRA Program.

[FR Doc. E6–2480 Filed 2–21–06; 8:45 am]

BILLING CODE 4312–50–S

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1102 (Preliminary)]

Activated Carbon From China

AGENCY: United States International Trade Commission.

ACTION: Notice of withdrawal of petition in antidumping investigation.

SUMMARY: On February 15, 2006, the Department of Commerce and the Commission received a letter from petitioners in the subject investigation (Calgon Carbon Corporation, Pittsburgh, PA, and Norit Americas, Inc., Marshall, TX) withdrawing their petition. Commerce has not initiated an investigation as provided for in section 732(c) of the Tariff Act of 1930 (19 U.S.C. 1673a(c)). Accordingly, the Commission gives notice that its antidumping investigation concerning activated carbon from China (investigation No. 731–TA–1102 (Preliminary)) is discontinued.

EFFECTIVE DATE: February 15, 2006.

FOR FURTHER INFORMATION CONTACT: Jim McClure (202–205–3191), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

By order of the Commission.

Issued: February 15, 2006.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E6–2468 Filed 2–21–06; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Technologies for Target Assessment

Notice is hereby given that, on February 1, 2006, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Technologies for Target Assessment (''TATS member firm Icoria, a Clinical Data Inc. Company'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in Icoria, Inc.'s ownership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Clinical Data, Inc., Newton, MA has acquired Icoria, Inc., Research Triangle Park, NC.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and TATS member firm Icoria, a Clinical Data Inc. Company, intends to file additional written notification disclosing all changes in membership.

On August 1, 2002, TATS member firm Icoria, a Clinical Data Inc. Company, filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 12, 2002 (67 FR 57853).

The last notification was filed with the Department of Justice on January 6, 2006. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 8, 2006 (71 FR 6523).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 06–1608 Filed 2–21–06; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

[F.C.S.C. Meeting Notice No. 2–06]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of Commission business and other matters specified, as follows:

DATE AND TIME: Thursday, March 2, 2006, at 10 a.m.

SUBJECT MATTER: (1) Issuance of Proposed Decisions in claims against Albania

(2) Issuance of Proposed Decisions in claims against Cuba

STATUS: Open.

All meetings are held at the Foreign claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Room 6002, Washington, DC 20579. Telephone: (202) 616–6988.

Mauricio J. Tamargo,

Chairman.

[FR Doc. 06–1693 Filed 2–17–06; 2:16 pm]

BILLING CODE 4410–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

National Summit on Retirement Savings

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of meeting.

SUMMARY: This document provides notice of the agenda for the national Summit on Retirement Savings, as called for by the Savings Are Vital for Everyone's Retirement (SAVER) Act, which amends Title I of the Employee Retirement Income Security Act of 1974.

DATES: The National Summit on Retirement Savings will begin on the morning of March 1, 2006 and end in the afternoon of March 2, 2006.

ADDRESSES: The Summit will be held at the Willard Intercontinental Hotel, 1401 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Wendy Gehring, Office of the Secretary, U.S. Department of Labor, Room S 2000, (202) 693–6000, or Mary Jost, Senior Director of the Education, International Foundation of Employee Benefits Plans, 18700 West Bluemound Road, P.O. Box 69, Brookfield, WI 53008–0069, (262) 786–6700. These are not toll free numbers.

SUPPLEMENTARY INFORMATION: On November 20, 1997, the President signed Public Law 105–92 (1997) the ''Savings Are Vital to Everyone's Retirement Act'' (SAVER). The SAVER legislation is aimed at advancing the public's knowledge and understanding of the importance of retirement savings by: (1) Providing a bipartisan National Summit on Retirement Savings co-hosted by the President and the Congressional Leadership in the House and Senate; and (2) establishing an ongoing educational program coordinated by the Department of Labor. The Summit will be held March 1st and 2nd, 2006 in Washington, DC. The purpose of the Summit is to: (1) Increase public awareness of the value of personal savings for retirement, (2) advance the public's knowledge and understanding of retirement savings and its importance to the well being of all Americans, (3) facilitate the development of a broad-based, public retirement savings education program, (4) identify the barriers faced by workers who want to save for retirement, (5) identify the barriers which employers, especially small employers, face in assisting their workers in accumulating retirement savings, (6) examine the impact and effectiveness of individual employers who promote personal savings and retirement savings plan participation among their workers, (7) examine the impact and effectiveness of government programs at the Federal, State, and local levels to educate the public about retirement savings principles, (8) develop recommendations for governmental and private sector action to promote pensions and individual retirement savings, and (9) develop recommendations for the coordination of Federal, State, and local retirement savings education initiatives. The Agenda for the National Summit on Retirement Savings follows.

This agenda is subject to change.

Draft Agenda

National Summit on Retirement Savings

March 1–2, 2006

''Saving for Your Golden Years: Trends, Challenges and Opportunities''

Day 1—Wednesday, March 1, 2006

- Registration/Continental Breakfast.
- Opening Plenary Session.
  - Welcome and Opening Remarks, Secretary of Labor Elaine L. Chao.
  - Overview and Introduction, Assistant Secretary of Labor Ann L. Combs, Employee Benefits Security Administration.
  - Review of Previous Summits and Current Status of Retirement Savings, Dr. Sylvester Schieber, U.S. Director of Benefits Consulting, Watson Wyatt Worldwide.
- Four Concurrent Breakout Sessions.

Delegates will work in one of four teams to examine the challenges facing four distinct groups discussing ways to reach them with retirement savings messages and recommending solutions to assist them in overcoming their savings obstacles. The Summit will address the central issues facing real workers and real families. The groups to be examined are:

- Group A: Low-Income Workers.
- Group B: Small Business Employees.
- Group C: New Entrants to the Workforce.
- Group D: Workers Nearing Retirement.

- Lunch.
  - The Honorable Donald L. Evans, CEO, the Financial Services Forum
  - Keynote Speaker—Mr. Ben Stein; Actor, Author, Economist, Lawyer, Teacher, Expert on Finance.
- Four Concurrent Breakout Sessions.
- Congressional Reception and Dinner.
  - Remarks by Members of Congress [invited]:
  - The Honorable William Frist, MD, Majority Leader, United States Senate.
  - The Honorable John Boehner, Majority Leader, United States House of Representatives.
  - The Honorable Michael Enzi, Chairman, Senate Committee on Health, Education, Labor and Pensions.
  - The Honorable Edward Kennedy, Ranking Member, Senate Committee on Health, Education, Labor and Pensions.

Day 2—Thursday, March 2, 2006

- Breakfast with Congressional Speakers [invited].
  - The Honorable Charles Grassley, Chairman, Senate Finance Committee.
  - The Honorable Michael Oxley, Chairman, House Financial Services Committee.
- Keynote Speaker.
  - The Honorable Richard B. Cheney, Vice President of the United States of America.
- Four Concurrent Breakout Sessions.
- Plenary Session—Reports from the Breakout groups.
- Luncheon and Closing Plenary Session.
  - Closing Remarks, Secretary Elaine L. Chao.

Signed at Washington, DC, this 15th day of February, 2006.

Ann Combs,

Assistant Secretary of Labor, Employee Benefits Security Administration.

[FR Doc. E6–2489 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,677]

Avanex Corporation, Fremont, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on January 19, 2006 in response to a petition filed by a company official on behalf of workers at Avanex Corporation, Fremont, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 30th day of January, 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2481 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,687]

Barry Controls D/I, Camden, AR; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on January 23, 2006 in response to a petition filed by a state workforce agent on behalf of workers at Barry Controls D/I, Camden, Arkansas.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 3rd day of February, 2006.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2482 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,615]

Bristol Compressors, Inc., a Division of Johnson Controls, Bristol, VA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on January 11, 2006 in response to a worker petition filed by a company official on behalf of workers at Bristol Compressors, Inc., a division of Johnson Controls, Bristol, Virginia.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 1st day of February 2006.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2479 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than March 6, 2006.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than March 6, 2006.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC this 7th day of February 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 1/23/06 and 1/27/06]

TA–W	Subject firm (Petitioners)	Location	Date of institution	Date of petition
58685	Delta Faucet Company, (Comp)	Chickasha, OK	01/23/06	01/19/06
58686	Signet Armorlite, Inc., (Comp)	San Marcos, CA	01/23/06	01/20/06
58687	Barry Controls, (State)	Camden, AR	01/23/06	01/20/06
58688	Novar Controls, (Comp)	Murfreesboro, TN	01/23/06	01/20/06
58689	LaSalle Labs, (Comp)	Little Falls, NY	01/23/06	01/20/06
58690	Weyerhaeuser, (State)	Wright City, OK	01/23/06	01/20/06
58691	Molding, Tooling and Design, Inc., (State)	Saco, ME	01/24/06	01/13/06
58692	Unique Balance, (IAM)	Dubuque, IA	01/24/06	01/23/06
58693	Lake County Greenhouse Corp., (Comp)	Crown Point, IN	01/24/06	01/14/06
58694	Doranco, (State)	Mansfield, MA	01/24/06	01/20/06
58695	American Truetzschler, Inc., (Comp)	Charlotte, NC	01/24/06	01/13/06
58696	Fingirs, (State)	Camarillo, CA	01/24/06	01/03/06
58697	Maxine Swim Group, (State)	Commerce, CA	01/24/06	01/04/06
58698	Andover Industries, (Wkrs)	Andover, OH	01/24/06	12/30/06
58699	B.A.G. Corporation, (Comp)	Sulphur Springs, TX	01/24/06	01/13/06
58700	Deutsch Engineered Connecting Devices, (Wkrs).	Hemet, CA	01/24/06	01/23/06
58701	Taylor Precision Products, (Comp)	Las Cruces, NM	01/24/06	01/23/06
58702	Kim Fai, Inc., (Wkrs)	San Francisco, CA	01/25/06	01/19/06
58703	TI Automotive, (Comp)	Marysville, MI	01/25/06	01/23/06
58704	Brunswick Bowling and Billards Corporation, (Comp).	Muskegon, MI	01/25/06	01/23/06
58705	Daisy Outdoor Products, (Wkrs)	Salem, MO	01/25/06	01/20/06
58706	Donaldson Company, (UAW)	Chillicothe, MO	01/25/06	01/23/06
58707	Zagora Gear Products, Inc., (Comp)	Charlotte, NC	01/25/06	01/09/06

APPENDIX—Continued

[TAA petitions instituted between 1/23/06 and 1/27/06]

TA–W	Subject firm (Petitioners)	Location	Date of institution	Date of petition
58708	Cortina Fabrics, Inc., (Comp)	Swepsonville, NC	01/25/06	01/09/06
58709	Longwood Engineered Products, Inc., (Comp)	Norwich, CT	01/25/06	01/24/06
58710	Tyco Electronics, (Wkrs)	South Pasadena, CA	01/25/06	01/20/06
58711	Scholle Packaging, (Comp)	Rancho Dominguez, CA	01/25/06	01/24/06
58712	TRW, (Comp)	Jackson, MI	01/25/06	01/18/06
58713	A.T. Cross Company, (Comp)	Lincoln, RI	01/25/06	01/24/06
58714	Pine Island Sportswear, Ltd., (Comp)	Monroe, NC	01/25/06	01/19/06
58715	Interface Fabrics, (Comp)	East Douglas, MA	01/25/06	01/20/06
58716	IBM, (Wkrs)	Danville, KY	01/25/06	01/24/06
58717	GKN Sinter Metals, (Comp)	Owosso, MI	01/25/06	01/16/06
58718	Schoeller Arca Systems, (union)	Tacoma, WA	01/25/06	01/24/06
58719	Encore Group (The), (Comp)	Noble, OK	01/25/06	01/25/06
58720	Kentucky Derby Hosiery, Inc., (Wkrs)	Mount Airy, NC	01/25/06	01/23/06
58721	Federal Mogul, (IBEW)	Boyertown, PA	01/25/06	01/25/06
58722	Berger Company, (Wkrs)	Atchison, KS	01/26/06	01/25/06
58723	Elliott Turbo Machinery Co., (Wkrs)	Jeannette, PA	01/26/06	01/16/06
58724	Sanford North America, (State)	Santa Monica, CA	01/26/06	01/25/06
58725	Rutgers Organics Corporation, (Comp)	State College, PA	01/26/06	01/26/06
58726	Nelson Acquisition, LLC, (Wkrs)	Logansport, IN	01/26/06	01/26/06
58727	Hollister, (UAW)	Kirksville, MO	01/26/06	01/25/06
58728	U.S. Security Associates, (Wkrs)	Bath, PA	01/26/06	01/20/06
58729	York Casket, (Union)	Lynn, IN	01/27/06	01/25/06
58730	Nestle Waters North America, (Wkrs)	Brea, CA	01/27/06	01/24/06
58731	Hospital Specialty Company, (State)	Tempe, AZ	01/27/06	01/25/06
58732	Jesco Athletic Company, (Wkrs)	Williamsport, PA	01/27/06	01/26/06
58733	Invensys, (Wkrs)	Mansfield, OH	01/27/06	01/26/06
58734	Conflandey, Inc., (Wkrs)	Whiteville, NC	01/27/06	01/26/06

[FR Doc. E6–2484 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,588]

EIC Corporation, Fremont, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on January 6, 2006, in response to a worker petition filed by the State of California on behalf of workers at EiC Corporation, Fremont, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 3rd day of February 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2478 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than March 6, 2006.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than March 6, 2006.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 13th day of February 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 1/30/06 and 2/3/06]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
58735	Frank Morrow Co. (Comp)	Providence, RI	01/30/06	01/27/06
58736	Honeywell Chemicals (Comp)	Claymont, DE	01/30/06	01/24/06
58737	Plymouth Rubber Co. (Comp)	Canton, MA	01/30/06	01/27/06
58738	John Hancock (State)	Boston, MA	01/30/06	01/27/06
58739	American Sunroof Co. (State)	Lansing, MI	01/30/06	01/26/06
58740	Jasc Software/Corel Software (State)	Eden Prairie, MN	01/30/06	01/27/06
58741	Singer Hosiery Mills, Inc. (Comp)	Thomasville, NC	01/30/06	01/25/06
58742	Johnson Controls, Inc. (Comp)	Jefferson City, MO	01/30/06	01/27/06
58743	Getronics (Wkrs)	Tampa, FL	01/30/06	01/25/06
58744	Omco Cast Metals, Inc. (GMP)	Winchester, IN	01/30/06	01/26/06
58745	Duffy Tool and Stamping (Union)	Muncie, IN	01/30/06	01/27/06
58746	U.S. Repeating Arms Co. (Union)	New Haven, CT	01/30/06	01/30/06
58747	Cone Denim LLC (Comp)	Greensboro, NC	01/31/06	01/27/06
58748	Gala Printing Co. (Comp)	Spartanburg, SC	01/31/06	01/25/06
58749	Jackson Products, Inc. (Comp)	Tonawanda, NY	01/31/06	01/23/06
58750	Robert Bosch Tool Corp. (State)	Heber Springs, AR	01/31/06	01/30/06
58751	Gerber Plumbing Fixtures (Union)	Kokomo, IN	01/31/06	01/30/06
58752	Claireson Manufacturing Co. (State)	Forrest City, AR	01/31/06	01/30/06
58753	Koch Industries—Invista (Wkrs)	Waynesboro, VA	01/31/06	01/27/06
58754	Allegheny Color Corporation (Comp)	Ridgway, PA	01/31/06	01/30/06
58755	Freightline of Portland, LLC (Union)	Portland, OR	01/31/06	01/30/06
58756	Wagner Knitting, Inc. (Comp)	Lowell, NC	01/31/06	01/30/06
58757A	Swarovski North America Limited (Comp)	Cranston, RI	01/31/06	01/30/06
58757	Swarovski North America Limited (Comp)	Cranston, RI	01/31/06	01/30/06
58758	Sony Direct View Set Assembly (Wkrs)	Mt. Pleasant, PA	01/31/06	01/31/06
58759	Buckingham Galleries (State)	New Hartford, CT	01/31/06	01/30/06
58760	Olympic Laser Processing (Comp)	Belleville, MI	01/31/06	01/31/05
58761	Carm Newsome Hosiery (Comp)	Fort Payne, AL	01/31/06	01/24/06
58762	Agilent Technologies, Inc. (Wkrs)	Colorado Springs, CO	01/31/06	01/31/06
58763	Spartech Polycom (Wkrs)	Washington, PA	01/31/06	01/31/06
58764	Enduroglas, LLC (Wkrs)	Manistee, MI	01/31/06	01/18/06
58765	J.G. Garment (UNITE)	Bailey, NC	02/01/06	01/31/06
58766	Filtrona (State)	Phoenix, AZ	02/01/06	01/31/06
58767	Houston Hosiery Mills (Comp)	Valdese, NC	02/01/06	01/25/06
58768	O'Mara Incorporated (Comp)	Rutherford College, NC	02/01/06	01/26/06
58769	American Medical Devices (State)	Dartmouth, MA	02/01/06	02/01/06
58770	Thomasville (Wkrs)	Conover, NC	02/01/06	02/01/06
58771	Richmond Yarns, Inc. (Comp)	Ellerbe, NC	02/01/06	01/31/06
58772	PGP Corporation (Comp)	Detroit, MI	02/01/06	02/01/06
58773	Perfection Tool and Mold (Comp)	Dayton, OH	02/01/06	02/01/06
58774	Innovex, Inc. (State)	Litchfield, MN	02/02/06	02/01/06
58775	Herrin Maytag Laundry Products (State)	Herrin, IL	02/02/06	02/01/06
58776	Flynn Enterprises, LLC (Wkrs)	Elkton, KY	02/02/06	01/27/06
58777	JDS Uniphase, Inc. (Wkrs)	Allentown, PA	02/02/06	01/23/06
58778	Cotton Boutique, Inc. (Wkrs)	Allentown, PA	02/02/06	01/31/06
58779	Moldex Tool (Wkrs)	Meadville, PA	02/02/06	02/02/06
58780	Direct Source Industries (Wkrs)	San Francisco, CA	02/03/06	02/02/06
58781	Nashua Corporation (Comp)	Merrimack, NH	02/03/06	01/30/06
58782	Ametek Commercial (Comp)	Kent, OH	02/03/06	01/31/06
58783	Mohon International, Inc. (Union)	Paris, TN	02/03/06	02/02/06
58784	Moretz, Inc. (Comp)	Newton, NC	02/03/06	02/02/06
58785	Saint-Gobain Calmar (Comp)	City of Industry, CA	02/03/06	02/03/06
58786	PPS Group, LLC (Comp)	City of Industry, CA	02/03/06	02/03/06

[FR Doc. E6–2495 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended, (19 U.S.C. 2273), the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the periods of January and February 2006.

In order for an affirmative determination to be made and a certification of eligibility to apply for directly-impacted (primary) worker adjustment assistance to be issued, each

of the group eligibility requirements of section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made and a certification of eligibility to apply for worker adjustment assistance as an adversely affected secondary group to be issued, each of the group eligibility requirements of section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either:

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of section 246(a)(3)(A)(ii) of the Trade Act must be met.

I. Whether a significant number of workers in the workers' firm are 50 years of age or older.

II. Whether the workers in the workers' firm possess skills that are not easily transferable.

III. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued; the date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of (a)(2)(A) (increased imports) of Section 222 have been met.

TA–W–58,545; Garner Automotive Electrical, Inc., Manufacturing Plant, Lexington, TN: December 23, 2004.

TA–W–58,545A; Garner Automotive Electrical, Inc., Administrative Office, Bartlett, TN: December 23, 2004.

TA–W–58,548; Keeler Brass Company, Subsidiary of FKI, PLC, Grand Rapids, MI: January 29, 2006.

TA–W–58,596; T.I. Industries, Inc., Lexington, NC: January 3, 2005.

TA–W–58,605; NVF Company, Yorklyn, DE: January 10, 2005.

TA–W–58,606; Osram Sylvania, Materials Div./Subsidiary of Siemens Corp., Warren, PA: February 7, 2006.

TA–W–58,622; Springs Global US, Inc., Charles D. Owen Mfg., Swannanoa, NC: January 12, 2005.

TA–W–58,627; Char Broil, LLC, Georgia, Inc.—D/B/A Bradley Select, Columbus, GA: January 4, 2005.

TA–W–58,627A; Char Broil, LLC, Georgia, Inc.—D/B/A Bradley Select, Opelika, AL: January 4, 2005.

TA–W–58,644; Corinthian, Inc., Sewing Department, Corinth, MS: January 12, 2005.

TA–W–58,714; Pine Island Sportswear, Ltd., Monroe, NC: January 19, 2005.

TA–W–58,275; Barth and Dreyfuss, Chino Div., Ontario, CA: October 26, 2004.

TA–W–58,448; Exopack, LLC, Monticello, AR: December 1, 2004.

TA–W–58,517; ISG Weirton, Inc., Formerly, Weirton Steel Corp, Weirton, WV: December 12, 2004.

TA–W–58,534; Robert Warren DBA Lance International, North Haven, CT: December 21, 2004.

The following certifications have been issued. The requirements of (a)(2)(B) (shift in production) of Section 222 have been met.

TA–W–58,288; Eastalco Aluminum Company, Subsidiary of Alcoa, Frederick, MD: November 7, 2004.

TA–W–58,288A; Eastalco Aluminum Company, Subsidiary of Alcoa, Baltimore, MD: November 7, 2004.

TA–W–58,688; Novar Controls, A Division of Honeywell Int.—Leased Workers of Manpower, Murfreesboro, TN: January 20, 2005.

TA–W–58,433; Consolidated Metco, Inc., Rivergate Division, Portland, OR: November 22, 2005.

TA–W–58,636; Smith and Nephew Endoscopy, Endoscopy Division, Andover, MA: January 11, 2005.

TA–W–58,722; Berger Company, Atchison, KS: January 25, 2005.

TA–W–58,685; Delta Faucet Company, Chickasha, OK: January 19, 2005.

TA–W–58,477; Dolce, Inc., Los Angeles, CA: November 29, 2006.

TA–W–58,719; Encore Group (The), United Design Division, Noble, OK: January 25, 2005.

The following certification has been issued. The requirement of supplier to a trade certified firm has been met.

None.

The following certification has been issued. The requirement of downstream producer to a trade certified firm has been met.

None.

Negative Determinations For Worker Adjustment Assistance

In the following cases, the investigation revealed that the criteria

for eligibility have not been met for the reasons specified.

The investigation revealed that criterion (a)(2)(A)(I.A) and (a)(2)(B)(II.A) (no employment decline) has not been met.

TA–W–58,582; Esselte Business Corporation, Union, MO.

TA–W–58,695; American Truetzschler, Inc., Charlotte, NC.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B) (shift in production to a foreign country) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B) (No shift in production to a foreign country) have not been met.

TA–W–58,405; NSK Corporation, Ann Arbor, MI.

TA–W–58,505; Rock-Tenn Company, Piedmont, SC.

TA–W–58,558,; Thomas C. Wilson, Inc., Long Island City, NY.

TA–W–58,560; Bennett Forest Industries, Inc., Elk City Sawmill, Grangeville, ID.

The investigation revealed that criteria (a)(2)(A)(I.C.) (Increased imports and (a)(2)(B)(II.C) (has shifted production to a foreign country) have not been met.

None.

The workers firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA–W–58,516; Hurley International, LLC, Costa Mesa, CA.

TA–W–58,546; Hamilton Sundstrand, Rockford Customer Service Repair Division, Rockford, IL.

TA–W–58,599; TRX Fulfillment Services, Atlanta, GA.

TA–W–58,676; Mainzer Minton Co., Hackettstown, NJ.

TA–W–58,730; Nestle Waters North America, Brea Division, Brea, CA.

The investigation revealed that criteria (2) has not been met. The workers firm (or subdivision) is not a supplier or downstream producer to trade-affected companies.

TA–W–58,516; Hurley International, LLC, Costa Mesa, CA.

TA–W–58,546; Hamilton Sundstrand, Rockford Customer Service Repair Division, Rockford, IL.

TA–W–58,599; TRX Fulfillment Services, Atlanta, GA.

TA–W–58,676; Mainzer Minton Co., Hackettstown, NJ.

TA–W–58,730; Nestle Waters North America, Brea Division, Brea, CA.

Negative Determinations For Alternative Trade Adjustment Assistance

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of section 246(a)(3)(A)(ii) of the Trade Act must be met.

In the following cases, it has been determined that the requirements of section 246(a)(3)(ii) have not been met for the reasons specified.

Since the workers are denied eligibility to apply for TAA, the workers cannot be certified eligible for ATAA.

TA–W–58,532; Imenco Corp., Bay City, MI.

TA–W–58,516; Hurley International, LLC, Costa Mesa, CA.

TA–W–58,546; Hamilton Sundstrand, Rockford Customer Service Repair Division, Rockford, IL.

TA–W–58,599; TRX Fulfillment Services, Atlanta, GA.

TA–W–58,676; Mainzer Minton Co., Hackettstown, NJ.

TA–W–58,730; Nestle Waters North America, Brea Division, Brea, CA.

TA–W–58,405; NSK Corporation, Ann Arbor, MI.

TA–W–58,505; Rock-Tenn Company, Piedmont, SC.

TA–W–58,558,; Thomas C. Wilson, Inc., Long Island City, NY.

TA–W–58,560; Bennett Forest Industries, Inc., Elk City Sawmill, Grangeville, ID.

TA–W–58,582; Esselte Business Corporation, Union, MO.

TA–W–58,695; American Truetzschler, Inc., Charlotte, NC.

The Department as determined that criterion (1) of section 246 has not been met. Workers at the firm are 50 years of age or older.

TA–W–58,477; Dolce, Inc., Los Angeles, CA.

The Department as determined that criterion (2) of section 246 has not been met. Workers at the firm possess skills that are easily transferable.

TA–W–58,288; Eastalco Aluminum Company, Subsidiary of Alcoa, Frederick, MD.

TA–W–58,288A; Eastalco Aluminum Company, Subsidiary of Alcoa, Baltimore, MD.

TA–W–58,688; Novar Controls, A Division of Honeywell Int.—Leased Wkrs of Manpower, Murfreesboro, TN

TA–W–58,685; Delta Faucet Company, Chickasha, OK

The Department as determined that criterion (3) of section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

I hereby certify that the aforementioned determinations were issued during the months of January and February 2006. Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: February 13, 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–2500 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,145]

General Cable, A/K/A Nextgen Fiber Optics, A Subsidiary Of General Cable Technologies Corporation, Datacom Business Team Dayville, Connecticut; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on February 23, 2005, applicable to workers of General Cable, a subsidiary of General Cable Technologies Corp., Datacom Business Team, Dayville, Connecticut. The notice was published in the **Federal Register** on December 15, 2005 (70 FR 74369).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of fiber communication cable.

New information shows that General Cable purchased NextGen Fiber Optics in July 2005 and that some workers separated from employment at the subject firm had their wages reported under a separate unemployment insurance (UI) tax account for NextGen Fiber Optics.

Accordingly, the Department is amending the certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of General Cable, a subsidiary of General Cable Technologies Corporation, Datacom Business Team, Dayville, Connecticut, who were adversely affected by increased customer imports.

The amended notice applicable to TA–W–58,145 is hereby issued as follows:

All workers of General Cable, a/k/a NextGen Fiber Optics, a subsidiary of General Cable Technologies Corporation, Data Com Business Team, Dayville, Connecticut, who became totally or partially separated from employment on or after October 17, 2004, through November 21, 2007, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 6th day of February 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2493 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–57,700]

Joy Technologies, Inc. DBA Joy Mining Machinery Mt. Vernon Plant, Mt. Vernon, Illinoi; Notice of Negative Determination on Reconsideration

On November 16, 2005, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The Notice of determination regarding Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) was published in the **Federal Register** on December 15, 2005 (70 FR 74373).

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 483, (''Union'') filed a petition on behalf of workers producing underground mining machinery (*i.e.* shuttle cars, electrical motors, gearboxes, and armored face conveyors) at the subject facility. Workers are not separately identifiable by product line.

The initial investigation revealed that sales and employment at the subject facility increased in 2004 from 2003 levels, that sales remained stable in January through July 2005 over the corresponding 2004 period, and that employment increased during January through July 2005 over the corresponding 2004 period. Company-wide sales increased during January through July 2005 from January through July 2005 levels.

The investigation also revealed that the subject firm did not import articles like or directly competitive with those produced at the subject firm or shift production abroad. The Department determined that the worker separations at the subject firm are attributable to the firm's shift in production from the subject facility to another domestic production facility.

In a letter dated November 3, 2005, two workers and the Union requested administrative reconsideration. The request stated that the subject facility is ''an upstream supplier to the Joy Mining Machinery facility'' located in Franklin, Pennsylvania and alleged that component production is being shifted to Mexico.

While the Union had filed the petition as primarily-affected (affected by imports or production shift of articles produced at the subject facility), the request for reconsideration is based on a secondarily-affected position (affected by loss of business as a supplier/assembler/finisher of products or components for a TAA certified firm). Although the request for reconsideration is beyond the scope of the petition, the Department conducted an investigation to address the workers' and Union's allegations.

As part of the reconsideration investigation, the Department contacted the petitioning workers, Union representatives, and the subject company for additional information and clarification of previously-submitted information.

Joy Mining Machinery, Franklin, Pennsylvania, was certified for TAA on January 19, 2000 (expired January 19, 2002). Because the investigation revealed that employment, sales and production levels at the Franklin, Pennsylvania facility increased during relevant period and TAA certification for Joy Mining Machinery, Franklin, Pennsylvania had expired prior to the relevant period, the workers cannot be certified for TAA as secondarily-affected.

The reconsideration investigation also revealed that the subject company does not have a Mexico facility which produces articles which are like or directly competitive with those produced at the subject facility, that the work at issue is temporary work which was assigned to several subject company facilities (including the Mt. Vernon, Illinois facility) to help meet peak demand, and that the ''overflow'' work was for the production of articles not normally produced at the subject facility. The Department also confirmed that work shifted from the subject facility to an affiliated production facility in Kentucky.

Conclusion

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Joy Technologies, Inc., dba Joy Mining Machinery, Mt. Vernon Plant, Mt. Vernon, Illinois.

Signed at Washington, DC, this 19th day of January 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance Assistance.

[FR Doc. E6–2475 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,786]

PPS Group, LLC (Prestige Staffing), City of Industry, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 3, 2006 in response to a worker petition filed by a company official on behalf of workers at PPS Group, LLC (Prestige Staffing), City of Industry, California.

The petitioning group of workers is covered by an earlier petition (TA–W–58,785) filed on February 3, 2006 that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 7th day of February 2006.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2501 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W–58,725]

Rutgers Organics Corporation, State College, PA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on January 26, 2006, in response to a worker petition filed by a company official on behalf of workers at Rutgers Organics Corporation, State College, Pennsylvania.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 31st day of January, 2006.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2483 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,445, TA–W–54,445A]

Scholle Corporation, Scholle Custom Packaging, Manistee, MI; Including an Employee of Scholle Corporation, Scholle Custom Packaging, Manistee, MI, Located in Marietta, GA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility to Apply for Worker Adjustment Assistance on May 26, 2004, applicable to workers of Scholle Corporation, Scholle Custom Packaging, Manistee, Michigan. The notice was published in the **Federal Register** on June 17, 2004 (69 FR 33942).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. New information shows that a worker separation occurred involving an employee of the Scholle Corporation, Scholle Custom Packaging, Manistee, Michigan located in Marietta, Georgia. Mr. Scott Fidler provided sales and customer support services for the manufacture of dry liners, bulk bags and liquid IBC produced by the subject company.

Based on these findings, the Department is amending this certification to include an employee of Scholle Corporation, Scholle Custom Packaging, Manistee, Michigan located in Marietta, Georgia.

The intent of the Department's certification is to include all workers of Scholle Corporation, Scholle Custom Packaging, Manistee, Michigan who were adversely affected by increased customer imports.

The amended notice applicable to TA–W–54,445 is hereby issued as follows:

All workers of Scholle Corporation, Scholle Custom Packaging, Manistee, Michigan (TA–W–54,445) and including an employee of Scholle Corporation, Scholle Custom Packaging, Manistee, Michigan, located in Marietta, Georgia (TA–W–54,445A), who became totally or partially separated from employment on or after March 5, 2003, through May 26, 2006, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 7th day of February 2006.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2487 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,333]

Sonoco Products Company, Chester, VA; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Sonoco Products Company, Chester, Virginia. The application did not contain new information supporting a conclusion that the determination was erroneous, and also did not provide a justification for reconsideration of the determination that was based on either mistaken facts or a misinterpretation of facts or of the law. Therefore, dismissal of the application was issued.

TA–W–58,333; Sonoco Products Company, Chester, Virginia (February 10, 2006).

Signed at Washington, DC this 13th day of February 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–2494 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–57,987]

Sun Chemical Performance Pigments Division, Cincinnati, OH; Notice of Revised Determination of Alternative Trade Adjustment Assistance on Reconsideration

By letter dated January 27, 2006, a petitioner requested administrative reconsideration regarding Alternative Trade Adjustment Assistance (ATAA). The certification for Trade Adjustment Assistance (TAA) was signed on January 6, 2006. The Notice of determination was published in the **Federal Register** on January 24, 2006 (71 FR 3887).

The initial investigation determined that subject worker group possess skills that are easily transferable.

A careful review reveals that there are few comparable jobs in the local commuting area which require those skills possessed by the subject worker group. At least five percent of the workforce at the subject from is at least fifty years of age. Competitive conditions within the industry are adverse.

Conclusion

After careful review of the additional facts obtained on reconsideration, I conclude that the requirements of section 246 of the Trade Act of 1974, as amended, have been met for workers at the subject firm.

In accordance with the provisions of the Act, I make the following certification:

All workers of at Sun Chemical, Performance Pigments Division, Cincinnati, Ohio, who became totally or partially separated from employment on or after September 12, 2004 through January 6, 2008, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under section 246 of the Trade Act of 1974.

Signed in Washington, DC, this 8th day of February 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2476 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,487]

U.S. Airways, Inc.; Greentree Reservations, Pittsburgh, PA; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at U.S. Airways, Inc., Greentree Reservations, Pittsburgh, Pennsylvania. The application did not contain new information supporting a conclusion that the determination was erroneous, and also did not provide a justification for reconsideration of the determination that was based on either mistaken facts or a misinterpretation of facts or of the law. Therefore, dismissal of the application was issued.

TA–W–58,487; U.S. Airways, Inc., Greentree Reservations, Pittsburgh, Pennsylvania, (February 10, 2006).

Signed at Washington, DC this 13th day of February 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–2498 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,404]

Weston Foods Ltd., West Hazelton, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, an investigation was initiated on November 23, 2005 in response to a petition filed on behalf of workers at Weston Foods, Ltd., West Hazelton, Pennsylvania (TA–W–58,404).

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 8th day of February, 2006.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2497 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–57,397]

Wyeth; Wyeth Pharmaceuticals Health Care Division, Rouses Point, New York; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 20, 2005, applicable to workers of Wyeth, Wyeth Pharmaceuticals, Health Care Division, Rouses Point, New York. The notice was published in the **Federal Register** on August 26, 2005 (70 FR 50412). The workers are engaged in the production of over the counter medicine.

New information provided by the petitioners show their intention was to apply for all available Trade Act benefits at the time of the filing. Therefore, the Department has made a decision to investigate further to determine if the workers are eligible to apply for Alternative Trade Adjustment Assistance.

Information obtained from the company states that a significant number of workers of the subject firm are age 50 or over, workers have skills that are not easily transferable, and conditions in the industry are adverse.

Review of this information shows that all eligibility criteria under Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended have been met for workers at the subject firm.

Accordingly, the Department is amending the certification to reflect its finding.

The amended notice applicable to TA–W–57,987 is hereby issued as follows:

All workers of Wyeth, Wyeth Pharmaceuticals Division, Health Care Division, Rouses Point, New York, who became totally or partially separated from employment on or after June 3, 2004 through July 20, 2007, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974 and are also eligible to apply for Alternative Trade Adjustment Assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 8th day of February 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–2491 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Modification to Unemployment Insurance (UI) Benefit Accuracy Measurement (BAM) Investigative Procedures; Submitted for Public Comment and Recommendations

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration (ETA), Office of Workforce Security, is soliciting comments concerning the proposed modification of the case investigation procedures for the BAM data collection. A copy of the proposed information collection request (ICR) can be obtained directly by accessing this Web site: *http://www.doleta.gov/Performance/guidance/OMBControlNumber.cfm.*

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before April 24, 2006.

ADDRESSES: Andrew W. Spisak, U.S. Department of Labor, ETA, Room S–4522, 200 Constitution Avenue, NW., Washington, DC 20210, Phone: 202–693–3196 (This is not a toll-free number), Fax: 202–693–3975, e-mail: *spisak.andrew@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

During fiscal year (FY) 2003, the Department of Labor Office of the

Inspector General (OIG) conducted an audit of the BAM program. The OIG final report (*OIG Report Number 22–03–009–03–315, September 30, 2003*) concluded that the BAM program is methodologically sound and accurately detects and reports UI payment errors; however, the BAM case investigation procedures potentially miss overpayments caused by unreported earnings during the claimant's benefit year. The OIG recommended that the BAM audit procedures be modified to include crossmatching UI beneficiaries' Social Security Numbers (SSN) against the state's intrastate wage records or the State Directory of New Hires (SDNH).

The use of the state wage record files was considered when BAM was designed but was not included in the methodology because the data are not available in time to insure the completion of BAM case investigations within the 90-day timeliness standard which was set to insure that information bearing on the propriety of UI payments is accurate and contemporaneous. Use of the SDNH as a BAM audit resource is encouraged but not required by the current BAM State Operations Handbook (ET Handbook No. 395, 4th ed., chapter VI, p. 5):

The potential for claimant employment during the benefit year should be verified using the State Directory of New Hires where available. This new hire directory is mandatory under section 453A of the Social Security Act, and BAM should access this resource when possible.

Following the OIG's recommendation, ETA conducted a pilot test of wage record and SDNH crossmatches as part of the BAM case investigation methodology between August 2004 and June 2005. Seven states participated—Alabama, Idaho, Illinois, Maine, Missouri, South Carolina, and Washington. The pilot showed that use of either the wage record or SDNH crossmatch resulted in increased detection of UI overpayments. Use of wage record data resulted in an estimated increase of 0.36 percentage points in the overpayment rate, and use of the state new hire data added an estimated 0.45 percentage points to the overpayment rate. The complete BAM Crossmatch Pilot Final Report is at *http://workforcesecurity.doleta.gov/unemploy/pdf/xmatch_pilot_report.pdf.*

The states that participated in the BAM crossmatch pilot reported no significant implementation or operational issues.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Based on the results of the pilot, ETA concluded that of the two methods tested, crossmatching BAM cases with the new hire directory is superior for the following reasons.

- Investigating cases identified by the state wage record crossmatch costs a little more than twice as much as investigating cases identified by the new hire directory.
- Pilot results indicated that the new hire directory crossmatch is somewhat more effective than the wage record crossmatch in detecting additional overpayment errors.
- The wage record crossmatch would require the revision of BAM payment accuracy rates to reflect the results of the post-audit. Chapter VI of ET Handbook No. 395 requires that ''a minimum of 98 percent of cases for the year must be completed within 120 days of the ending date of the Calendar Year.'' Final BAM data could not be published until all of the wage record follow-up audits are completed, which could be several months after the 120-day close-out deadline for the original BAM investigations. In comparison, because the new hire directory crossmatches are concurrent with the rest of the BAM investigation, the BAM data publication schedule should not be adversely affected.
- Implementation of a post-audit requirement would also likely have a negative impact on BAM case completion timeliness. As each quarter's cases are crossmatched with the most recent wage records, BAM investigators would have to follow-up on hits for several completed cases while they are conducting audits for current cases. This would likely delay completion of the on-going sample cases. The pilot states that conducted new hire directory crossmatches as part of their BAM investigations reported no change in their case completion timeliness.

In August 2004, Public Law 108–295, section 3, authorized state workforce security agencies to access the National Directory of New Hires (NDNH) ''for purposes of administering an unemployment compensation program under Federal or State law''. During FY 2005, the Texas, Utah, and Virginia UI agencies participated in a pilot test which matched UI payments against the NDNH data. The results of this pilot indicate that because the NDNH includes data for out-of-state, Federal civilian, and military employment, and in-state hires by some multi-state employers, it is a more effective tool in identifying potentially disqualifying employment than the SDNH, which includes only intrastate employment data.

According to the regulation establishing a quality control program for UI, each state shall:

Perform the requirements of this section in accordance with instructions issued by the Department, pursuant to § 602.30(a) of this part, to ensure standardization of methods and procedures in a manner consistent with this part [20 CFR 602.21].

Further, each state shall:

Complete prompt and in-depth case investigations to determine the degree of accuracy and timeliness in the administration of the State UI law and Federal programs with respect to benefit determinations, benefit payments, and revenue collections; and conduct other measurements and studies necessary or appropriate for carrying out the purposes of this part [20 CFR 602.21].

In order to enhance the ability of BAM to detect erroneous UI benefit payments and to ensure that each state follows standard methods and procedures with respect to case investigations, ETA proposes to modify ET Handbook No. 395, Chapter VI (Investigative Procedures), to incorporate crossmatches with the NDNH into the BAM case investigation methodology:

Section 453(i) of the Social Security Act [42 U.S.C. 653(i)] directs the Secretary of Health and Human Services to maintain an automated database of the State Directory of New Hires records in the National Directory of New Hires (NDNH). Public Law 108–295, section 3,

authorizes state workforce security agencies to access the NDNH ''for purposes of administering an unemployment compensation program under Federal or State law''. BAM must utilize this resource as part of the audit of paid claims to detect and investigate claimant employment during the benefit year to determine its effect on the claimant's eligibility for UI.

This requirement will be effective with BAM batch 200801 (sampling week beginning December 30, 2007, and ending January 5, 2008). States may begin to use the NDNH crossmatch as part of their BAM paid claims investigations prior to the effective date. States not participating in the NDNH crossmatch prior to the effective date may crossmatch BAM paid claims sample cases with their SDNH. However, once the state begins to access the NDNH, they must utilize the NDNH as part of the BAM paid claims investigation instead of the SDNH. All BAM paid claims investigations must include the NDNH crossmatch by the effective date (BAM sampling batch 200801).

BAM auditors will conduct fact-finding for those BAM cases in which the claimant's SSN matches one or more records in the NDNH (or SDNH) to determine if there are any issues affecting the claimant's eligibility for UI benefits for the sampled week. Agencies will conduct fact-finding according to the procedures in ET Handbook No. 395.

Pending approval of this information collection request by the Office of Management and Budget, ETA will issue technical specifications for crossmatching BAM cases with the new hire directories. BAM program managers will be responsible for identifying the organizational unit within their state that administers their state's participation in the NDNH or manages their SDNH and for determining the procedures needed to link BAM data with the NDNH or SDNH data.

State agencies that currently use their state's wage records as part of the BAM investigation may continue to do so. However, the use of wage records as part of the BAM investigation is not required.

Type of Review: Revision of a currently approved collection.

Agency: Employment and Training Administration.

Title: Modification to Unemployment Insurance Benefit Accuracy Measurement Investigative Procedures.

OMB Number: 1205–0245.

Agency Form Number: BAM State Operations Handbook (ET Handbook No. 395, 4th ed.).

Recordkeeping: States are required to follow their state laws regarding public record retention in retaining records for this proposed data collection system.

Affected Public: State Workforce Agencies (Primary), individuals, businesses, and not-for-profit institutions.

Total Respondents: 188,984 (unchanged).

Estimated Total Burden Hours: 429,805 (+6,562 from current burden).

Total Burden Cost (capital/startup): $38,411 ($739 per agency, annualized over 3-year life cycle).

Total Burden Cost (operating/maintaining): $504,000 (unchanged).

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 6, 2006.

Cheryl Atkinson,

Administrator, Office of Workforce Security.

[FR Doc. E6–2490 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Regulations Governing the Administration of the Longshore and Harbor Workers' Compensation Act (ESA–100, LS–200, LS–201, LS–203, LS–204, LS–262, LS–267, LS–271, LS–274, LS–513). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before April 24, 2006.

ADDRESSES: Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0418, fax (202) 693–1451, E-mail *bell.hazel@dol.gov*. Please use only one method of transmission for comments (mail, fax, or E-mail).

SUPPLEMENTARY INFORMATION:

I. *Background:* The Office of Workers' Compensation Programs (OWCP) administers the Longshore and Harbor Workers' Compensation Act (LHWCA), as amended (20 CFR 702.162, 702.174, 702.175, 20 CFR 702.242, 20 CFR 702.285, 702.321, 702.201, and 702.111) as it pertains to the provision of benefits to workers injured in maritime employment on the navigable waters of the United States or in an adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel, as well as coverage extended to certain other employees. The Longshore Act administration requirements include: Payment of compensation liens incurred by Trust Funds; certification of exemption and reinstatement of employers who are engaged in the building, repairing, or dismantling of exclusively small vessels; settlement of cases under the Act; reporting of earnings by injured claimants receiving benefits under the Act; filing applications for relief under second injury provisions; and, maintenance of injury reports under the Act. This information collection is currently approved for use through December 31, 2006.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other

technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor (DOL) seeks extension of approval to collect this information in order to carry out its responsibility to insure that Longshore beneficiaries are receiving appropriate benefits.

Failure to request this information, there would be no way to insure beneficiaries are receiving the correct amount of benefits.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Regulations Governing the Administration of the Longshore and Harbor Workers' Compensation Act.

OMB Number: 1215–0160.

Agency Number: (ESA–100, LS–200, LS–201, LS–203, LS–204, LS–262, LS–267, LS–271, LS–274, LS–513).

Affected Public: Individuals or households, Businesses or other for-profit.

Total Respondents: 185,716.

Total Responses: 185,716.

Frequency: On Occasion and Annually.

Type of Response: Recordkeeping and Reporting.

Estimated Total Burden Hours: 71,376.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $66,571.

Information collection	Annual responses	Average response time (hours)	Annual burden hours
LS–200, Report of Earnings	18,000	0.17	2,440
LS–200, Report of Earnings with no earnings information to report	3,600	0	0
Liens (702.162)	10	0.5	5
Certifications (702.174)	5	0.75	4
Reinstatements (702.175)	2	0.5	1
Settlement Applications (702.242)	5,040	2	10,080
Section 8(f) Payments (702.321)	485	5	2,425
ESA–100 (LS) Annual Report	42,000	0.02	840
LS–271, Application for Self-insurance	20	2	40
LS–274, Report of Injury Experience of Self-Insured Employer	619	1	619
LS–201, Notice of Employee's Injury of Death	5,040	0.25	1,260
LS–513, Report of Payments	619	0.5	309
LS–267, Claimant's Statement	1,456	0.033	48
LS–203, Employee's Claim for Compensation	11,340	0.25	2,835
LS–204, Attending Physician's Supplementary Report	100,800	0.5	50,400
LS–262, Claim for Death Benefits	280	0.25	70
Total	185,716	.....	71,376

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating maintenance): $66,571.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 15, 2006.

Sue Blumenthal,

Acting Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning Employment Standards Administration.

[FR Doc. E6–2455 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–CF–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed reinstatement of the ''Current Population Survey (CPS) Volunteer Supplement.'' A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before April 24, 2006.

ADDRESSES: Send comments to Amy A. Hobby, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212, telephone number 202–691–7628. (This is not a toll free number.)

FOR FURTHER INFORMATION CONTACT: Amy A. Hobby, BLS Clearance Officer, telephone number 202–691–7628. (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The September 2006 CPS Volunteer Supplement will be conducted at the request of the Corporation for National and Community Service, and USA Freedom Corps. The Volunteer Supplement will provide information on the total number of individuals in the U.S. involved in unpaid volunteer activities, measures of the frequency or intensity with which individuals volunteer, types of organizations that facilitate volunteerism, and the activities in which volunteers participate. It will also provide information on civic engagement.

Because the Volunteer Supplement is part of the CPS, the same detailed demographic information collected in

the CPS will be available on respondents to the Supplement. Comparisons of volunteer activities will be possible across characteristics such as sex, race, age, and educational attainment of the respondent. It is intended that the Supplement will be conducted annually, if resources permit, in order to gauge changes in volunteerism.

II. Current Action

Office of Management and Budget clearance is being sought for the CPS Volunteer Supplement. The September 2006 instrument includes some revisions made since the September 2005 instrument. A follow-up question to the ones that determine volunteer status was added to probe for volunteering for religious organizations. A question was added to determine the main activity a volunteer performs for his main organization. Two questions were added to determine if individuals had attended public meetings or worked with neighbors to improve something, and how frequently these events occurred. The questions on volunteering abroad and those asked of people who no longer volunteer were dropped.

Type of Review: Reinstatement, with change, of a previously approved collection for which approval has expired.

Agency: Bureau of Labor Statistics.

Title: CPS Volunteer Supplement.

OMB Number: 1220–0176.

Affected Public: Households.

Total Respondents: 58,000.

Frequency: Annually.

Total Responses: 112,000

Average Time Per Response: 4 minutes.

Estimated Total Burden Hours: 7,467 hours.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 14th day of February, 2006.

Kimberley Hill,

Acting Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. E6–2473 Filed 2–21–06; 8:45 am]

BILLING CODE 4510–24–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 06–04]

Public Information Session Regarding Benin Compact Signing

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: The Millennium Challenge Corporation (''MCC'') will hold a public information meeting on Thursday, February 23, 2006 at the Institute for International Economics in Washington, DC. The meeting will inform interested parties about the MCC Compact with Benin, which will be signed on February 22, 2006. The event is being co-sponsored by MCC and the Center for Global Development. MCC's Chief Executive Officer, Ambassador John J. Danilovich, will be presenting remarks and members of the Benin Transaction Team, from both MCC and Benin, will participate in a panel discussion.

DATES: Thursday, February 23, 2006; from 2–3:30 p.m.

ADDRESSES: Institute for International Economics, 1750 Massachusetts Avenue, NW., Washington, DC 20036–1903.

FOR FURTHER INFORMATION CONTACT: Information on the meeting may be obtained from Erik Rasmussen at (202) 521–3600.

SUPPLEMENTARY INFORMATION: Due to security requirements at the meeting location, all individuals wishing to attend the meeting are encouraged to arrive at least 15 minutes before the meeting begins and must supply photo identification. Those wishing to attend should e-mail Erik Rasmussen at *events@mcc.gov* with the following information: Name, Telephone Number, E-mail address; Affiliation/Company Name.

Dated: February 16, 2006.

Frances C. McNaught,

Vice President, Domestic Relations.

[FR Doc. 06–1629 Filed 2–21–06; 8:45 am]

BILLING CODE 9210–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–317, 50–318, and 72–8]

Calvert Cliffs Nuclear Power Plant, Inc.; Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Notice of Consideration of Approval of Application; Regarding Proposed Merger and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under 10 CFR 50.80 and 72.50 approving the indirect transfer of the Renewed Facility Operating Licenses, which are numbered DPR–53 and DPR–69, for Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, respectively, and the Materials License, which is numbered SNM–2505, for the Calvert Cliffs Independent Spent Fuel Storage Installation, currently held by Calvert Cliffs Nuclear Power Plant, Inc. (CCNPP, Inc.), as owner and licensed operator.

According to an application for approval filed by Constellation Generation Group, LLC (CGG), on behalf of CCNPP Inc., in connection with the merger of CGG's parent company, Constellation Energy Group, Inc. (CEG, Inc.) and FPL Group, Inc. (FPL Group), FPL Group will become a wholly owned subsidiary of CEG, Inc. At the closing of the merger, the former shareholders of FPL Group will own approximately 60% of the outstanding stock of CEG, Inc., and the pre-merger shareholders of CEG, Inc., will own the remaining approximately 40%. In addition, the CEG, Inc., board of directors will be composed of fifteen members, nine of whom will be named by FPL Group, and six of whom will be named by the current CEG, Inc. CCNPP, Inc. will continue to own and operate the facilities and hold the licenses.

No physical changes to the facility or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80 and 72.50, no license, or any right thereunder, shall

be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve the application for the indirect transfer of a license, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i) through (viii).

Requests for a hearing and petitions for leave to intervene should be served upon Mr. Jay M. Gutierrez at Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue, Washington, DC 20004, telephone: 202–739–5466, fax: 202–739–3001, and e-mail *jgutierrez@morganlewis.com;* the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.302 and 2.305.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated January 23, 2006, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 13th day of February 2006.

For the Nuclear Regulatory Commission.

Patrick D. Milano,

Senior Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1618 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–414]

Duke Energy Corporation, North Carolina Power Agency No. 1, Piedmont Municipal Power Agency, Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Renewed Facility Operating License No. NPF–52, issued to Duke Energy Corporation (the licensee), for operation of the Catawba Nuclear Station, Unit 2 located in York County, South Carolina.

The proposed amendment would revise the Technical Specifications and Operating License on a one-time basis, to modify the steam generator tube repair criteria and add more restrictive steam generator primary to secondary leakage limits for end of cycle 14 and operating cycle 15.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's public document room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and

the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner/requestor in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i) through (viii).

A request for a hearing or a petition for leave to intervene must be filed 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; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *hearingdocket@nrc.gov;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent to Ms. Lisa F. Vaughn, Legal Department (PBOSE), 422 South Church Street, Charlotte, NC 28201–1006, attorney for the licensee.

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated December 19, 2005, as supplemented February 2, 2006, which are available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 13th day of February 2006.

For the Nuclear Regulatory Commission.

John Stang,

Senior Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1556 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250 and 50–251]

Florida Power and Light Company, Turkey Point, Units 3 and 4; Notice of Consideration of Approval of Application Regarding Proposed Merger and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under Title 10 of the Code of Federal Regulations (10 CFR), Section 50.80 approving the indirect transfer of the Renewed Facility Operating Licenses, which are numbered DPR–31 and DPR–41, for the Turkey Point Nuclear Plant, Units 3 and 4, currently held by Florida Power and Light Company (FPL), as owner and licensed operator of the Turkey Point Nuclear Plant.

According to an application for approval filed by FPL, FPL Group, Inc., the parent organization of FPL, will merge with a newly created subsidiary of Constellation Energy Group, Inc., and become a wholly owned subsidiary of Constellation Energy. FPL will continue to own and operate the Turkey Point facilities and hold the licenses.

No physical changes to the Turkey Point facilities or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve the application for the indirect transfer of the licenses, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the licenses, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i) through (viii).

Requests for a hearing and petitions for leave to intervene should be served upon M. S. Ross, Managing Attorney, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420 (telephone: 561–691–7126, fax: 561–694–6274, e-mail: *mitch_ross@fpl.com*); the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.302 and 2.305.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated January 20, 2006, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland this 13th day of February 2006.

For the Nuclear Regulatory Commission.

Brendan T. Moroney,

Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1559 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–335 and 50–389]

Florida Power and Light Company; St. Lucie Nuclear Plant; Units 1 and 2; Notice of Consideration of Approval of Application Regarding Proposed Merger and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under Title 10 of the *Code of Federal Regulations* (CFR), Section 50.80 approving the indirect transfer of the Renewed Facility Operating Licenses, which are numbered DPR–67 and NPF–16, for the St. Lucie Nuclear Plant, Units 1 and 2, to the extent currently held by Florida Power and Light Company (FPL), as owner and licensed operator of St. Lucie Unit 1 and co-owner and licensed operator of St. Lucie Unit 2.

According to an application for approval filed by FPL, FPL Group, Inc., the parent organization of FPL, will merge with a newly created subsidiary of Constellation Energy Group, Inc., and become a wholly owned subsidiary of Constellation Energy. FPL will continue to own and operate St. Lucie Unit 1, and continue to own its 85.1 percent ownership interest in and operate St. Lucie Unit 2, and hold the licenses to the extent now held. The other co-owners of St. Lucie Unit 2, Orlando Utilities Commission of the City of Orlando, Florida, and the Florida Municipal Power Agency, are not involved in the proposed transaction.

No physical changes to the St. Lucie facilities or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve the application for the indirect transfer of the licenses, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the licenses, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also

consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i) through (viii).

Requests for a hearing and petitions for leave to intervene should be served upon M. S. Ross, Managing Attorney, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420 (telephone: 561–691–7126, fax: 561–694–6274, e-mail: *mitch_ross@fpl.com*); the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.302 and 2.305.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated January 20, 2006, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 13th day of February 2006.

For the Nuclear Regulatory Commission.

Brendan T. Moroney,

Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1560 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–331]

FPL Energy Duane Arnold, LLC, Duane Arnold Energy Center; Notice of Consideration of Approval of Application Regarding Proposed Merger and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under Title 10 of the Code of Federal Regulations, Section 50.80 approving the indirect transfer of Facility Operating License DPR–49 for the Duane Arnold Energy Center, to the extent currently held by FPL Energy Duane Arnold LLC, as a co-owner and licensed operator of Duane Arnold Energy Center.

According to an application for approval filed by FPL Energy Duane Arnold LLC, FPL Group, Inc., the parent organization of FPL Energy Duane Arnold LLC, will merge with a newly created subsidiary of Constellation Energy Group, Inc. and become a wholly owned subsidiary of Constellation Energy. FPL Energy Duane Arnold LLC will continue to own its 70 percent ownership interest in and operate the Duane Arnold Energy Center, and hold the license, to the same extent now held. The other co-owners of the facility, Central Iowa Power Cooperative and Corn Belt Power Cooperative, are not involved in the proposed transaction.

No physical changes to the Duane Arnold Energy Center facility or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve the application for the indirect transfer of the license, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i) through (viii).

Requests for a hearing and petitions for leave to intervene should be served upon M.S. Ross, Managing Attorney, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420 (telephone: 561–691–7126, fax: 561–694–6274, e-mail: *mitch_ross@fpl.com*); the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.302 and 2.305.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, within 30 days from the date of publication of this notice, persons may

submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated January 20, 2006, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 13th day of February 2006.

For the Nuclear Regulatory Commission.

Deirdre W. Spaulding,

Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1555 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–443]

FPL Energy Seabrook, LLC, Seabrook Station, Unit No. 1; Notice of Consideration of Approval of Application Regarding Proposed Merger and Opportunity for a Hearing

The Nuclear Regulatory Commission (NRC or the Commission) is considering the issuance of an order under Title 10 of the Code of Federal Regulations (10 CFR) Section 50.80 approving the indirect transfer of Facility Operating License No. NPF–86 for the Seabrook Station, Unit No. 1 (Seabrook), to the extent currently held by FPL Energy Seabrook, LLC (FPLE) as a co-owner and licensed operator of Seabrook.

According to an application for approval filed by FPLE, FPL Group, Inc., the parent organization of FPLE, will merge with a newly created subsidiary of Constellation Energy Group, Inc. and become a wholly owned subsidiary of Constellation Energy Group, Inc. FPLE will continue to own its 88.23 percent ownership interest in Seabrook, operate Seabrook, and hold the license to the same extent now held. The other co-owners of Seabrook, Hudson Light & Power Department, Massachusetts Municipal Wholesale Electric Company, and Taunton Municipal Light Plant, are not involved in the proposed transaction.

No physical changes to the Seabrook facility or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve the application for the indirect transfer of the license if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i) through (viii).

In accordance with 10 CFR Sections 2.302 and 2.305, requests for a hearing and petitions for leave to intervene should be served upon M. S. Ross, Managing Attorney, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420 (telephone: 561–691–7126, fax: 561–694–6274, e-mail: *mitch_ross@fpl.com*); the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated January 20, 2006, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland this 13th day of February 2006.

For the Nuclear Regulatory Commission.

G. Edward Miller,

Project Manager, Plant Licensing Branch I–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1557 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

In the Matter of National Aeronautics and Space Administration; Confirmatory Order (Effective Immediately)

National Aeronautics and Space Administration (NASA or Licensee) is the holder of Byproduct Material Licenses 19–05748–02 and 19–05748–03 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR part 30. License No. 19–05748–02 was originally issued on June 28, 1960, and is due to expire on July 3, 2011. License No. 19–05748–03 was originally issued on October 1, 1963, and is due to expire on September 30, 2015.

On January 16, 2003, the NRC Office of Investigations (OI) initiated an investigation (OI Case No. 1–2003–011) at NASA. Based on the evidence developed during its investigations, OI substantiated that the contract RSO deliberately failed to report missing licensed material as required, and provided incomplete and inaccurate information, verbally and in writing, to the NRC in violation of 10 CFR 30.9(a). The results of the investigation completed on May 25, 2005, were sent to NASA in a letter dated August 18, 2005.

Subsequent to the NRC's identification of the apparent violations, NASA took several actions to assure that these events would not recur. These actions included: (a) Selecting a new contract RSO to provide radiation safety services; (b) changing the inventory database to improve tracking of sources; (c) implementing recommendations made by NASA Security Office following its evaluation of the materials storage area to improve security of the facility; (d) conducting a physical inventory of all items and determining that all but two sources, which were below reportable quantities, were accounted for; and (e) instructing the contract RSO that all notifications shall be made within required regulatory timeframes.

Also, in response to the NRC's August 18, 2005, letter, NASA requested the use of Alternative Dispute Resolution (ADR) to resolve the apparent violations and pending enforcement action. ADR is a process in which a neutral mediator, with no decision-making authority, assists the NRC and NASA to resolve any disagreements on whether a violation occurred, the appropriate enforcement action, and the appropriate corrective actions. At NASA's request: (1) A joint Alternative Dispute Resolution (ADR) mediation session was held at the NASA facility in Greenbelt, Maryland, on November 4, 2005, between NASA, its contract Radiation Safety Officer (RSO), and the NRC; and (2) an individual ADR session was held in the Region I Office in King of Prussia, PA on December 19, 2005, between NASA and the NRC at which the contract RSO participated in portions of the mediation. These ADR sessions were mediated by a professional mediator, arranged through Cornell University's Institute of Conflict Management. Based on the discussions during the ADR sessions, a settlement agreement was reached regarding this matter. The elements of the settlement agreement are as follows:

1. The NRC determined that violations of NRC requirements occurred at NASA when: (a) Contrary to 10 CFR 20.1501, its contract Radiation Safety Officer (RSO) failed to perform a reasonable and necessary evaluation of information provided to him in memoranda from a health physics technician on September 10, 2002, and October 21, 2002, to determine whether the licensed material reported as missing in those memoranda, at the NASA Goddard Space Flight Center in Greenbelt, Maryland, reached the threshold for reportability under 10 CFR 20.2201; and (b) contrary to 10 CFR 30.9(a), the contract RSO provided inaccurate information to an NRC inspector during an NRC inspection on December 18–19, 2002, when he provided an inspector with an inventory form indicating all sources were accounted for when, in fact, sources were not accounted for at the time.

2. NASA agreed that the contract RSO caused NASA to violate NRC requirements when he failed to perform a reasonable and necessary evaluation, pursuant to 10 CFR 20.1501, of information provided to him by the health physics technician, to determine whether the licensed material reported as missing in the memoranda identified in Item 1 reached the threshold for reportability under 10 CFR 20.2201. NASA also agreed that the contract RSO provided inaccurate information during the December 18–19, 2002 inspection, as noted in Item 1. The NRC maintained that the contract RSO's actions were willful, at a minimum, in careless disregard of NRC requirements, because the contract RSO had reasonable information that material was not accounted for, yet he failed to investigate and take appropriate action, and he provided information to the inspector that was inaccurate. NASA contended that the contract RSO's actions were not in careless disregard, in part, because he had doubts about the accuracy of the information. The NRC and NASA agreed to disagree on the willfulness of the actions by the contract RSO.

3. While NASA and the NRC agreed to disagree on the willfulness of the contract RSO's actions, NASA and the NRC agreed that the contract RSO's actions caused NASA to be in violation of NRC requirements, which resulted in an enforcement action that will be taken against NASA as part of this ADR agreement.

4. NASA also agreed to complete, in addition to the actions it has already taken, other actions to ensure that others at NASA Goddard, other NASA facilities, and other NRC licensees, learned from these violations. Those additional actions included: (a) Increasing the frequency of its internal audits of its radiation safety program from annually to quarterly, for, at a minimum, through the end of 2007; (b) retaining an organization independent of NASA Goddard to conduct an annual independent review of the radiation safety program, at a minimum, for 2006 and 2007; and (c) providing a presentation at the NASA Occupational Health Conference in 2006, and include, at a minimum, in that presentation, a description of the violations that are described in Item 1 of this agreement, as well as the circumstances that led to the violations, lessons learned, and the corrective actions taken and planned to prevent recurrence.

5. NASA agreed to complete all of the additional actions in Item 4 by December 31, 2007, and send a letter to the NRC informing the NRC that these actions are complete. NASA agreed to send this letter to the NRC within 30 days of completion of all actions.

6. In light of the corrective actions that NASA has taken or has committed to take as described above, NASA agreed to the NRC issuance of a Notice of Violation for the two violations described in Item 1, which the NRC will characterize as a Severity Level III problem, as well as for the other violations described in the NRC inspection report attached to the NRC August 18, 2005, letter which will be characterized at Severity Level IV. This

action will be publicly available in ADAMS and on the NRC ''Significant Enforcement Actions'' Web site, and the NRC will issue a press release announcing this action, as well as the actions NASA has taken and committed to take to address the violation. NASA disagreed that the two violations described in Item 1 warrant a Severity Level III characterization. The NRC and NASA agreed to disagree regarding the Severity Level III characterization.

7. NASA agreed to issuance of a Confirmatory Order confirming this agreement, and also agreed to waive any request for a hearing regarding this Confirmatory Order.

In light of the actions NASA has taken and agreed to take to correct the violation and prevent recurrence, as set forth in Section III above, the NRC has concluded that its concerns regarding the violation can be resolved through the NRC's confirmation of the commitments as outlined in this Confirmatory Order.

I find that NASA's commitments as set forth in Section III above are acceptable. However, in view of the foregoing, I have determined that these commitments shall be confirmed by this Confirmatory Order. Based on the above and NASA's consent, this Confirmatory Order is immediately effective upon issuance.

Accordingly, pursuant to Sections 103, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR parts 20 and 30, *it is hereby ordered*, that by December 31, 2007:

1. NASA will increase the frequency of its internal audits of its radiation safety program from annually to quarterly, for, at a minimum, through the end of 2007;

2. NASA will retain an organization independent of NASA Goddard to conduct an annual independent review of the radiation safety program, at a minimum, for 2006 and 2007;

3. NASA will provide a presentation at the NASA Occupational Health Conference in 2006, and include, at a minimum, in that presentation, a description of the violations that are described in Section 3 of this agreement, as well as the circumstances that led to the violations, lessons learned, and the corrective action taken and planned to prevent recurrence; and

4. Within 30 days of completion of all of these actions as set forth in Sections V.1–3, NASA will send a letter to the NRC informing the NRC that the actions are complete.

The Director, Office of Enforcement, may relax or rescind, in writing, any of the above conditions upon a showing by NASA of good cause.

Any person adversely affected by this Confirmatory Order, other than NASA, may request a hearing within 20 days of its issuance. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and must include a statement of good cause for the extension. Any request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Chief, Rulemaking and Adjudications Staff, Washington, DC 20555. Copies of the hearing request shall also be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement, to the Director of the Division of Regulatory Improvement Programs at the same address, and to MSHMC. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that answers and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Office of the General Counsel by means of facsimile transmission to 301–415–3725 or e-mail to *OGCMailCenter@nrc.gov*. If such a person requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by a person whose interest is adversely affected, 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 such hearing shall be whether this Confirmatory Order shall be sustained. An answer or a request for a hearing shall not stay the effectiveness date of this order.

Dated this 10th day of February 2006.

For the Nuclear Regulatory Commission.

Michael Johnson,

Director, Office of Enforcement.

[FR Doc. 06–1558 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Dockets No. 50–220 and 50–410]

Nine Mile Point Nuclear Station, LLC; Nine Mile Point Nuclear Station, Unit Nos. 1 and 2; Notice of Consideration of Approval of Application Regarding Proposed Merger and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under 10 CFR 50.80 approving the indirect transfer of the Renewed Facility Operating Licenses, which are numbered DPR–63 and NPF–69, for the Nine Mile Point Nuclear Station, Unit Nos. 1 and 2 (NMP), currently held by Nine Mile Point Nuclear Station, LLC (NMP LLC), as owner and licensed operator. Long Island Power Authority holds a 18-percent ownership interest in NMP Unit No. 2, but is not involved in this proposed action.

According to an application for approval filed by Constellation Generation Group, LLC (CGG), on behalf of NMP LLC, in connection with the merger of CGG's parent company, Constellation Energy Group, Inc. (CEG, Inc.) and FPL Group, Inc. (FPL Group), FPL Group will become a wholly owned subsidiary of CEG, Inc. At the closing of the merger, the former shareholders of FPL Group will own approximately 60% of the outstanding stock of CEG, Inc., and the pre-merger shareholders of CEG, Inc., will own the remaining approximately 40%. In addition, the CEG, Inc., board of directors will be composed of fifteen members, nine of whom will be named by FPL Group, and six of whom will be named by the current CEG, Inc. NMP LLC will continue to own and operate the facility and hold the licenses to the same extent now held.

No physical changes to the facility or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve the application for the indirect transfer of a license, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i) through (viii).

Requests for a hearing and petitions for leave to intervene should be served upon Mr. Jay M. Gutierrez at Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue, Washington, DC 20004, telephone: 202–739–5466, fax: 202–739–3001, and e-mail *jgutierrez@morganlewis.com*; the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.302 and 2.305.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated January 23, 2006, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland this 13th day of February 2006.

For the Nuclear Regulatory Commission.

Patrick D. Milano,

Senior Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1619 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–244]

R.E. Ginna Nuclear Plant, LLC; R.E. Ginna Nuclear Power Plant; Notice of Consideration of Approval of Application Regarding Proposed Merger and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under 10 CFR 50.80 approving the indirect transfer of the Renewed Facility Operating License, which is numbered DPR–18, for the R.E. Ginna Nuclear Power Plant (Ginna), currently held by R.E. Ginna Nuclear Power Plant, LLC (Ginna LLC), as owner and licensed operator.

According to an application for approval filed by Constellation Generation Group, LLC (CGG), on behalf of Ginna LLC, in connection with the merger of CGG's parent company, Constellation Energy Group, Inc. (CEG, Inc.), and FPL Group, Inc. (FPL Group), FPL Group will become a wholly owned subsidiary of CEG, Inc. At the closing of the merger, the former shareholders of FPL Group will own approximately 60% of the outstanding stock of CEG, Inc., and the pre-merger shareholders of CEG, Inc., will own the remaining approximately 40%. In addition, the CEG, Inc., board of directors will be composed of fifteen members, nine of whom will be named by FPL Group, and six of whom will be named by the current CEG, Inc. Ginna LLC will continue to own and operate the facility and hold the license.

No physical changes to the facility or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve the application for the indirect transfer of a license, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is

established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i) through (viii).

Requests for a hearing and petitions for leave to intervene should be served upon Mr. Jay M. Gutierrez at Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue, Washington, DC 20004, telephone: 202–739–5466, fax: 202–739–3001, and e-mail *jgutierrez@morganlewis.com*; the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.302 and 2.305.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated January 23, 2006, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland this 13th day of February 2006.

For the Nuclear Regulatory Commission.

Patrick D. Milano,

Senior Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1617 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[IA 05–041]

In the Matter of Theodore D. Simmons, II; Confirmatory Order (Effective Immediately)

I

Theodore D. Simmons, II (Mr. Simmons) is employed by a contractor hired to provide various health and safety services to NASA's Goddard Space Flight Center. Mr. Simmons serves as the Radiation Safety Officer (RSO) on the NRC license.

II

On January 16, 2003, the NRC Office of Investigations (OI) initiated an investigation (OI Case No. 1–2003–011) at NASA. Based on the evidence developed during its investigations, OI did substantiate that Mr. Simmons deliberately failed to report missing licensed material as required, and provided incomplete and inaccurate information, verbally and in writing, to the NRC in violation of 10 CFR 30.9(a). The results of the investigation, completed on May 25, 2005, were sent to Mr. Simmons in a letter dated August 18, 2005.

III

Subsequent to the inspection in December 2002, and after becoming aware of the details of the apparent violation, Mr. Simmons undertook a number of corrective actions to assure that these events would not recur. These actions included changing the manner in which assessments were completed and source location was verified, and attendance at a 40-hour Radiation Safety Officer course in November 2005 which addressed the issue of communications and reportability to the NRC.

In response to the NRC's August 18, 2005, letter, Mr. Simmons requested the use of Alternative Dispute Resolution (ADR) to resolve these apparent violations and pending enforcement action. ADR is a process in which a neutral mediator, with no decision-making authority, assists the NRC and the individual to resolve any disagreements on whether a violation occurred, the appropriate enforcement action, and the appropriate corrective actions. At Mr. Simmons' request: (1) A joint Alternative Dispute Resolution (ADR) mediation session was held at the NASA facility in Greenbelt, Maryland, on November 4, 2005, between Mr. Simmons, NASA, and the NRC; and (2) an individual ADR session was held in the Region I Office in King of Prussia, PA, on December 19, 2005, between Mr. Simmons and the NRC, at which NASA participated in portions of the mediation. These ADR sessions were mediated by a professional mediator, arranged through Cornell University's Institute of Conflict Management. Based on the discussions during the ADR sessions, a settlement agreement was reached regarding this matter. The elements of the settlement agreement are as follows:

1. The NRC determined that violations of NRC requirements occurred at NASA when: (a) Contrary to 10 CFR 20.1501, Mr. Simmons failed to perform a reasonable and necessary evaluation of information provided to him in memoranda from a health physics technician on September 10, 2002, and October 21, 2002, to determine whether the licensed material reported, in those memoranda, as missing at the NASA Goddard Space Flight Center in Greenbelt, Maryland, reached the threshold for reportability under 10 CFR 20.2201; and (b) contrary to 10 CFR 30.9 (a) Mr. Simmons provided inaccurate information to an NRC inspector during an NRC inspection on December 18–19, 2002, when he provided an inspector with an inventory form used by health physics technicians to account for sources indicating all sources were accounted for, when in fact, sources were not accounted for at the time.

2. Mr. Simmons agreed that he caused NASA to violate NRC requirements when he failed to perform a reasonable and necessary evaluation, pursuant to 10 CFR 20.1501, of information provided to him by the health physics technician, to determine whether the licensed material reported as missing in the memoranda identified in Item 1 reached the threshold for reportability under 10 CFR 20.2201. Mr. Simmons also agreed that he provided inaccurate information during the December 18–19, 2002, inspection, as noted in Item 1.

3. The NRC maintained that Mr. Simmons' actions were willful, at a

minimum, in careless disregard of NRC requirements, because Mr. Simmons had reasonable information that material was not accounted for, yet failed to evaluate and take appropriate action, and he provided information to the inspector that was inaccurate. Mr. Simmons contended that his actions were not willful or in careless disregard, in part, because he had doubts about the accuracy of the information, and did not believe it warranted an immediate evaluation. The NRC and Mr. Simmons agreed to disagree on willfulness of his actions.

4. While Mr. Simmons and the NRC agreed to disagree on the willfulness of Mr. Simmons' actions, Mr. Simmons and the NRC agreed that Mr. Simmons' actions caused NASA to be in violation of NRC requirements, which resulted in an enforcement action that will be taken against NASA as part of a separate ADR agreement between NASA and the NRC.

5. Mr. Simmons, subsequent to the NRC's identification of these violations, took actions to assure that he learned from these violations and provided the NRC with assurance that it would not recur. These actions included attendance at a 40-hour Radiation Safety Officer course in November 2005 which addressed the issue of communications and reportability to the NRC.

6. During the ADR mediation session, Mr. Simmons recognized an opportunity for others in the industry to learn from his actions which contributed to the violations set forth in Item 1. Therefore, Mr. Simmons agreed to take the following future corrective actions, namely: (a) Providing a lessons learned presentation to all NASA Goddard users of material, as well as to other NASA Goddard employees willing to attend, addressing, at a minimum, reporting requirements, requirements for ensuring completeness and accuracy of information, and being forthright with the NRC in response to questions from inspectors; and (b) providing a similar session to employees from other NASA facilities at a future NASA Occupational Health Conference in 2006.

7. Mr. Simmons agreed to complete the additional actions in Item 6 by August 31, 2006, and send a letter to the NRC informing the NRC that these actions are complete. Mr. Simmons agreed to send this letter to the NRC within 30 days of completion of all actions.

8. In light of the actions Mr. Simmons took as described in Item 5, the actions Mr. Simmons has committed to take as described in Items 6 and 7, and the action that the NRC will take against NASA for the violations, the NRC agrees to neither issue a Notice of Violation to Mr. Simmons, nor issue an Order banning him from NRC-licensed activities. Rather, the NRC will issue a letter and Confirmatory Order to Mr. Simmons confirming the commitments set forth herein. This letter and the confirmatory Order will be publically available in ADAMS, will appear on the NRC ''Significant Enforcement Actions—Individuals'' website for a period of 1 year, and will be discussed in a press release announcing the ADR agreement between NASA and the NRC.

9. Mr. Simmons agreed to issuance of the letter and Confirmatory Order confirming this agreement and also agrees to waive any request for a hearing regarding this Confirmatory Order.

IV

In light of the actions Mr. Simmons has taken and agreed to take to correct the violations and prevent recurrence, as set forth in Section III above, the NRC has concluded that its concerns regarding the violations can be resolved through the NRC's confirmation of the commitments as outlined in this Confirmatory Order.

I find that Mr. Simmons' commitments as set forth in Section III above are acceptable. However, in view of the foregoing, I have determined that these commitments shall be confirmed by this Confirmatory Order. Based on the above, and Mr. Simmons' consent, this Confirmatory Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 103, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Parts 20 and 30, it is hereby ordered, that:

1. Mr. Simmons will: (a) Provide a lessons learned presentation to all NASA Goddard users of material, as well as to other NASA Goddard employees willing to attend, addressing, at a minimum, reporting requirements, requirements for ensuring completeness and accuracy of information, and being forthright with the NRC in response to questions from inspectors; and (b) provide a similar session to employees from other NASA facilities at a future NASA Occupational Health Conference in 2006.

2. Mr. Simmons will complete these additional actions by August 31, 2006, and will send a letter to the NRC informing the NRC that these actions are complete. Mr. Simmons will send this letter to the NRC within 30 days of completion of all actions.

The Director, Office of Enforcement, may relax or rescind, in writing, any of the above conditions upon a showing by Mr. Simmons of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than Mr. Simmons, may request a hearing within 20 days of its issuance. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and must include a statement of good cause for the extension. Any request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Chief, Rulemaking and Adjudications Staff, Washington, DC 20555. Copies of the hearing request shall also be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement, and to the Director of the Division of Regulatory Improvement Programs at the same address. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that answers and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Office of the General Counsel by means of facsimile transmission to 301–415–3725 or e-mail to *OGCMailCenter@nrc.gov*. If such a person requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, 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 such hearing shall be whether this Confirmatory Order shall be sustained. An answer or a request for a hearing shall not stay the effectiveness date of this order.

Dated this 10th day of February 2006.

For the Nuclear Regulatory Commission.

Michael Johnson,

Director, Office of Enforcement.

[FR Doc. 06–1620 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

Nuclear Regulatory Commission

Sunshine Federal Register Notice

DATE: Weeks of February 20, 27, March 6, 13, 20, 27, 2006.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Matters To Be Considered:

Week of February 20, 2006

There are no meetings scheduled for the Week of February 20, 2006.

Week of February 27, 2006—Tentative

There are no meetings scheduled for the Week of February 27, 2006.

Week of March 6, 2006—Tentative

There are no meetings scheduled for the Week of March 6, 2006.

Week of March 13, 2006—Tentative

Monday, March 13, 2006

1:30 p.m. Briefing on Office of Information Services (OIS) Programs, Performance, and Plans (Public Meeting). (Contact: Edward Baker, 301–415–8700).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Wednesday, March 15, 2006

9:30 a.m. Briefing on Office of Nuclear Security and Incident Response (NSIR) Programs, Performance, and Plans (Public Meeting). (Contact: Evelyn S. Williams, 301–415–7011).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

1:30 p.m. Discussion of Security Issues (Closed—Ex. 1 & 3).

Thursday, March 16, 2006

9:30 a.m. Briefing on Office of Nuclear Reactor Regulation (NRR) Programs, Performance, and Plans (Public Meeting). (Contact: Cynthia Carpenter, 301–415–1275).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Week of March 20, 2006—Tentative

There are no meetings scheduled for the Week of March 20, 2006.

Week of March 27, 2006—Tentative

There are no meetings scheduled for the Week of March 27, 2006.

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/what-we-do/policy-making/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify the NRC's Disability Program Coordinator, Deborah Chan, at 301–415–2100, or by e-mail at *DLC@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: February 16, 2006.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 06–1676 Filed 2–17–06; 2:44 pm]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Notice for Opportunity To Comment on Model Safety Evaluation on Technical Specification Improvement To Revise Diesel Fuel Oil Testing Program Using the Consolidated Line Item Improvement Process

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comment.

SUMMARY: Notice is hereby given that the staff of the Nuclear Regulatory Commission (NRC) has prepared a model safety evaluation (SE) relating to changes to Diesel Fuel Oil Testing Programs. The changes relocate references to specific American Society for Testing and Materials (ASTM) standards for fuel oil testing to licensee-controlled documents and adds alternate criteria to the ''clear and bright'' acceptance test for new fuel oil. The NRC staff has also prepared a model no significant hazards consideration (NSHC) determination relating to this matter. The purpose of these models is to permit the NRC to efficiently process amendments that propose to adopt the associated changes into plant-specific technical specifications (TS). Licensees of nuclear power reactors to which the models apply could request amendments confirming the applicability of the SE and NSHC determination to their reactors. The NRC staff is requesting comments on the model SE and model NSHC determination prior to announcing their availability for referencing in license amendment applications.

DATES: The comment period expires 30 days from the date of this publication. Comments received after this date will be considered if it is practical to do so, but the Commission can only ensure consideration only for comments received on or before this date.

ADDRESSES: Comments may be submitted either electronically or via U.S. mail.

Submit written comments to: Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Hand deliver comments to 11545 Rockville Pike, Rockville, Maryland, between 7:45 a.m. and 4:15 p.m. on Federal workdays.

Copies of comments received may be examined at the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland.

Comments may be submitted by electronic mail to *CLIIP@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: William D. Reckley, Special Projects Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation, Mail Stop O–7D1, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1323.

SUPPLEMENTARY INFORMATION:

Background

Regulatory Issue Summary 2000–06, ''Consolidated Line Item Improvement Process for Adopting Standard Technical Specification Changes for Power Reactors,'' was issued on March 20, 2000. The consolidated line item improvement process (CLIIP) is intended to improve the efficiency and transparency of NRC licensing processes. This is accomplished by processing proposed changes to the Standard Technical Specifications (STS) (NUREGs 1430–1434) in a manner that supports subsequent license amendment

applications. The CLIIP includes an opportunity for the public to comment on proposed changes to the STS following a preliminary assessment by the NRC staff and finding that the change will likely be offered for adoption by licensees. The CLIIP directs the NRC staff to evaluate any comments received for a proposed change to the STS and to either reconsider the change or proceed with announcing the availability of the change to licensees. Those licensees opting to apply for the subject change to TS are responsible for reviewing the NRC staff's evaluation, referencing the applicable technical justifications, and providing any necessary plant specific information. Each amendment application submitted in response to the notice of availability would be processed and noticed in accordance with applicable rules and NRC procedures.

This notice for comment involves the relocation of references to specific ASTM standards for fuel oil testing to licensee-controlled documents and adds alternate criteria to the ''clear and bright'' acceptance test for new fuel oil. The changes were proposed by the Technical Specification Task Force (TSTF) in STS Change Traveler TSTF–374, accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site *http://www.nrc.gov/reading-rm/adams.html* (Accession No. ML011340449). Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Applicability

This proposed change to adopt TSTF–374 is applicable to all nuclear power reactors. The CLIIP does not prevent licensees from requesting an alternative approach or proposing changes other than those proposed in TSTF–374. Variations from the approach recommended in this notice may, however, require additional review by the NRC staff and may increase the time and resources needed for the review.

Public Notices

This notice requests comments from interested members of the public within 30 days of the date of publication in the **Federal Register**. Following the NRC staff's evaluation of comments received as a result of this notice, the NRC staff may reconsider the proposed change or may proceed with announcing the availability of the change in a subsequent notice (perhaps with some changes to the SE or proposed NSHC determination as a result of public comments). If the NRC staff announces the availability of the change, licensees wishing to adopt the change will submit an application in accordance with applicable rules and other regulatory requirements. The NRC staff will in turn issue for each application a notice of proposed action, which includes a proposed NSHC determination. A notice of issuance of an amendment of operating license will also be issued to announce the adoption of TSTF–374 for each plant that applies for and receives the requested change.

Proposed Safety Evaluation

U.S. Nuclear Regulatory Commission, Office of Nuclear Reactor Regulation, Consolidated Line Item Improvement, Technical Specification Task Force (TSTF) Change Traveler TSTF–374, Diesel Fuel Oil Testing Program.

1.0 Introduction

By application dated [DATE], [LICENSEE NAME] (the licensee), submitted a request for changes to the [PLANT NAME], Technical Specifications (TS) (Agencywide Documents Access and Management System Accession No. [MLxxxxxxxxx]). The requested change would relocate references to specific American Society for Testing and Materials (ASTM) standards for fuel oil testing to licensee-controlled documents and would add alternate criteria to the ''clear and bright'' acceptance test for new fuel oil. These changes were described in a Notice of Availability published in the **Federal Register** on [DATE] ([xx FR xxxxx]).

2.0 Regulatory Evaluation

The onsite electrical power system includes standby power sources, distribution systems, and vital auxiliary supporting systems to supply power to safety-related equipment. Most commercial nuclear power plants use diesel generators as the emergency power source for the safety-related electrical buses. The importance of the diesel generators (or other standby power sources) is reflected in their incorporation into NRC regulations, TS, and other regulatory programs, including Appendix B (''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants'') to part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR part 50). NUREG–0800, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants,'' addresses diesel fuel oil and other supporting systems in section 9.5.4, ''Emergency Diesel Engine Fuel Oil Storage and Transfer System Review Responsibilities.''

The TS include requirements for testing diesel fuel oil to ensure it is of the appropriate grade and that it has not been contaminated (*i.e.*, proper fuel oil quality). The Diesel Fuel Oil Testing Program defined in the TS includes tests for (1) the acceptability of new fuel oil for use prior to addition to storage tanks; (2) other properties of new fuel oil within limits within 30 days following sampling and addition to storage tanks; and (3) total particulate concentration of the fuel oil every 31 days. The current TS identify particular ASTM standards and methods of performing these tests. The industry submitted TSTF–374 proposing changes to the Standard TS (STS) (NUREGs 1430—1434) to provide the flexibility to address future changes in Environmental Protection Agency (EPA) regulations for fuel oil or revisions to the ASTM standards. TSTF–374 was reviewed and accepted by the NRC staff and has been incorporated into each of the STS NUREGs. Requirements for testing the diesel fuel oil are maintained, but references to specific ASTM standards are relocated to licensee-controlled documents and an alternative to the ''clear and bright'' acceptance test for new fuel is added to address changes in EPA requirements.

3.0 Technical Evaluation

In adopting TSTF–374, the licensee proposes to relocate the reference to specific ASTM standards from the TS Administrative Controls Section [5.5.13], ''Diesel Fuel Oil Testing Program,'' to a licensee-controlled document. Although the reference to specific testing standards or methods is relocated, TS [5.5.13] retains acceptance criteria for new and stored diesel fuel oil and refers to ''applicable ASTM standards'' for sampling and testing requirements. The specific testing standards or methods are relocated to the TS Bases Section, which are controlled in accordance with 10 CFR 50.59, ''Changes, tests, and experiments,'' as described in TS [5.5.14], ''Technical Specification (TS) Bases Control Program.'' The licensee's testing programs for diesel fuel oil are also governed by other regulatory requirements, including Appendix B (Quality Assurance Criteria) to 10 CFR part 50. While the relocation of selected program details provides the licensee with some flexibility to adopt practices defined in future ASTM standards, the NRC staff finds that the remaining TS, TS Bases Control Program, and other

NRC regulations provide appropriate regulatory controls to ensure diesel fuel oil quality will be maintained.

The plant-specific adoption of TSTF–374 also includes an alternative to the ''clear and bright'' test currently required for new fuel oil acceptability. The revised TS would allow either the ''clear and bright'' test or a test confirming that the fuel oil has ''water and sediment content within limits.'' This alternative test is better suited for darker colored fuels and is recognized in ASTM standards that have been referenced in NRC approved amendment requests. The NRC staff finds that the alternative for testing the water and sediment content will maintain or improve the inspection of new fuel oil and therefore finds the change acceptable.

The licensee included in its application the proposed revisions to the TS Bases to reflect the changes to TS [5.5.13] and to incorporate the references to the applicable ASTM standards. The changes are consistent with TSTF–374 and will be incorporated into the TS Bases in accordance with TS [5.5.14].

4.0 State Consultation

In accordance with the Commission's regulations, the [STATE] State official was notified of the proposed issuance of the amendments. The State official had [(1) no comments or (2) the following comments—with subsequent disposition by the staff].

5.0 Environmental Consideration

The amendment changes a requirement with respect to the installation or use of a facility component located within the restricted area as defined in 10 CFR part 20 and changes surveillance requirements. The NRC staff has determined that the amendment involves no significant increase in the amounts and no significant change in the types of any effluents that may be released offsite, and that there is no significant increase in individual or cumulative occupational radiation exposure. The Commission has previously issued a proposed finding that the amendment involves no significant hazards consideration, and there has been [(1) no public comment on such finding (2) the following comments with subsequent disposition by the NRC staff ([xx FR xxxxx, DATE]). Accordingly, the amendment meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Pursuant to 10 CFR 51.22(b) no environmental impact statement or environmental assessment need be prepared in connection with the issuance of the amendment.

6.0 Conclusion

The Commission has concluded, based on the considerations discussed above, that (1) there is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner, (2) such activities will be conducted in compliance with the Commission's regulations, and (3) the issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

Proposed No Significant Hazards Consideration Determination

Description of amendment request: The requested change would relocate references in the technical specifications (TS) to specific American Society for Testing and Materials (ASTM) standards for fuel oil testing to licensee-controlled documents and would add alternate criteria to the ''clear and bright'' acceptance test for new fuel oil. The proposed change is described in Technical Specification Task Force (TSTF) Standard TS Change Traveler TSTF–374 related to the Diesel Fuel Oil Testing Program and was described in the Notice of Availability published in the **Federal Register** on [DATE] ([xx FR xxxxx]).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of any accident previously evaluated?

Response: No.

The proposed changes relocate the specific ASTM standard references from the Administrative Controls Section of TS to a licensee-controlled document. Requirements to perform testing in accordance with applicable ASTM standards are retained in the TS as are requirements to perform surveillances of both new and stored diesel fuel oil. Future changes to the licensee-controlled document will be evaluated pursuant to the requirements of 10 CFR 50.59, ''Changes, tests and experiments,'' to ensure that such changes do not result in more than a minimal increase in the probability or consequences of an accident previously evaluated. In addition, the ''clear and bright'' test used to establish the acceptability of new fuel oil for use prior to addition to storage tanks has been expanded to recognize more rigorous testing of water and sediment content. Relocating the specific ASTM standard references from the TS to a licensee-controlled document and allowing a water and sediment content test to be performed to establish the acceptability of new fuel oil will not affect nor degrade the ability of the emergency diesel generators (DGs) to perform their specified safety function. Fuel oil quality will continue to meet ASTM requirements.

The proposed changes do not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, and configuration of the facility or the manner in which the plant is operated and maintained. The proposed changes do not adversely affect the ability of structures, systems, and components (SSCs) to perform their intended safety function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed changes do not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of any accident previously evaluated. Further, the proposed changes do not increase the types and amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures.

Therefore, the changes do not involve a significant increase in the probability or consequences of any accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes relocate the specific ASTM standard references from the Administrative Controls Section of TS to a licensee-controlled document. In addition, the ''clear and bright'' test used to establish the acceptability of new fuel oil for use prior to addition to storage tanks has been expanded to allow a water and sediment content test to be performed to establish the acceptability of new fuel oil. The changes do not involve a physical alteration of the plant (*i.e.*, no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The requirements retained in the TS continue to require testing of the diesel fuel oil to ensure the proper functioning of the DGs.

Therefore, the changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed changes relocate the specific ASTM standard references from the Administrative Controls Section of TS to a licensee-controlled document. Instituting the proposed changes will continue to ensure the use of applicable ASTM standards to evaluate the quality of both new and stored fuel oil designated for use in the emergency DGs. Changes to the licensee-controlled document are performed in accordance with the provisions of 10 CFR 50.59. This approach provides an effective level of regulatory control and ensures that diesel fuel oil testing is conducted such that there is no significant reduction in a margin of safety.

The ''clear and bright'' test used to establish the acceptability of new fuel oil for use prior to addition to storage tanks has been expanded to allow a water and sediment content test to be performed to establish the acceptability of new fuel oil. The margin of safety provided by the DGs is unaffected by the proposed changes since there continue to be TS requirements to ensure fuel oil is of the appropriate quality for emergency DG use. The proposed changes provide the flexibility needed to improve fuel oil sampling and analysis methodologies while maintaining sufficient controls to preserve the current margins of safety.

Based upon the reasoning presented above, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Dated at Rockville, Maryland, this 10th day of February 2006.

For the Nuclear Regulatory Commission.

William D. Reckley,

Senior Project Manager, Special Projects Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 06–1621 Filed 2–21–06; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application of Arch Coal, Inc. To Withdraw Its 5% Perpetual Cumulative Convertible Preferred Stock (liquidation preference $50 Per Share), From Listing and Registration on the New York Stock Exchange, Inc. File No. 1–13105

February 14, 2006.

On February 6, 2006, Arch Coal, Inc., a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 12d2–2(d) thereunder,[2] to withdraw its 5% perpetual cumulative convertible preferred stock (liquidation preference $50 per share) (''Security''), from listing and registration on the New York Stock Exchange, Inc. (''NYSE'').

On January 6, 2006, the Board of Directors (''Board'') of the Issuer approved resolutions to withdraw the Security from listing and registration on NYSE. The Issuer previously commenced a conversion offer (''Offer'') to pay a premium to holders of any and all of the Security who elected to convert to shares of the Issuer's common stock, par value $.01 per share, subject to the terms of the Offer. On December 31, 2005, the Issuer accepted for conversion all shares of the Security validly tendered and not withdrawn as of the expiration date of the Offer. Upon expiration of the Offer, 150,508 shares of the Security remained outstanding. Based on information provided to the Issuer from its transfer agent, the Securities that remain outstanding are held by approximately 35 holders. The Board decided that it was in the best interest of the Issuer and its stockholders to delist and deregister the Security on NYSE due to the limited market for the Security.

The Issuer stated that it has complied with the requirements of NYSE's rules governing an issuer's voluntary withdrawal of a security from listing and registration by complying with all applicable rules in the State of Delaware, in which the Issuer is incorporated, and by providing NYSE with the required documents governing the removal of securities from listing and registration on NYSE.

The Issuer's application relates solely to the withdrawal of the Security from listing on NYSE and from registration under Section 12(b) of the Act,[3] and shall not affect its obligation to be registered under Section 12(g) of the Act.[4]

Any interested person may, on or before March 13, 2006, comment on the facts bearing upon whether the application has been made in accordance with the rules of NYSE, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/delist.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include the File Number 1–13105 or;

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 1–13105. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Nancy M. Morris,

Secretary.

[FR Doc. E6–2435 Filed 2–21–06; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(g).

[5] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of February 20, 2006:

A Closed Meeting will be held on Thursday, February 23, 2006 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries

will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10) permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Campos, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, February 23, 2006 will be:

Formal orders of investigations;

Institution and settlement of injunctive actions; and

Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: February 16, 2006.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 06–1665 Filed 2–17–06; 11:18 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53286; File No. SR–CBOE–2006–16]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change To Amend CBOE Rule 8.7 To Implement CBOE's 1-Up Program on a Permanent Basis

February 14, 2006.

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 February 8, 2006, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend CBOE Rule 8.7 to make its 1-up Pilot Program permanent. The text of the proposed rule change is available on the CBOE's Web site (*http://www.cboe.com*), at the CBOE's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III 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 amend CBOE Rule 8.7 to request permanent approval of the CBOE's pilot program that allows Market-Makers to submit an undecremented electronic quotation of a size as low as one contract (''1-up'') when the underlying primary market for the option disseminates a 1-up market, *i.e.,* a market that reflects a quotation for 100 shares of the underlying security (the ''Program''). The ability to quote 1-up is expressly conditioned on the process being automated; in other words, a Market-Maker may not manually adjust his quotes to reflect a 1-up size quote.[3]

On August 17, 2004, the Commission approved the Program on a one-year pilot basis.[4] Subsequently, on August 15, 2005, the Program was extended for an additional six months, until February 17, 2006, to allow the CBOE time to further consider whether the Program is a useful tool for Market-Makers to manage their risks when the underlying primary market quotes 1-up.[5]

The CBOE believes that the Program has been effective in serving the original purpose of the rule filing, which was to address the fact that Market-Makers may be subject to heightened and possibly inappropriate levels of risk due to their obligation to maintain electronic two-sided quotes for at least 10-contracts, whereas there is no restriction on the stock specialist's ability to disseminate a 1-up market. Additionally, when the underlying market disseminates a 1-up quote, it substantially restricts the amount of liquidity available in that security to 100 shares on that particular side of the market, which limits a Market-Maker's ability to hedge his/her positions and increases his/her financial exposure. Accordingly, the CBOE requests that the Program be approved on a permanent basis.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) Act[7] requirements that the rules of an exchange 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* CBOE Rule 8.7.

[4] *See* Securities Exchange Act Release No. 50205 (August 17, 2004), 69 FR 51869 (August 23, 2004) (approving the pilot program as set forth in SR–CBOE–2003–39).

[5] *See* Securities Exchange Act Release No. 52256 (August 15, 2005), 70 FR 48787 (August 19, 2005) (approving and extending the pilot program as set forth in SR–CBOE–2005–56).

[6] 15 U.S.C. 78(b).

[7] 15 U.S.C. 78f(b)(5).

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 at (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2006–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2006–16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2006–16 and should be submitted on or before March 15, 2006.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[8] In particular, the Commission believes that the proposal is consistent with section 6(b)(5) of the Act,[9] which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

The Commission believes the Program, by providing CBOE Market-Makers with the ability to adjust their quotation sizes to correspond to the liquidity in the underlying primary market, provides a reasonable method for Market-Makers to manage their risks when the primary market disseminates a 1-up market. The Commission notes that the Program has been operating on a pilot basis for almost 18 months and that, after evaluating quotation data relating to the Program, the CBOE believes that the Program is functioning as intended. The Commission also notes that, even though Market-Makers will have the ability to quote 1-up when the underlying primary market disseminates a 1-up market, Market-Makers should have an incentive to display competitive quotations with significant size because the CBOE's matching algorithm for allocating incoming orders in CBOE's Hybrid Trading System is based in part of the size of the Market-Maker's quotation at the best price.

The Commission finds good cause, pursuant to section 19(b)(2) of the Act,[10] for approving the proposed rule change prior to the thirtieth day after publication in the **Federal Register.** The Program is scheduled to expire on February 17, 2006, and as such, to allow the Program to continue to operate without interruption, the Commission believes it is appropriate to accelerate approval. The Commission notes that no comments were received in connection with the approval of the Program on a pilot basis or the approval of the extension of the pilot period for the Program. Accordingly, the Commission finds that good cause exists, pursuant to section 6(b)(5) of the Act,[11] to approve the proposal on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[12] that the proposed rule change (SR–CBOE–2006–16), is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Nancy M. Morris,

Secretary.

[FR Doc. E6–2437 Filed 2–21–06; 8:45 am]

BILLING CODE 8010–01–P

[8] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capial formation. *See* 15 U.C.C. 78c(f).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(2).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53278; File No. SR–CBOE–2006–09]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change Relating to the Exposure Period for Crossing Orders in the Hybrid Trading System

February 13, 2006.

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 January 30, 2006, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the CBOE. The 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

CBOE proposes to decrease the exposure period for crossing orders in its Hybrid Trading System (''Hybrid'') from 10 seconds to 3 seconds. The text of the proposed rule change is provided below (additions are *italicized;* deletions are [bracketed]).

Chicago Board Options Exchange, Incorporated Rules

* * * * *

Rule 6.45A.—Priority and Allocation of Equity Option Trades on the CBOE Hybrid System

(a)–(e) No change.

* * * Interpretations and Policies:

.01 Principal Transactions: Order entry firms may not execute as principal against orders they represent as agent unless: (i) Agency orders are first

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

exposed on the Hybrid System for at least [ten (10)]*three (3)* seconds, (ii) the order entry firm has been bidding or offering for at least [ten (10)]*three (3)* seconds prior to receiving an agency order that is executable against such bid or offer, or (iii) the order entry firm proceeds in accordance with the crossing rules contained in Rule 6.74.

.02 Solicitation Orders. Order entry firms must expose orders they represent as agent for at least [ten (10)]*three (3)* seconds before such orders may be executed electronically via the electronic execution mechanism of the Hybrid System, in whole or in part, against orders solicited from members and non-member broker-dealers to transact with such orders.

* * * * *

Rule 6.45B—Priority and Allocation of Trades in Index Options and Options on ETFs on the CBOE Hybrid System

(a)–(d) No change.

* * * Interpretations and Policies:

.01 Principal Transactions: Order entry firms may not execute as principal against orders they represent as agent unless: (i) Agency orders are first exposed on the Hybrid System for at least [ten (10)]*three* (3) seconds, (ii) the order entry firm has been bidding or offering for at least [ten (10)]*three (3)* seconds prior to receiving an agency order that is executable against such bid or offer, or (iii) the order entry firm proceeds in accordance with the crossing rules contained in Rule 6.74.

.02 Solicitation Orders. Order entry firms must expose orders they represent as agent for at least [ten (10)]*three(3)* seconds before such orders may be executed electronically via the electronic execution mechanism of the Hybrid System, in whole or in part, against orders solicited from members and non-member broker-dealers to transact with such orders.

* * * * *

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 CBOE 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 CBOE 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

CBOE rules provide that an order entry firm may not execute an order it represents as agent with a facilitation or solicited order (referred to herein as ''crossing orders'') using Hybrid unless it first complies with the 10-second exposure requirement. Specifically, order entry firms may not execute a facilitation cross unless (i) the agency order is first exposed on Hybrid for at least 10 seconds, (ii) the order entry firm has been bidding or offering for at least 10 seconds prior to receiving the agency order that is executable against such bid or offer, or (iii) the order entry firm proceeds in accordance with the floor-based open outcry crossing rules contained in CBOE Rule 6.74, *''Crossing'' Orders*. Similarly, order entry firms may not execute a solicitation cross unless the agency order is first exposed on Hybrid for at least 10 seconds. During this 10 second exposure period for crossing orders, other members may enter orders to trade against the exposed order.

The Exchange proposes to shorten the duration of the exposure period contained in the rules governing such transactions, as set forth in Interpretations and Policies .01 and .02 to CBOE Rules 6.45A, *Priority and Allocation of Equity Option Trades on the CBOE Hybrid System*, and 6.45B, *Priority and Allocation of Trades in Index Options and Options on ETFs on the CBOE Hybrid System*, from 10 seconds to 3 seconds. This shortened exposure period is fully consistent with the electronic nature of Hybrid. Market participants on the CBOE have implemented systems that monitor any updates to the CBOE market including any changes resulting from orders being entered into Hybrid and can automatically respond based on pre-set parameters. Thus, an exposure period of 3 seconds will permit exposure of orders on the CBOE in a manner consistent with the Exchange's electronic market.

By reducing the exposure time from 10 seconds to 3 seconds, the CBOE believes that members will be able to provide liquidity to their customers' orders on a timelier basis, thus providing investors with more speedy executions. Timely and accurate executions are consistent with the principles under which Hybrid was developed.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b) of the Act [3] in general and furthers the objectives of section 6(b)(5) of the Act [4] in particular in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change will provide investors with more timely execution of their options orders, while ensuring that there is an adequate exposure of all crossing orders in the CBOE marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the CBOE consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2006–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2006–09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2006–09 and should be submitted on or before March 15, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Nancy M. Morris,

Secretary.

[FR Doc. E6–2439 Filed 2–21–06; 8:45 am]

BILLING CODE 8010–01–P

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53287; File No. SR–Phlx–2006–10]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Imposing Licensing Fees in Connection with the Firm-Related Equity Option and Index Option Fee Cap

February 14, 2006.

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 February 2, 2006, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Phlx. The Phlx has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend its schedule of fees to adopt a license fee of $.10 for options traded on the following products:[5] (1) State Street Global Advisors', a division of State Street Bank and Trust Company (''SSGA''), streetTracks based on the Dow Jones & Co., Inc. (''Dow Jones'') Global Titans 50 Index^{SM}, traded under the symbol DGT; (2) SSGA's streetTracks based on the Dow Jones Wilshire 5000 Index^{SM}, traded under the symbol TMW; (3) BGI's iShares Dow Jones Select Dividend Index^{SM}, traded under the symbol DVY; (4) iShares Dow Jones U.S. Total Market Index^{SM}, traded under the symbol IYY; (5) iShares Dow Jones U.S. Basic Materials Index^{SM}, traded under the symbol IWM; (6) iShares Dow Jones U.S. Consumer Services Sector Index^{SM}, traded under the symbol IYC; (7) iShares Dow Jones U.S. Financial Sector Index^{SM}, traded under the symbol IYF; (8) iShares Dow Jones U.S. Financial Services Sector Index^{SM}, traded under the symbol IYG; (9) iShares Dow Jones U.S. Healthcare Sector Index^{SM}, traded under the symbol IYH; (10) iShares Dow Jones U.S. Industrial Sector Index^{SM}, traded under the symbol IYJ; (11) iShares Dow Jones U.S. Consumer Goods Sector Index^{SM}, traded under the symbol IYK; (12) iShares Dow Jones U.S. Real Estate Sector Index^{SM}, traded under the symbol IYR; (13) iShares Dow Jones U.S. Technology Sector Index^{SM}, traded under the symbol IYW; (14) iShares Dow Jones U.S. Telecommunications Sector Index^{SM}, traded under the symbol IYZ; (15) iShares Dow Jones U.S. Utilities Sector Index^{SM}, traded under the symbol IDU; and (16) First Trust's ETF based on the Dow Jones Select Microcap Index^{SM}, traded under the symbol FDM, (collectively ''Dow Jones products'')[6] to be assessed per contract side for equity option ''firm'' transactions (comprised of equity option firm/proprietary comparison transactions, equity option firm/proprietary transactions and equity option firm/proprietary facilitation transactions). This license fee will be imposed only after the Exchange's $60,000 ''firm-related'' equity option and index option comparison and transaction charge cap, described more fully below, is reached.

Currently, the Exchange imposes a cap of $60,000 per member organization[7] on all ''firm-related''

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] This fee will be charged only to Exchange Members.

[6] ''Dow Jones'' and ''SSGA's streetTracks based on the Dow Jones Global Titans 50 Index^{SM}'', ''SSGA's streetTracks based on the Dow Jones Wilshire 5000 Index^{SM}'', ''BGI's iShares Dow Jones Select Dividend Index^{SM}'', ''iShares Dow Jones U.S. Total Market Index^{SM}'', ''iShares Dow Jones U.S. Basic Materials Index^{SM}'', ''iShares Dow Jones U.S. Consumer Services Sector Index^{SM}'', ''iShares Dow Jones U.S. Financial Sector Index^{SM}'', ''iShares Dow Jones U.S. Financial Services Sector Index^{SM}'', ''iShares Dow Jones U.S. Healthcare Sector Index^{SM}'', ''iShares Dow Jones U.S. Industrial Sector Index^{SM}'', ''iShares Dow Jones U.S. Consumer Goods Sector Index^{SM}'', ''iShares Dow Jones U.S. Real Estate Sector Index^{SM}'', ''iShares Dow Jones U.S. Technology Sector Index^{SM}'', ''iShares Dow Jones U.S. Telecommunications Sector Index^{SM}'', ''iShares Dow Jones U.S. Utilities Sector Index^{SM}'', and ''First Trust's ETF based on the Dow Jones Select Microcap Index^{SM}'', are service marks of Dow Jones & Company, Inc. and have been licensed for use for certain purposes by the Philadelphia Stock Exchange, Inc. The Dow Jones products are not sponsored, endorsed, sold or promoted by Dow Jones, and Dow Jones makes no representation regarding the advisability of investing in such product(s).

[7] The firm/proprietary comparison or transaction charge applies to member organizations for orders for the proprietary account of any member or non-member broker-dealer that derives more than 35% of its annual, gross revenues from commissions and principal transactions with customers. Member

equity option and index option comparison and transaction charges combined.[8] Specifically, ''firm-related'' charges include equity option firm/proprietary comparison charges, equity option firm/proprietary transaction charges, equity option firm/proprietary facilitation transaction charges, index option firm/proprietary comparison charges, index option firm/proprietary transaction charges, and index option firm/proprietary facilitation transaction charges (collectively the ''firm-related charges''). Thus, such firm-related charges in the aggregate for one billing month may not exceed $60,000 per month per member organization.

The Exchange also imposes a license fee of $0.10 per contract side for equity option and index option ''firm'' transactions on certain licensed products (collectively ''licensed products'') after the $60,000 cap, as described above, is reached.[9] Therefore, when a member organization exceeds the $60,000 cap (comprised of combined firm-related charges), the member organization is charged $60,000, plus license fees of $0.10 per contract side for any contracts in licensed products (if any) over those that were included in reaching the $60,000 cap. In other words, if the cap is reached, the $0.10 license fee is imposed on all subsequent equity option and index option firm transactions; these license fees are charged in addition to the $60,000 cap.

The Exchange proposes to adopt a $.10 license fee per contract side for the Dow Jones products for equity option firm transactions, which will be imposed after the $60,000 cap is reached in the same way as the current licensed product fees are assessed. Thus, when a member organization exceeds the $60,000 cap, the member organization will be charged $60,000 plus any applicable license fees for trades of licensed products, including the Dow Jones products, over those trades that were counted in reaching the $60,000 cap.[10]

This proposal is scheduled to become effective for transactions settling on or after February 2, 2006.

The text of the proposed rule change is available at the Commission's Public Reference Room, at the Exchange and at the Exchange's Web site: *http://www.phlx.com/exchange/phlx_rule_fil.html.*

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 Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposal. 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 assessing the Dow Jones products license fee of $.10 per contract side after reaching the $60,000 cap as described in this proposal is to help defray licensing costs associated with the trading of these products, while still capping member organizations' fees enough to attract volume from other exchanges. The cap operates this way in order to offer an incentive for additional volume without leaving the Exchange with significant out-of-pocket costs.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of dues, fees and charges is consistent with section 6(b) of the Act[11] in general, and furthers the objectives of section 6(b)(4) of the Act[12] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change. The Phlx has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act,[13] and paragraph (f)(2) of Rule 19b–4 thereunder[14] because it establishes or changes a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2006–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2006–10. This file

organizations will be required to verify this amount to the Exchange by certifying that they have reached this threshold by submitting a copy of their annual report, which was prepared in accordance with Generally Accepted Accounting Principles (''GAAP''). In the event that a member organization has not been in business for one year, the most recent quarterly reports, prepared in accordance with GAAP, will be accepted. *See* Securities Exchange Act Release No. 43558 (November 14, 2000), 65 FR 69984 (November 21, 2000) (SR–Phlx–00–85).

[8] *See* Securities Exchange Act Release No. 51024 (January 11, 2005), 70 FR 3088 (January 19, 2005) (SR–Phlx–2004–94).

[9] For a complete list of the licensed products that are assessed a $.10 license fee per contract side after the $60,000 cap is reached, *see* $60,000 ''Firm Related'' Equity Option and Index Option Cap on the Exchange's fee schedule. *See also*, Securities Exchange Act Release No. 52220 (August 5, 2005), 70 FR 46899 (August 11, 2005) (SR–Phlx–2005–49).

[10] Consistent with current practice, when calculating the $60,000 cap, the Exchange first calculates all equity option and index option transaction and comparison charges for products without license fees and then equity option and index option transaction and comparison charges for products with license fees (*i.e.*, QQQ license fees) that are assessed by the Exchange after the $60,000 cap is reached. *See* Securities Exchange Act Release No. 50836 (December 10, 2004), 69 FR 75584 (December 17, 2004) (SR–Phlx–2004–70).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 240.19b–4(f)(2).

number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the Phlx. 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–2006–10 and should be submitted on or before March 15, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Nancy M. Morris,

Secretary.

[FR Doc. E6–2457 Filed 2–21–06; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Gemini Investors IV, L.P. (''Applicant''), 20 William Street, Wellesley, MA 02481, an SBIC Applicant under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and § 107.730, Financings which Constitute Conflicts of Interest, of the Small Business Administration (''SBA'') rules and regulations (13 CFR 107.730 (2004)). Gemini Investors IV, L.P. proposes to provide financing in the form of subordinated debt with warrant to purchase 5% of common stock of UMD Technology, Inc. (''UMD''), 1499 SE Tech Center Place, Suite 140, Vancouver, WA 98683. The financing is contemplated for growth, modernization, working capital and business expansion of UMD.

This investment requires an exemption from the prohibitions in 13 CFR 107.730, Conflicts of Interest, because an affiliated SBIC, Gemini Investors III, L.P. (''Gemini III''), has a controlling equity interest (66% pre-closing, 62.7% post closing) in UMD. Therefore, UMD Technology, Inc. is considered an Associate of the Applicant as defined in § 107.50 of the Regulations.

Notice is hereby given that any interested person may submit written comments on the transaction to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Jaime Guzmàn-Fournier,

Associate Administrator for Investment.

[FR Doc. E6–2430 Filed 2–21–06; 8:45 am]

BILLING CODE 8025–01–P

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2004–19485; Notice 2]

Decision That Nonconforming 2004 Jeep Liberty Multipurpose Passenger Vehicles Manufactured for the Mexican Market Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of decision by the National Highway Traffic Safety Administration that nonconforming 2004 Jeep Liberty multipurpose passenger vehicles manufactured for the Mexican market are eligible for importation.

SUMMARY: This document announces a decision by the National Highway Traffic Safety Administration (NHTSA) that certain 2004 Jeep Liberty multipurpose passenger vehicles manufactured for the Mexican market that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S. certified version of the 2004 Jeep Liberty multipurpose passenger vehicle), and they are capable of being readily altered to conform to the standards.

DATES: This decision was effective January 26, 2005. The agency notified the petitioner at that time that the subject vehicles are eligible for importation. This document provides public notice of the eligibility decision.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified as required under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Wallace Environmental Testing Laboratories, Inc. (WETL) of Huston, Texas (Registered Importer 90–005), petitioned NHTSA to decide whether 2004 Jeep Liberty multipurpose passenger vehicles manufactured for the Mexican market are eligible for importation into the United States. NHTSA published notice of the petition on November 3, 2004 (69 FR 64129) to afford an opportunity for public comment. The reader is referred to that notice for a thorough description of the petition.

One comment was received in response to the notice of petition, from DaimlerChrysler Corporation (DCC), the vehicle's original manufacturer. DCC addressed issues concerning the absence of advanced airbag systems on the vehicles that are the subject of this petition. DCC observed that the petition states that the Mexican model's passive restraint system is identical to that installed on the U.S.-model. DCC

explained that the systems are not identical and that this inaccuracy could lead to a public misperception that the Mexican market vehicles are equipped with advanced airbag system capabilities.

The agency notes that DCC did not challenge the similarity of the Mexican model to its U.S.-certified counterpart for the purpose of establishing the Mexican model's eligibility for importation into the United States. DCC observed that it chose to install advanced air bag systems in 2004 Jeep Liberty multipurpose passenger vehicles that it certified for sale in the United States.

The Transportation Equity Act for the 21st Century (TEA 21), enacted by Congress on June 9, 1998 as Public Law 105–178, directed NHTSA to issue a new rule ''to improve occupant protection for occupants of different sizes, belted and unbelted, under Federal Motor Vehicle Safety Standard No. 208, while minimizing the risk to infants, children, and other occupants from injuries and deaths caused by air bags, by means that include advanced air bags.''

NHTSA issued the new rule (referred to as ''the advanced air bag rule'') on December 18, 2001 (66 FR 65376). Under the new rule, sled testing is no longer an option to demonstrate compliance with the standard's requirements. In addition, offset, oblique, and full frontal barrier crash tests (using both rigid and deformable barriers) are stipulated for assessing the protection of both belted and unbelted occupants. Other tests are included to prove compliance with airbag low risk deployment and suppression requirements. The test speeds and injury criteria for barrier tests have been revised, and the use of an entire family of test dummies is now included. High volume vehicle manufacturers are subject to certain phase-in requirements and may also voluntarily certify vehicles to the advanced airbag requirements prior to the time when such requirements become mandatory.

Small volume manufacturers (which NHTSA considers Registered Importers to be for FMVSS phase-in purposes), need only meet the new rules for all passenger vehicles manufactured on or after September 1, 2006.

Since the vehicles at issue were manufactured prior to the date when the advanced air bag requirements will go into effect for all passenger vehicles, the agency concluded that the issue raised by DCC was not germane to the issue of whether those vehicles are eligible for importation. Accordingly, the agency decided to grant the petition.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final decision must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP–457 is the vehicle eligibility number assigned to vehicles admissible under this notice of final decision.

Final Decision

Accordingly, on the basis of the foregoing, NHTSA has decided that 2004 Jeep Liberty multipurpose passenger vehicles manufactured for the Mexican market that were not originally manufactured to comply with all applicable FMVSS are substantially similar to 2004 Jeep Liberty multipurpose passenger vehicles originally manufactured for sale in the United States and certified under 49 U.S.C. 30115, and are capable of being readily altered to conform to all applicable FMVSS.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E6–2433 Filed 2–21–06; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34421]

HolRail LLC—Construction and Operation Exemption—In Orangeburg and Dorchester Counties, SC

AGENCY: Surface Transportation Board, Transportation.

ACTION: Notice of Availability of Final Scope of Study for the Environmental Impact Statement.

SUMMARY: On November 13, 2003, HolRail LLC (HolRail) filed a petition with the Surface Transportation Board (the Board or STB) pursuant to 49 U.S.C. 10502 for authority to construct and operate a rail line in Orangeburg and Dorchester counties, South Carolina (SC). The proposed project would involve the construction and operation of approximately two miles of new rail line from the existing cement production factory owned by HolRail's parent company, Holcim (US) Inc. (Holcim), located near Holly Hill in Orangeburg County, to the terminus of an existing rail line of the Norfolk Southern Railway Company (NSR), located to the south near Giant in Dorchester County.

Based on consultations conducted to date, the Board's Section of Environmental Analysis (SEA) determined that the preparation of an Environmental Impact Statement (EIS) is appropriate. To help determine the scope of the EIS, and as required by the Board's regulations at 49 CFR 1105.10(a)(2), SEA published in the **Federal Register** on July 29, 2005, the Notice of Intent to Prepare an EIS; Notice of Initiation of the Scoping Process; Notice of Availability of Draft Scope of Study for the EIS and Request for Comments. The scoping comment period originally concluded on August 31, 2005, but due to an inadvertent omission in the scoping notice mailed to Federal, state and local agencies, SEA accepted comments from any interested agency through October 28, 2005. After review and consideration of all comments received, this notice sets forth the Final Scope of Study for the EIS. The Final Scope of Study reflects changes to the Draft Scope of Study as a result of the comments, and summarizes and addresses the principal environmental concerns raised by the comments.

FOR FURTHER INFORMATION CONTACT: Mr. David Navecky, Section of Environmental Analysis, Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001, or 202–565–1593, or *naveckyd@stb.dot.gov.* Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background: By petition filed on November 13, 2003, HolRail seeks an exemption from the Board under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for authority to construct and operate a rail line in Orangeburg and Dorchester counties, SC, approximately 40 miles northwest of Charleston and 60 miles southeast of Columbia.

The new rail line would establish alternative rail service at the Holly Hill facility which is presently served only by CSX Transportation, Inc. (CSX). Holcim recently completed an expansion of the Holly Hill plant and has determined that alternative rail access is necessary to achieve the full benefits of the expanded production capacity. HolRail would arrange for a third-party operator to provide rail service, and would employ a contractor to provide maintenance service for the line, or engage the third-party operator to perform this service.

Pursuant to the Board's responsibilities under the National Environmental Policy Act (NEPA), SEA has begun the environmental review of HolRail's proposal by consulting with appropriate Federal, state, and local agencies, as well as HolRail, and conducting technical surveys and analyses. SEA has also consulted with the South Carolina State Historic Preservation Office (SHPO) in accordance with the regulations implementing section 106 of the National Historic Preservation Act (NHPA) at 36 CFR part 800 and identified appropriate consulting parties to the section 106 process.

Based on the nature and content of the public and agency comments received, SEA determined that the effects of the proposed project on the quality of the natural environment may be significant, and thus, preparation of an EIS is appropriate. For the environmental review process, SEA intends to analyze the potential environmental impacts of the proposed route, the no-action or no-build alternative (i.e., continuing use of the CSX line), and one alternative route that SEA has preliminarily determined as a reasonable and feasible build alternative.

Environmental Review Process: The NEPA process is intended to assist the Board and the public in identifying and assessing the potential environmental consequences of a proposed action before a decision on the proposed action is made. SEA is responsible for ensuring that the Board complies with NEPA and related environmental statutes. The first stage of the EIS process is scoping. Scoping is an open process for determining the scope of environmental issues to be addressed in the EIS. For this scoping process, SEA developed a Draft Scope of Study for the EIS and issued the document for public review and written comment. In response to the Draft Scope of Study, SEA received written comments from four agencies and one interested party. After review and consideration of all comments received, this notice sets forth the Final Scope of Study for the EIS. The Final Scope of Study reflects changes to the Draft Scope of Study as a result of the comments.

With the issuance of this Final Scope of Study, SEA will now prepare a Draft EIS (DEIS) for the project. The DEIS will address those environmental issues and concerns identified during the scoping process. It will also contain SEA's preliminary recommendations for environmental mitigation measures. Upon its completion, the DEIS will be made available for public and agency review and comment for at least 45 days. SEA will then prepare a Final EIS (FEIS) that addresses the comments on the DEIS from the public and agencies. Then, in reaching its decision in this case, the Board will take into account the DEIS, the FEIS, and all environmental comments that are received.

Summary of and Response to Scoping Comments

Written comments on the Draft Scope of Study were received from the U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), SC Department of Transportation (SCDOT), SC Office of Ocean and Coastal Resource Management (OCRM) and CSX Transportation, Inc. (CSX).

The USFWS, NMFS and SCDOT offered no specific comments on the Draft Scope of Study. In its comment letter, OCRM certified that the proposed project would be consistent with the SC Coastal Zone Management Program provided that (1) no freshwater wetlands are disturbed or altered and that (2) all necessary erosion and sediment control practices are maintained until the entire site is stabilized. If the proposed action would include disturbing two acres or more of land, or if less than two acres but within one-half mile of a receiving water body, a stormwater permit application must be submitted and approved by OCRM prior to any land disturbing activity. If land disturbing activities will be two acres or less and not within one-half mile of a receiving water body then a ''Disturbing Less Than Two Acres Form'' must be submitted to OCRM. Because the Draft Scope of Study already addressed wetland and surface water impacts and related permitting requirements, changes to the Scope of Study in response to OCRM's comments were not needed.

CSX's comments addressed the level of detail to be provided in the description of the alternatives and the nature of environmental impacts to be provided in the EIS. CSX also expressed conclusions on environmental impacts to be expected. Regarding the description of the alternatives, CSX listed the project design specifications and types of construction and operation activities it believes should be provided in the EIS. SEA will incorporate those details that SEA deems relevant and applicable to this EIS. SEA has clarified in the Final Scope of Study that the reasonable and feasible alternatives to be addressed in the EIS are construction and operation over Alignments A and B, and the no-action or no-build alternative.

In comments on environmental impacts, CSX addressed impact categories in general, and provided specific comments on the nature and types of impacts that should be addressed in the EIS in the areas of transportation and traffic safety; public health and worker health and safety; water resources; biological resources; geology and soils; and noise and vibration. SEA will address those impacts as appropriate based on the alternative descriptions and affected environment discussions yet to be prepared.

Final Scope of Study for the EIS

Proposed Action and Alternatives

The proposed project would provide alternative rail access to the Holcim facility, which is currently served only by CSX. The existing CSX line begins at the terminus of an NSR rail line at Giant, SC, passes to the immediate west of the Holcim facility, and continues to Creston, SC. The proposed action would involve the construction and operation of an approximately 2-mile rail line that would also begin at the terminus of the NSR line at Giant, SC, and end at the Holcim facility.

HolRail proposes two potential alignments, both of which are on the east side of and parallel to the existing CSX line across Four Hole swamp, a world class heritage swamp according to comments submitted by the U.S. Army Corps of Engineers, SC Department of Natural Resources, and National Audubon Society during preliminary consultations. Alignment A would involve constructing the new rail line largely within the existing ROW of the CSX rail line. Alignment B would be constructed approximately 50 yards east of the CSX ROW, on property almost entirely owned by Holcim. Either alignment would connect with NSR to the south on land owned by a neighboring cement facility, over which HolRail intends to obtain access by easement or other arrangement.

HolRail intends to construct and own the track, which would be a part of the common carrier rail network. HolRail would arrange for a third-party operator to provide rail service. HolRail would also employ a contractor to provide maintenance service for the line, or engage the third-party operator to perform this service.

Environmental Impact Analysis

The reasonable and feasible alternatives that will be evaluated in the EIS are (1) a new rail line utilizing

Alignment A, (2) a new rail line using Alignment B, and (3) the no-action or no-build alternative. Any other alternatives that were considered but not carried forward in the EIS and the reasons they were discarded will also be briefly described in the EIS.

Proposed New Construction

The EIS will document the activities associated with the construction and operation of the proposed new rail line.

Impact Categories

Impact areas addressed in the EIS will include the effects of the proposed construction and operation of the new rail line on transportation and traffic safety, public health and worker health and safety, water resources, biological resources, air quality, geology and soils, land use, environmental justice, noise, vibration, recreation and visual resources, cultural resources, and socioeconomics. The EIS will include a discussion of each of these categories as they currently exist in the project area and will address the potential impacts from the proposed project on each category, as described below:

1. Transportation and Traffic Safety

The EIS will:

a. Describe the potential impacts of the proposed new rail line construction and operation on the existing transportation network in the project area.

b. Describe the potential for train derailments or accidents from proposed rail operations.

c. Describe potential pipeline safety issues at rail/pipeline crossings, as appropriate.

d. Propose mitigative measures to minimize or eliminate potential project impacts to transportation and traffic safety, as appropriate.

2. Public Health and Worker Health and Safety

The EIS will:

a. Describe potential public health impacts from the proposed new rail line construction and operation.

b. Describe potential impacts to worker health and safety from the proposed new rail line construction and operation.

c. Propose mitigative measures to minimize or eliminate potential project impacts to public health and worker health and safety, as appropriate.

3. Water Resources

The EIS will:

a. Describe the existing groundwater resources within the project area, such as aquifers and springs, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.

b. Describe the existing surface water resources within the project area, including watersheds, streams, rivers, and creeks, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.

c. Describe existing wetland systems in the project area, including Four Hole Swamp, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.

d. Describe the permitting requirements that are appropriate for the proposed new rail line construction and operation regarding wetlands, stream crossings (including floodplains), water quality, and erosion control.

e. Propose mitigative measures to minimize or eliminate potential project impacts to water resources, as appropriate.

4. Biological Resources

The EIS will:

a. Describe the existing biological resources within the project area, including vegetative communities, wildlife and fisheries, and Federal and state threatened or endangered species and the potential impacts to these resources resulting from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts to biological resources, as appropriate.

5. Air Quality Impacts

The EIS will:

a. Describe the potential air quality impacts resulting from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts to air quality, as appropriate.

6. Geology and Soils

The EIS will:

a. Describe the native soils and geology of the proposed project area.

b. Describe the potential impacts to soils and geologic features from the proposed new rail line construction and operation.

c. Propose mitigative measures to minimize or eliminate potential project impacts on soils and geologic features, as appropriate.

7. Land Use

The EIS will:

a. Describe existing land use patterns within the project area and identify those land uses that would be potentially impacted by the proposed new rail line construction and operation.

b. Describe the potential impacts associated with the proposed new rail line construction and operation to land uses identified within the project area.

c. Propose mitigative measures to minimize or eliminate potential project impacts to land use, as appropriate.

8. Environmental Justice

The EIS will:

a. Describe the demographics of the communities potentially impacted by the construction and operation of the proposed new rail line.

b. Evaluate whether new rail line construction or operation would have a disproportionately high adverse impact on any minority or low-income group.

c. Propose mitigative measures to minimize or eliminate potential project impacts on environmental justice communities of concern, as appropriate.

9. Noise

The EIS will:

a. Describe the existing noise environment of the project area and potential noise impacts from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts to noise receptors, as appropriate.

10. Vibration

The EIS will:

a. Describe the potential vibration impacts from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts from vibration, as appropriate.

11. Recreation and Visual Resources

The EIS will:

a. Describe existing recreation and visual resources in the proposed project area and potential impacts to recreation and visual resources from construction and operation of the proposed new rail line.

b. Propose mitigative measures to minimize or eliminate potential project impacts to recreation and visual resources, as appropriate.

12. Cultural Resources

The EIS will:

a. Describe the cultural resources in the area of the proposed project and potential impacts to cultural resources from the proposed new rail line construction and operation.

b. Describe the NHPA section 106 process for the proposed project, and

propose mitigative measures to minimize or eliminate potential project impacts to cultural resources, as appropriate.

13. Socioeconomics

The EIS will:

a. Describe the demographic characteristics of the project area.

b. Describe the potential environmental impacts to employment and the local economy as a result of the proposed new rail line construction and operation.

c. Propose mitigative measures to minimize or eliminate potential project adverse impacts to socioeconomic resources, as appropriate.

14. Cumulative and Indirect Impacts

The EIS will:

a. Address any identified potential cumulative impacts of the proposed new rail line construction and operation, as appropriate. Cumulative impacts are the impacts on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such actions.

b. Address any identified potential in direct impacts of the proposed new rail line construction and operation, as appropriate. Indirect impacts are impacts that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.

Decided: February 16, 2006.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams,

Secretary.

[FR Doc. E6–2456 Filed 2–21–06; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. MC–F–21014]

KBUS Holdings, LLC, & CUSA, LLC-Acquisition of Control-America Charters, Ltd. et al.

AGENCY: Surface Transportation Board.

ACTION: Notice Tentatively Approving Finance Transaction.

SUMMARY: KBUS Holdings, LLC (KBUS), and CUSA, LLC (CUSA) (collectively, Applicants), have filed an application under 49 U.S.C. 14303 to acquire control of American Coach Lines, Inc. (ACL), by acquiring all of the outstanding stock of ACL from ACL Acquisition LLC, William Bergstrom, George Del Pino, Mark Konttinen, John Garrett, Bruce Bechard, Robert Finke, Ron Dillon, Sr., and Vesa Nikunen (collectively, Sellers). ACL currently controls the following federally regulated motor carriers of passengers: America Charters, Ltd.; American Coach Lines of Atlanta, Inc.; American Coach Lines of Jacksonville, Inc.; American Coach Lines of Miami, Inc.; American Coach Lines of Orlando, Inc.; Dillon's Bus Service, Inc.; Florida Cruise Connection, Inc., d/b/a Cruise Connection; Midnight Sun Tours, Inc.; Southern Coach Company; and Southern Tours, Inc. Persons wishing to oppose this application must follow the rules at 49 CFR 1182.5 and 1182.8. The Board has tentatively approved the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments must be filed by April 10, 2006. Applicants may file a reply by April 24, 2006. If no comments are filed by April 10, 2006, this notice is effective on that date.

ADDRESSES: Send and original and 10 copies of any comments referring to STB Docket No. MC–F–21014 to: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, send one copy of comments to the Applicants' representative: Stephen Flott, Flott & Co. PC, P.O. Box 17655, Arlington, VA 22216–7655.

FOR FURTHER INFORMATION CONTACT: Eric S. Davis, (202) 565–1608 [Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339].

SUPPLEMENTARY INFORMATION: CUSA is a noncarrier which owns 23 federally regulated and several non-federally regulated motor carriers. CUSA is, in turn, wholly owned by noncarrier KBUS Holdings, LLC, which acquired the assets and business operations of the federally regulated motor carriers owned by Coach USA, Inc., then consolidated those assets/operations into the motor passenger carriers now controlled by CUSA.[1] The CUSA group of companies generated more than $215 million in gross revenue for the calendar year ending December 31, 2004.

The Sellers own 100% of the shares of ACL, a noncarrier, which in turn owns 100% of the shares of the federally regulated motor carriers listed above. The ACL-controlled carriers have facilities in the six coastal states from Maryland to Florida, operate a fleet of more than 430 motor coaches and 110 minibuses, and had, as of December 31, 2005, approximately 1,200 employees.

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction found to be consistent with the public interest, taking into consideration at least: (1) The effect of the transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of affected carrier employees.

KBUS and CUSA have submitted information, as required by 49 CFR 1182.2, including the information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b). Applicants state that the proposed transaction will have no impact on the adequacy of transportation services available to the public, that the proposed transaction will not have an adverse effect on total fixed charges, and that the interests of employees of the carriers controlled by ACL will not be adversely impacted. Additional information, including a copy of the application, may be obtained from the Applicants' representative.

On the basis of the application, we find that the proposed acquisition of control is consistent with the public interest and should be authorized. If any opposing comments are timely filed, this finding will be deemed vacated, and unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The proposed finance transaction is approved and authorized, subject to the filing of opposing comments.

2. If timely opposing comments are filed, the findings made in this notice will be deemed as having been vacated.

3. This notice will be effective April 10, 2006, unless timely opposing comments are filed.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 400 7th Street, SW., Room 8214, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street &

[1] *See KBUS Holdings, LLC—Acquisition of Assets and Business Operations—All West Coachlines, Inc., et al.*, STB Docket No. MC–F–21000 (STB served July 23, 2003).

Pennsylvania Avenue, NW., Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 400 7th Street, SW., Washington, DC 20590.

Decided: February 15, 2006.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams,

Secretary.

[FR Doc. E6–2466 Filed 2–21–06; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

February 15, 2006.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

Dates: Written comments should be received on or before March 24, 2006 to be assured of consideration.

Financial Management Service

OMB Number: 1510–0048.

Type of Review: Extension.

Title: Minority Bank Deposit Program (MBDP) Certification Form for Admission.

Form: FMS form 3144.

Description: A financial institution who wants to participate in the MBDP must complete this form. The approved application certifies the institution as minority and is admitted into the program.

Respondents: Business or other for-profit.

Estimated Total Burden Hours: 75 hour.

Clearance Officer: Jiovannah Diggs, (202) 874–7662, Financial Management Service, Room 144, 3700 East West Highway, Hyattsville, MD 20782.

OMB Reviewer: Alexander T. Hunt, (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E6–2441 Filed 2–21–06; 8:45 am]

BILLING CODE 4810–35–P

Federal Register

Wednesday,
February 22, 2006

Part II

Department of Veterans Affairs

38 CFR Part 21

Veterans and Dependents Education: Topping-Up Tuition Assistance; Licensing and Certification Tests; Duty To Assist Education Claimants; Proposed Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AK80

Veterans and Dependents Education: Topping-Up Tuition Assistance; Licensing and Certification Tests; Duty To Assist Education Claimants

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the regulations governing various aspects of the education programs the Department of Veterans Affairs (VA) administers, in order to implement some provisions of the Veterans Benefits and Health Care Improvement Act of 2000, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, and the Veterans Claims Assistance Act of 2000 that affect those programs. Specifically, these statutory provisions include provisions for payment, under Survivors' and Dependents' Educational Assistance, the Post-Vietnam Era Veterans' Educational Assistance Program, and the Montgomery GI Bill—Active Duty, for the cost of taking tests for licensure or certification. They also include provisions for payment under the Montgomery GI Bill—Active Duty of the difference between the portion of tuition and expenses covered by tuition assistance programs administered by the various military departments and the actual charges made by educational institutions. In addition, this document proposes rules regarding the timing and the scope of assistance VA will provide to claimants under the education programs VA administers who file substantially complete applications for benefits, or who attempt to reopen previously denied claims. The proposed rule would make other changes in the education benefits regulations that are nonsubstantive changes for the purpose of clarity, technical changes, or restatements of statutory provisions.

DATES: Comments must be received on or before April 24, 2006.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or e-mail comments through *http://www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AK80.'' All comments received will be available for public inspection in the Office of Regulation Policy and Management, room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment. In addition, see the Paperwork Reduction Act of 1995 heading under the **SUPPLEMENTARY INFORMATION** section of this preamble regarding submission of comments on the information collection provisions.

FOR FURTHER INFORMATION CONTACT: Lynn M. Nelson, Education Advisor (225C), Education Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–7187.

SUPPLEMENTARY INFORMATION: Section 3689 of title 38 U.S.C., as added by section 122 of the Veterans Benefits and Health Care Improvement Act of 2000 (Pub. L. 106–419) and amended by section 308(d) of the Veterans Benefits Act of 2002 (Pub. L. 107–330), contains provisions that allow veterans and other eligible persons to receive educational assistance under Survivors' and Dependents' Educational Assistance (DEA), the Post-Vietnam Era Veterans' Educational Assistance Program (VEAP), and the Montgomery GI Bill—Active Duty (MGIB) to cover the costs of taking tests for licensing or certification. Section 3689 provides that both the tests and the organizations offering the tests must be approved for VA training before veterans or other eligible persons could be paid for the cost of these tests. Section 3689(a) further provides that the Secretary of Veterans Affairs may approve these tests and organizations or use the State approving agencies (SAAs) to carry out this responsibility. The proposed rule would reflect the Secretary's determination that the SAAs are fully capable of carrying out this responsibility for all tests and organizations except for those tests the Federal Government offers.

This proposed rule would contain provisions that VA believes are necessary to properly administer the provisions of 38 U.S.C. 3689 for payment of the cost of taking tests for licensure or certification. For example, VA believes that a testing organization should have the right to seek a review of an SAA's adverse decision. Although this isn't stated in the law, it would be provided in proposed § 21.4268(f). Under proposed § 21.4268(f), if an organization or entity offering a test disagrees with a decision made by an SAA, the organization or entity may seek a review of the SAA's decision by VA's Director of Education Service. The organization or entity would request such review in writing to the SAA. Proposed § 21.4268(f)(2) would require that the request must be received by the SAA within 90 days of the date of the notice that the test or organization was not approved. Proposed § 21.4268(f)(3) would require that the review by the Director of Education Service would be based on the evidence of record and would not be *de novo* in character. Proposed § 21.4268(f)(4) would provide that VA's Director of Education Service, or Under Secretary of Benefits, may seek the advice of the Professional Certification and Licensure Advisory Committee as to whether or not the SAA's decision should be reversed. The Professional Certification and Advisory Committee was established under 38 U.S.C. 3689(e) to advise the Secretary with respect to the requirements of organizations and entities offering licensing and certification tests to individuals eligible for VA educational assistance under chapters 30, 32, 34, or 35 of title 38. Under proposed § 21.4268(f)(5), the decision made by the Director of Education Service, or Under Secretary for Benefits, would be the final administrative decision. Such decision would not be subject to further administrative review.

Similarly, section 3689 states that the veteran or eligible person should be paid, but doesn't state whether VA should make that payment before or after the individual takes the test. Under the proposed rule, this payment would be made as a reimbursement rather than an advance payment. VA believes this is necessary to simplify the process for applicants, to minimize the costs of administering these payments, and to reduce the possibility of overpayments. A veteran or eligible person may contact VA at 1–888–GIBill–1 (1–888–442–4551) to determine if the test he or she wants to take is approved for reimbursement.

In addition, 38 U.S.C. 3689(d) provides that ''the organization or entity that offers such test is deemed to be an * * * ''educational institution'' * * * for [certain] purposes * * *.'' We propose to amend the definitions in various subparts of the education regulations in 38 CFR part 21 where appropriate to carry out this provision.

The payment of benefits under the MGIB is also affected by provisions in 38 U.S.C. 3014, as amended by section 1602 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106–398). Specifically, the proposed rule would reflect those provisions, under which VA can, at the election of the individual, pay educational assistance to meet the portion of the charges of an

educational institution for education or training that are not paid by the Secretary of a military department under 10 U.S.C. 2007(a) or (c). Such payments by VA would be defined in the proposed rule as ''tuition assistance top-up.'' (The payments by the Secretary of a military department under 10 U.S.C. 2007(a) or (c) are commonly called ''tuition assistance''.) The proposed rule would make clear how VA makes these payments and makes charges for them against each individual's entitlement.

The Veterans Claims Assistance Act of 2000 (Pub. L. 106–475) (VCAA) included provisions amending 38 U.S.C. 5102 and 5103 and adding new sections 38 U.S.C. 5100 and 5103A pertaining to VA's duty to assist claimants in obtaining evidence in support of claims for benefits. Upon receipt of a substantially complete application for benefits, VA's duty under the VCAA is to make reasonable efforts to help the claimant obtain the evidence necessary to substantiate the claim. This effort is commonly referred to as the duty to assist. VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim.

Under 38 U.S.C. 5103A(e), VA is directed to prescribe regulations to carry out the provisions of section 5103A. In the **Federal Register** of August 29, 2001 (66 FR 45620), VA issued a final rule amending 38 CFR part 3, subpart A, to carry out those and other provisions of the VCAA with respect to claims for benefits that are governed by 38 CFR part 3 (including compensation, pension, dependency and indemnity compensation, burial benefits, monetary benefits ancillary to those benefits, and special benefits) (66 FR at 45629). Section 701 of the Veterans Benefits Act of 2003 (Pub. L. 108–183) further amended 38 U.S.C. 5102 and 5103.

This proposed rule's provisions under the VCAA and the Veterans Benefits Act of 2003 would apply to the educational benefits programs administered by the Secretary (which currently are DEA, VEAP, MGIB, and the Montgomery GI Bill–Selected Reserve (MGIB–SR)) and would apply to claims filed on or after November 9, 2000.

VA is proposing to define a *substantially complete application* in proposed § 21.1029(g). In regard to an individual's first application for educational assistance administered by VA, we propose in (g)(1) to define a *substantially complete application* as an application that contains:

- The claimant's name;
- His or her relationship to the veteran, if applicable;
- Sufficient information for VA to verify the claimed service, if applicable;
- The benefit claimed;
- The program of education, if applicable; and
- The name of the educational institution the claimant intends to attend, if applicable.

If an application is a subsequent application for educational assistance, and the claimant's relationship to the veteran (if applicable) and sufficient information for VA to identify the claimed service (if applicable) are already on record with VA, under proposed § 21.1029(g)(2) a *substantially complete application* would be an application containing:

- The claimant's name;
- The benefit claimed;
- The program of education, if applicable; and
- The name of the educational institution the claimant intends to attend, if applicable.

Although VA application forms for educational assistance request more information than is listed in the proposed definition, the information specified in proposed 38 CFR 21.1029(g) to make an application substantially complete is generally sufficient for VA to identify the benefit claimed, determine whether the claimant is potentially eligible for it, and identify, at least generally, the types of information or evidence that would be required to substantiate the claim. A substantially complete application will trigger VA's duty to assist. A complete application would necessarily be a substantially complete application for purposes of VA's assistance in developing the claim.

In addition, this proposed rule contains restatements of statute and would make technical changes and nonsubstantive changes for the purpose of clarity in the regulations governing various aspects of the education programs VA administers.

Paperwork Reduction Act of 1995

This proposed rule includes provisions constituting collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (''Act'') that would need approval by the Office of Management and Budget (OMB). Accordingly, under section 3507(d) of the Act, VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns a control number for each collection of information it approves. VA 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.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to the Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or e-mail comments through *www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AK80.''

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Under this heading, *Paperwork Reduction Act of 1995,* the collections of information referred to in this paragraph are described, under their proposed titles. The proposed amendments in 38 CFR 21.1030(b), 21.1030(c), 21.4209, 21.4250(b), 21.4252(h), 21.4258, 21.4259, 21.4268, and 21.7140 contain collections of information under the Act for which we are requesting approval by OMB. For the collections of information in three of these sections as proposed to be amended, §§ 21.4250, 21.4258, and 21.4259, SAAs are the respondents, as SAAs also are for a related collection of information in 38 CFR 21.4154, which

is currently approved under OMB control number 2900–0051. For administrative convenience, we are requesting OMB to approve under that OMB control number the information collections relating to those four sections of the regulations (see ''State Approving Agency Reports and Notices, 38 CFR 21.4154, 21.4250(b), 21.4258, and 21.4259'' and the proposed information collection approval parentheticals at the end of each of those sections in the proposed rule).

This proposed rule would also amend some provisions containing other collections of information that have existing approval by OMB. In particular, the collections of information in proposed 38 CFR 21.1030(a)(1), (b)(1), and (c)(1) are approved under OMB control numbers 2900–0154 (Application for VA Education Benefits) and 2900–0098 (Application for Survivors' and Dependents' Educational Assistance (Under Chapter 35, Title 38 U.S.C.)). The collections of information in proposed 38 CFR 21.1030(a)(2) are approved under OMB control numbers 2900–0074 (Request for Change of Program or Place of Training (For Veterans, Servicepersons, & Members of the Selected Reserve)) and 2900–0099 (Request for Change of Program or Place of Training Survivors' and Dependents' Educational Assistance (Under Provisions of Chapter 35, Title 38 U.S.C.)).

The proposed rule would reflect, in the information collection approval parenthetical at the end of § 21.4252, Courses precluded; erroneous, deceptive, or misleading practices, as proposed to be amended, an OMB control number for the information collection in § 21.4252(h) as proposed to be amended, for which we are requesting OMB approval, and the OMB control numbers for the currently approved collections of information in § 21.4252(j) and (l), which paragraphs and collections of information this document does not propose to amend. The collections of information in current § 21.4252(j) and (l) are approved under OMB control number 2900–0156 (Notice of Change in Student Status) and OMB control number 2900–0073 (Enrollment Certification), respectively. No changes would be made by this proposed rule to the currently approved collections of information in § 21.4252. The collections of information in § 21.5133, Certifications and release of payments, and in § 21.7152, Certification of enrollment, are approved under OMB control number 2900–0465 (Student Verification of Enrollment) and OMB control number 2900–0073, respectively. Although this document proposes to amend certain provisions of §§ 21.5133 and 21.7152, including by adding descriptions of circumstances in which the respective section's collection of information would not apply, those amendments would not change the collections of information by VA under §§ 21.5133 and 21.7152.

We are proposing in § 21.7131 to make the technical correction of removing the information collection approval parenthetical. The approval under the OMB control number it contains, 2900–0607, was discontinued at VA's request, since VA no longer had a need to conduct that information collection.

This proposed rule includes information collection approval parentheticals at the end of certain sections. They display currently-approved OMB control numbers (OMB's approval of which is either current for information collections under those sections or requested in relation to this rulemaking to be modified to include those sections as proposed to be amended) and OMB control numbers shown as 2900–XXXX for information collections for which we are requesting newly-approved OMB control numbers in this rulemaking. We are also proposing in § 21.4154 to revise, with a technical change for the purpose of clarification, the information collection approval parenthetical in which we display OMB control number 2900–0051.

Title: Request for Reimbursement of Licensing or Certification Test Fee; 38 CFR 21.1030(b), 21.7140(c)(4).

Summary of collection of information: The collection of information in proposed §§ 21.1030(b) and 21.7140(c)(4) is necessary to apply 38 U.S.C. 3689 and 5101(a) to claims for educational assistance for licensing or certification tests under the various educational assistance programs VA administers. It would require that an individual must file a claim for educational assistance under the laws VA administers in order for VA to determine basic eligibility and to pay educational assistance to that individual for reimbursement of the cost of any licensing or certification test.

Description of need for information and proposed use of information: The information collection in proposed §§ 21.1030(b) and 21.7140(c)(4) is needed to enable VA to decide whether an individual is entitled to the educational assistance he or she is seeking for taking a licensing or certification test and, if VA determines that he or she should be paid, the amount to be paid to the claimant.

Description of likely respondents: Respondents would be veterans, servicemembers, and veterans' dependents who wish to receive educational assistance under DEA, VEAP, or the MGIB for reimbursement for taking an approved licensing or certification test.

Estimated number of respondents: 3,600.

Estimated frequency of responses: On occasion. When an individual wishes to receive educational assistance as a reimbursement of the cost of a licensing or certification test, the individual would need to file a claim for the benefit. Some claimants would file just one claim while others would file several from time to time as the situation may warrant.

Estimated total annual reporting and recordkeeping burden: 1,000 hours of reporting burden. VA estimates that there would be no recordkeeping burden.

Estimated average burden per response: 15 minutes.

Title: Application for Educational Assistance to Supplement Tuition Assistance; 38 CFR 21.1030(c), 21.7140(c)(5).

Summary of collection of information: The collection of information in proposed §§ 21.1030(c) and 21.7140(c)(5) is necessary to apply 38 U.S.C. 3014(b) and 5101(a) to claims for educational assistance under the MGIB to supplement tuition assistance provided under a program administered by the Secretary of a military department. Section 5101(a) requires that an individual must file a claim for a benefit under the laws VA administers in order for VA to pay that benefit to the individual.

Description of need for information and proposed use of information: The information collection in §§ 21.1030(c) and 21.7140(c)(5) is needed to enable VA to decide whether the claimant should be paid the educational assistance he or she is seeking to supplement the tuition assistance the claimant received and, if he or she should be paid, the amount to be paid.

Description of likely respondents: Respondents would be veterans, reservists, and servicemembers who wish to receive educational assistance under the MGIB for reimbursement for that portion of the cost of a course not covered by tuition assistance provided under a program administered by the Secretary of a military department.

Estimated number of respondents: 12,250.

Estimated frequency of responses: When an individual wishes to receive educational assistance for

reimbursement for that portion of the cost of a course not covered by tuition assistance, the individual would need to file a claim for the benefit. Some claimants would file just one claim while others would file several from time to time as the situation warrants.

Estimated total annual reporting and recordkeeping burden: 3,000 hours of reporting burden. VA estimates that there would be no recordkeeping burden.

Estimated average burden per response: 12 minutes.

Title: Availability of Educational, Licensing, and Certification Records; 38 CFR 21.4209.

Summary of collection of information: The collection of information in § 21.4209 as proposed to be amended is necessary so that VA can apply 38 U.S.C. 3690(c) and also verify that the payments of educational assistance under the various programs VA administers were correct. Section 21.4209 would require that educational institutions with courses and programs approved for VA training (including organizations or entities with licensing and certification tests approved) must make records available to Government representatives if they are needed to verify that the payments for these courses, programs, and tests are correct. The section would require that the educational institution retain these records for 3 years unless the Government Accountability Office (GAO) or VA asks that they be kept longer.

Description of need for information and proposed use of information: The information collection in proposed § 21.4209 is needed to enable VA to decide whether the payments in the educational assistance programs it administers have been correct.

Description of likely respondents: Respondents are educational institutions with course(s) and program(s) approved for VA training, and organizations or entities with licensing and/or certification test(s) approved for payment under those programs VA administers that allow for such payments.

Estimated number of respondents: 8,000 (this includes respondents who would retain records but make no reports or disclosures).

Estimated frequency of responses: Each year VA or SAA representatives would conduct a total of about 3,000 compliance or supervisory visits of the 8,000 respondents. There may be some overlap of visits by VA and the SAA, so some respondents would be visited annually, some twice a year, and some less frequently.

Estimated total annual reporting and recordkeeping burden: 6,000 hours. VA estimates that there will be no recordkeeping burden hours because these are records the institutions maintain in the normal course of their operations.

Estimated average burden per respondent: 2 hours per visit.

Title: Advertising, Sales, and Enrollment Materials, and Candidate Handbooks; 38 CFR 21.4252(h).

Summary of collection of information: The collection of information in proposed § 21.4252(h) is needed to implement 38 U.S.C. 3696(b), which requires that an educational institution maintain a complete record of all advertising, sales, or enrollment materials used by or on behalf of the educational institution during the preceding 12 months, and to implement 38 U.S.C. 3689, under which the requirements are applicable to organizations and entities offering licensing or certification tests. For organizations and entities offering licensing or certification tests, candidate handbooks are the equivalent of enrollment materials.

Description of need for information and proposed use of information: VA or the Federal Trade Commission (FTC) would use the materials in any investigation (as permitted under 38 U.S.C. 3696(c)) of whether the materials were erroneous, deceptive, or misleading.

Description of likely respondents: Educational institutions that offer courses approved for VA training and that advertise those courses, and organizations and entities that offer licensing or certification tests.

Estimated number of respondents: 8,000 (this includes respondents that would keep records but make no reports).

Estimated frequency of responses: Each year VA or SAA representatives would conduct a total of about 3,000 compliance or supervisory visits of the 8,000 respondents, during which the respondents would have to show their advertising and sales materials, and enrollment materials or candidate handbooks, to an employee of VA or the SAA. There may be some overlap of visits by VA and the SAA, so some respondents would be visited annually, some twice a year, and some less frequently.

Estimated total annual reporting and recordkeeping burden: 750 hours of reporting burden. VA estimates that there will be no recordkeeping burden, because these materials would be kept in the normal course of business.

Estimated average burden per respondent: 15 minutes per visit.

Title: Application for Approval of a Licensing or Certification Test and Organization or Entity; 38 CFR 21.4268.

Summary of collection of information: The collection of information in proposed § 21.4268 is necessary to apply 38 U.S.C. 3689. That section provides that an organization or entity offering licensing or certification tests that wishes to have its tests approved for VA payment, and to be itself approved, must make various certifications to VA and furnish information that the Secretary requires to determine whether payment may be made. Since the SAAs are, with limited exceptions, acting for VA in approving these tests and testing organizations or entities, an organization or entity must in general provide the information and make the certifications to the SAA with jurisdiction. This can best be done on an application for approval.

Description of need for information and proposed use of information: The SAAs (or occasionally VA) will use this information to decide if the licensing or certification tests and the organizations or entities offering them can be approved for payments under the appropriate education programs that VA administers.

Description of likely respondents: Organizations and entities that offer licensing or certification tests.

Estimated number of respondents: 950.

Estimated frequency of responses: Most organizations and entities would apply just once. However, if an approved organization or entity began offering a licensing or certification test that had not been approved, it would have to apply again.

Estimated total annual reporting and recordkeeping burden: 3,000 hours of reporting burden. VA estimates that there will be no recordkeeping burden. Although the proposed rule would require a certification that records will be retained, this requirement would not cause a recordkeeping burden because the records would be retained in the ordinary course of business.

Estimated average burden per response: 3 hours.

Title: State Approving Agency Reports and Notices; 38 CFR 21.4154, 21.4250(b), 21.4258, and 21.4259.

Summary of collection of information: The collections of information in §§ 21.4250(b), 21.4258, and 21.4259 as proposed to be amended are required to implement 38 U.S.C. 3673, 3678, 3679, and 3689. Section 38 U.S.C. 3673 instructs VA and the SAAs to cooperate and establish an exchange of

information pertaining to educational institutions to assure programs administered by VA are effectively and efficiently administered. Sections 3678 and 3679 provide that the SAAs must notify the educational institutions and VA of all approval and disapproval actions. Section 3689 provides that an organization or entity offering a licensing or certification test is deemed to be an ''institution'' or ''educational institution'' and that a licensing or certification test is deemed to be a ''course'' as those terms are applied under and for purposes of, among other sections, 38 U.S.C. 3673, 3678, and 3679. The information collections in §§ 21.4250(b), 21.4258, and 21.4259 as proposed to be amended are required notices regarding the approval or disapproval of courses. The information collection in § 21.4259 also includes suspension notices; the SAAs may suspend approval of the course for new enrollments while giving an educational institution 60 days to correct any deficiencies. The collection in § 21.4154 is required to implement 38 U.S.C. 3674. VA uses the reports described in § 21.4154 to determine reimbursement of expenses and allocation of payments.

Description of need for information and proposed use of information: The information in § 21.4154 is needed to determine reimbursement of expense the SAAs incur. VA also needs the information to obtain workload information to support budget requests in determining the amount of appropriations needed to adequately reimburse the SAAs. The information in §§ 21.4250(b), 21.4258, and 21.4259 as proposed to be amended is needed to notify educational institutions, training establishments, and organizations and entities that offer licensing or certification tests of the approval or disapproval of the courses or tests they offer. VA needs the information to determine whether or not payment of educational assistance is permitted for enrollment in courses, training programs, or to reimburse the cost of a licensing or certification test. Under 38 U.S.C. 3680, VA may not award educational assistance to any eligible veteran or eligible person if his or her education or training program is not approved. Similarly, under 38 U.S.C. 3689, VA may not award educational assistance for any licensing or certification test unless the requirements in section 3689 are met.

Description of likely respondents: SAAs.

Estimated number of respondents: 59.

Estimated frequency of responses: For reports, quarterly. For notices, on occasion, whenever an SAA approves, disapproves, or suspends approvals under § 21.4250(b), 21.4258, or 21.4259 as proposed to be amended.

Estimated total annual reporting and recordkeeping burden: 37,647 hours of reporting burden. There is no recordkeeping burden because the records the SAAs would keep are records they would keep in normal operations.

Estimated average burden per respondent: 638 hours.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: having an annual effect on the economy of $100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this proposed rule and has concluded that it is a significant regulatory action under Executive Order 12866 because it raises novel policy issues.

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Although this proposed rule would affect some small entities that are testing organizations or educational institutions, any economic impact on them would be minor. The portions of this proposed rule that could have an economic impact on these small entities are recordkeeping, reporting, and application for approval requirements, the burdens for which would be the minor ones discussed in this preamble under the heading *Paperwork Reduction Act of 1995.* Pursuant to 5 U.S.C. 605(b), this proposed rule, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, and tribal governments, or the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for programs that would be affected by this proposed rule are 64.117, Survivors and Dependents Educational Assistance; 64.120, Post-Vietnam Era Veterans' Educational Assistance; and 64.124, All-Volunteer Force Educational Assistance. This proposed rule would also affect the Montgomery GI Bill—Selected Reserve program, for which there is no Catalog of Federal Domestic Assistance number.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Defense Department, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: November 3, 2005.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set out above, VA proposes to amend 38 CFR part 21 (subparts B, D, G, and K) as follows:

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart B—Claims and Applications for Educational Assistance

1. The authority citation for part 21, subpart B is revised to read as follows:

Authority: 38 U.S.C. 501(a), ch. 51, and as noted in specific sections.

2. Section 21.1029 is amended by:

a. Revising the introductory text.

b. In paragraph (b)(1), removing ''§ 21.1032'' and adding, in its place, ''§ 21.1033''.

c. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (i), respectively.

d. Adding new paragraph (c).

e. In newly redesignated paragraph (e)(1)(ii), removing ''paragraph (c)(1)(i)'' and adding, in its place, ''paragraph (d)(1)(i)''.

f. In newly redesignated paragraph (e)(4), removing ''school'' and adding, in its place, ''educational institution or training establishment''.

g. Adding paragraphs (f), (g), and (h).

The revision and additions read as follows:

§ 21.1029 Definitions.

The following definitions of terms apply to this subpart and subparts C, D, F, G, H, K, and L, to the extent that the terms are not otherwise defined in those subparts:

* * * * *

(c) *Educational institution.* The term *educational institution* means:

(1) A vocational school or business school;

(2) A junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution;

(3) A public or private elementary school or secondary school;

(4) Any entity, other than an institution of higher learning, that provides training for completion of a State-approved alternative teacher certification program;

(5) An organization or entity offering a licensing or certification test; or

(6) Any private entity that offers, either directly or indirectly under an agreement with another entity, a course or courses to fulfill requirements for the attainment of a license or certificate generally recognized as necessary to obtain, maintain, or advance in employment in a profession or vocation in a high technology occupation.

(Authority: 38 U.S.C. 3452, 3501(a)(6), 3689(d))

* * * * *

(f) *Information.* The term *information* means nonevidentiary facts, such as the claimant's Social Security number or address, or the name of the educational institution the claimant is attending.

(Authority: 38 U.S.C. 5101, 5102, 5103)

(g) *Substantially complete application.* (1) The term *substantially complete application* means, for an individual's first application for educational assistance administered by VA, an application containing—

(i) The claimant's name;

(ii) His or her relationship to the veteran, if applicable;

(iii) Sufficient information for VA to verify the claimed service, if applicable;

(iv) The benefit claimed;

(v) The program of education, if applicable; and

(vi) The name of the educational institution or training establishment the claimant intends to attend, if applicable.

(2) For subsequent applications for educational assistance administered by VA, a *substantially complete application* means an application containing the information specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, except that the application may omit any information specified in paragraphs (g)(1)(ii) or (g)(1)(iii) of this section that is already of record with VA.

(Authority: 38 U.S.C. 5102, 5103, 5103A)

(h) *Training establishment.*The term *training establishment* means any establishment providing apprentice or other training on-the-job, including those under the supervision of a college, university, any State department of education, any State apprenticeship agency, any State board of vocational education, any joint apprenticeship committee, the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. chapter 4C, or any agency of the Federal government authorized to supervise such training.

(Authority: 38 U.S.C. 3452(e), 3501(a)(9))

3. Section 21.1030 is revised to read as follows:

§ 21.1030 Claims.

(a) *Claim for educational assistance.* (1) The first time an individual claims educational assistance administered by VA for pursuit of a program of education, he or she must file an application for educational assistance using a form the Secretary prescribes for that purpose.

(2) If an individual changes his or her program of education or place of training after filing his or her first application for educational assistance, he or she must file an application requesting the change of program or place of training using a form the Secretary prescribes for that purpose.

(3) A servicemember must consult with his or her education service officer before filing an application for educational assistance, whether it is the first application or an application to request a change of program or place of training.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 501, 3034(a), 3241(a), 3471, 3513, 5101(a))

(b) *Filing a claim for educational assistance to pay for a licensing or certification test.* To receive educational assistance to pay for a licensing or certification test, an individual must file a claim for educational assistance.

(1) If the claim is the first claim for educational assistance administered by VA, the individual must file an application for educational assistance using a form the Secretary prescribes for that purpose and must include the information described in paragraphs (b)(2)(i) through (b)(2)(vi) of this section.

(2) If the claim is the second or subsequent claim for educational assistance, the claim must include:

(i) The name of the test;

(ii) The name and address of the organization or entity issuing the license or certificate;

(iii) The date the claimant took the test;

(iv) The cost of the test;

(v) A statement authorizing release of the claimant's test information to VA, such as: ''I authorize release of my test information to VA''; and

(vi) Such other information as the Secretary may require.

(Authority: 38 U.S.C. 501, 3034(a), 3241(a), 3471, 3513, 5101(a))

(c) *Filing a claim for educational assistance to supplement tuition assistance provided under a program administered by the Secretary of a military department.* To receive *tuition assistance top-up* as defined in § 21.4200(hh), an individual must file a claim for educational assistance.

(1) If the claim is the first claim for educational assistance administered by VA, the individual must file an application for educational assistance using a form the Secretary prescribes for that purpose.

(2) If the claim is the second or subsequent claim for educational assistance, the claimant may submit a statement that he or she wishes to receive tuition assistance top-up.

(3) The claimant must also submit a copy of the form(s) that the military service with jurisdiction requires for tuition assistance and that had been presented to the educational institution, covering the course or courses for which the claimant wants tuition assistance top-up. Examples of these forms include:

(i) DA Form 2171, Request for Tuition Assistance-Army Continuing Education System;

(ii) AF Form 1227, Authority for Tuition Assistance-Education Services Program;

(iii) NAVMC 10883, Application for Tuition Assistance, and either NAVEDTRA 1560/5, Tuition Assistance Authorization or NAVMC (page 2), Tuition Assistance Authorization;

(iv) Department of Homeland Security, USCG CG–4147, Application for Off-Duty Assistance; and

(v) Request for Top-Up: eArmyU Program.

(4) The claimant must also provide to VA the following information, to the extent it is not contained on any form filed under paragraph (c)(1) or (c)(3) of this section:

(i) His or her name;

(ii) His or her Social Security number;

(iii) The name of the educational institution;

(iv) The name of the course or courses for which the claimant wants educational assistance;

(v) The number of the course or courses;

(vi) The number of credit hours for each course;

(vii) The beginning and ending date of each course;

(viii) The cost of the course or courses; and

(ix) If the claimant doesn't want to receive the full amount of that cost not met by the Secretary of the military department concerned, the portion that the claimant wishes to receive.

(5) If the claimant's military department uses an electronic tuition assistance application process with electronic signatures, VA will accept an electronic transmission of the approved tuition assistance application directly from the military department concerned on behalf of the claimant if—

(i) The electronic tuition assistance application indicates the servicemember's intent to claim tuition-assistance top-up; and

(ii) The information described in paragraph (c)(4) of this section is included in the electronic application.

(Authority: 38 U.S.C. 501, 3034(a), 3241(a), 3471, 3513, 5101(a))

(The Office of Management and Budget has approved the information collection provisions in this section under control numbers 2900–0074, 2900–0098, 2900–0099, 2900–0154, 2900–XXXX, and 2900–XXXX.)

4. Section 21.1031 is amended by:

a. In paragraph (a), removing ''claim forms,'' and adding, in its place, ''VA claim forms and''.

b. Revising paragraph (b) to read as follows.

§ 21.1031 VA responsibilities when a claim is filed.

(b) *VA has a duty to notify claimants of necessary information or evidence.* (1) Except when a claim cannot be substantiated because there is no legal basis for the claim, or undisputed facts render the claimant ineligible for the claimed benefit, when VA receives a complete or substantially complete application for educational assistance provided under subpart C, D, G, H, K, or L of this part VA will—

(i) Notify the claimant of any information and evidence that is necessary to substantiate the claim; and

(ii) Inform the claimant which information and evidence, if any, the claimant is to provide to VA and which information and evidence, if any, VA will try to obtain for the claimant.

(2) The information and evidence that VA, pursuant to paragraph (b)(1) of this section informs the claimant that the claimant must provide, must be provided within one year from the date of the notice. If VA does not receive such information and evidence from the claimant within that time period, VA may adjudicate the claim based on the information and evidence in the file.

(3) If the claimant has not responded to the request within 30 days, VA may decide the claim before the expiration of the one-year period prescribed in paragraph (b)(2) of this section, based on all the information and evidence in the file, including information and evidence it has obtained on behalf of the claimant. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the request, VA must readjudicate the claim. If VA's decision on a readjudication is favorable to the claimant, the award shall take effect as if the prior decision by VA on the claim had not been made.

(4) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information. If the information necessary to complete the application is not received by VA within one year from the date of such notice, VA cannot pay or provide any benefits based on that application.

(5) For the purpose of this paragraph, if VA must notify the claimant, VA will provide notice to:

(i) The claimant;

(ii) His or her fiduciary, if any; and

(iii) His or her representative, if any.

(Authority: 38 U.S.C. 5102, 5103, 5103A(a)(3))

§ 21.1032 [Redesignated and amended]

5. Section 21.1032 is redesignated as § 21.1033, and in newly redesignated § 21.1033, paragraph (b) is removed and reserved.

6. New § 21.1032 is added to read as follows:

§ 21.1032 VA has a duty to assist claimants in obtaining evidence.

(a) *VA's duty to assist begins when VA receives a complete or substantially complete application.* (1) Except as provided in paragraph (d) of this section, upon receipt of a complete or substantially complete application for educational assistance under subpart C, D, G, H, K, or L of this part, VA will—

(i) Make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim; and

(ii) Give the assistance described in paragraphs (b) and (c) of this section to an individual attempting to reopen a finally decided claim.

(2) VA will not pay any fees a custodian of records may charge to provide the records VA requests.

(Authority: 38 U.S.C. 5103A)

(b) *Obtaining records not in the custody of a Federal department or agency.* (1) VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency. These records include relevant records from:

(i) State or local governments;

(ii) Private medical care providers;

(iii) Current or former employers; and

(iv) Other non-Federal governmental sources.

(2) The reasonable efforts described in paragraph (b)(1) of this section will generally consist of an initial request for the records and, if VA does not receive the records, at least one follow-up request. The following are exceptions to this provision concerning the number of requests that VA generally will make:

(i) VA will not make a follow-up request if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile.

(ii) If VA receives information showing that subsequent requests to the initial or another custodian could result in obtaining the records sought, reasonable efforts will include an initial request and, if VA does not receive the records, at least one follow-up request to the new source or an additional request to the original source.

(3) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including—

(i) The person, company, agency, or other custodian holding the records;

(ii) The approximate time frame covered by the records; and

(iii) In the case of medical treatment records, the condition for which treatment was provided.

(4) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A)

(c) *Obtaining records in the custody of a Federal department or agency.* (1) VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to:

(i) Military records;

(ii) Medical and other records from VA medical facilities;

(iii) Records from non-VA facilities providing examination or treatment at VA expense; and

(iv) Records from other Federal agencies.

(2) VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include cases in which the Federal department or agency advises VA that the requested records do not exist or that the custodian of such records does not have them.

(3) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal department or agency custodians. At VA's request, the claimant must provide enough information to identify and locate the existing records, including—

(i) The custodian or agency holding the records;

(ii) The approximate time frame covered by the records; and

(iii) In the case of medical treatment records, the condition for which treatment was provided.

(4) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A)

(d) *Circumstances where VA will refrain from or discontinue providing assistance.* VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete or complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently not credible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A)

(e) *Duty to notify claimant of inability to obtain records.* (1) VA will notify the claimant either orally or in writing when VA:

(i) Makes reasonable efforts to obtain relevant non-Federal records, but is unable to obtain them; or

(ii) After continued efforts to obtain Federal records, concludes that it is reasonably certain they do not exist or that further efforts to obtain them would be futile.

(2) For non-Federal records requests, VA may provide the notice to the claimant at the same time it makes its final attempt to obtain the relevant records.

(3) VA will make a record of any oral notice conveyed under paragraph (e) of this section to the claimant.

(4) The notice to the claimant must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) The fact described in paragraph (e)(1)(i) or (e)(1)(ii) of this section;

(iv) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(v) A notice that the claimant is ultimately responsible for obtaining the evidence.

(5) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the existence of such records and ask that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will ask that the claimant obtain the records and provide them to VA.

(6) For the purpose of this section, if VA must notify the claimant, VA will provide notice to:

(i) The claimant;

(ii) His or her fiduciary, if any; and

(iii) His or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a), 5103A)

Subpart D—Administration of Educational Assistance Programs

7. The authority citation for part 21, subpart D is revised to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 34, 35, 36, and as noted in specific sections.

8. Section 21.4005 is amended by:

a. Adding introductory text to the section.

b. Revising the paragraph (a) heading and paragraphs (a)(1) and (a)(2), and the authority citation at the end of paragraph (a).

c. Redesignating paragraphs (a)(3) and (a)(4) as paragraphs (a)(5) and (a)(7), respectively.

d. Adding new paragraphs (a)(3), (a)(4), and (a)(6).

e. In newly redesignated paragraph (a)(5), removing ''a school'' and adding, in its place, ''an educational institution'' and removing ''such school.'' and adding, in its place, ''such educational institution.''.

f. Redesignating paragraphs (b)(1)(ii)(*a*) through (b)(1)(ii)(*f*) as paragraphs (b)(1)(ii)(A) through (b)(1)(ii)(F), respectively.

g. Revising newly redesignated paragraph (b)(1)(ii)(F).

h. In paragraphs (b)(1)(i) and (b)(2)(i), removing ''school'' and adding, in its place, ''educational institution''.

i. Redesignating paragraphs (b)(2)(ii)(*a*) and (b)(2)(ii)(*b*) as paragraphs (b)(2)(ii)(A) and (b)(2)(ii)(B), respectively.

j. Removing the authority citation following newly redesignated paragraph (b)(2)(ii)(A) and adding an authority citation following newly redesignated paragraph (b)(2)(ii)(B).

k. In newly redesignated paragraphs (b)(1)(ii)(D), (b)(2)(ii)(A), and (b)(2)(ii)(B), removing ''schools'' and adding, in its place, ''educational institutions''.

l. In newly redesignated paragraph (b)(2)(ii)(B), removing ''persons.'' and adding, in its place, ''persons, or desiring to offer licensing or certification tests to veterans or eligible persons.''.

m. In paragraph (c)(1), removing ''request for'' and adding, in its place, ''requests for''.

n. Removing the authority citation following paragraph (c)(2) and adding an authority citation following paragraph (c)(3).

o. Revising paragraph (d).

p. In paragraph (e), redesignating paragraphs (e)(1) through (e)(3) as paragraphs (e)(1)(i) through (e)(1)(iii), respectively; designating the introductory text following the paragraph heading as paragraph (e)(1) introductory text; and designating the undesignated paragraph as paragraph (e)(2).

q. In newly redesignated paragraph (e)(1) introductory text, removing ''when:'' and adding, in its place, ''when, in circumstances involving a finding of conflicting interests:''.

r. In newly redesignated paragraph (e)(2), removing ''school'' and adding, in its place, ''educational institution''.

s. Adding an authority citation for paragraph (e).

t. Removing paragraph (f).

The revisions and additions read as follows:

§ 21.4005 Conflicting interests.

For the purposes of this section, a person will be considered to be an ''officer'' of the State approving agency or VA when he or she has authority to exercise supervisory authority, and ''educational institution'' includes an organization or entity offering licensing or certification tests.

(Authority: 38 U.S.C. 3683, 3689)

(a) *A conflict of interest can cause the dismissal of a VA or State approving agency officer or employee and other adverse consequences.* (1) An officer or employee of VA will be immediately dismissed from his or her office or employment, if while such an officer or employee he or she has owned any interest in, or received any wages, salary, dividends, profits, gratuities, or services from any educational institution operated for profit—

(i) In which a veteran or eligible person was pursuing a course of education under 10 U.S.C. chapter 1606 or 38 U.S.C. chapter 30, 32, 34, 35, or 36; or

(ii) Offering a licensing or certification test that is approved for payment of educational assistance under 38 U.S.C. chapter 30, 32, or 35 to veterans or eligible persons who take that test.

(2) Except as provided in paragraph (a)(3) or (c) of this section, VA will discontinue payments under § 21.4153 to a State approving agency when the Secretary finds that any individual who is an officer or employee of a State approving agency has, while he or she was such an officer or employee, owned any interest in, or received any wages, salary, dividends, profits, gratuities, or services from any educational institution operated for profit—

(i) In which a veteran or eligible person was pursuing a course of education or training under 10 U.S.C. chapter 1606 or 38 U.S.C. chapter 30, 32, 34, 35, or 36; or

(ii) Offering a licensing or certification test that is approved for payment of educational assistance under 38 U.S.C. chapter 30, 32, or 35 to veterans or eligible persons who take that test.

(3) VA will not discontinue payments to a State approving agency under paragraph (a)(2) of this section if the State approving agency, after learning that it has any officer or employee described in that paragraph, acts without delay to end the employment of that individual.

(4) If VA discontinues payments to a State approving agency pursuant to paragraph (a)(2) of this section, VA will not resume these payments while such an individual is an officer or employee of the:

(i) State approving agency;

(ii) State Department of Veterans Affairs; or

(iii) State Department of Education.

* * * * *

(6) If a State approving agency finds that any officer or employee of VA or of the State approving agency owns an interest in, or receives wages, salary, dividends, profits, gratuities, or services from an organization or entity, operated for profit, that offers licensing or certification tests, the State approving agency:

(i) Will not approve any licensing or certification test that organization or entity offers; and

(ii) Will withdraw approval of any licensing or certification test that organization or entity offers.

* * * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241, 3683, 3689)

(b) * * *

(1) * * *

(ii) * * *

(F) His or her position is not connected in any way with the inspection, approval, or supervision of educational institutions desiring to train veterans or eligible persons or to offer a licensing or certification test; or with the processing of claims by or making payments to veterans and eligible persons for taking an approved licensing or certification test.

(2) * * *

(ii) * * *

(B) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241, 3683, 3689)

(c) * * *

(3) * * *

(Authority: 38 U.S.C. 512(a), 3683)

(d) *Notice when VA does not grant a requested waiver.* When VA has denied a request for waiver of application of paragraph (a)(1) or (a)(2) of this section, VA will immediately notify the State approving agency and the educational institution:

(1) That the approval of courses or licensing and certification tests offered by the educational institution must be withdrawn;

(2) The reasons for the withdrawal of approval; and

(3) The conditions that will permit the courses or such tests to be approved again.

(Authority: 38 U.S.C. 3683, 3689(d))

(e) * * *

(Authority: 38 U.S.C. 3683, 3690, 5104)

9. Section 21.4008 is revised to read as follows:

§ 21.4008 Prevention of overpayments.

(a) *Prevention of overpayments to veterans and eligible persons enrolled in educational institutions.* When approval of a course may be withdrawn, and overpayments may exist or may be created, VA may suspend further payments to veterans and eligible persons enrolled in the educational institution offering the course until the question of withdrawing approval is resolved. See § 21.4210.

(Authority: 38 U.S.C. 3690(b))

(b) *Prevention of overpayments to veterans and eligible persons taking licensing and certification tests.* When approval of a licensing or certification test may be withdrawn, and overpayments may exist or may be created, VA may suspend payments to veterans and eligible persons taking that test until the question of withdrawing approval is resolved. See § 21.4210.

(Authority: 38 U.S.C. 3689(a), 3690(b))

10. Section 21.4009 is amended by:

a. Revising the section heading.

b. Adding introductory text.

c. Revising paragraphs (c) and (d).

d. In paragraph (e), removing ''A school'' and adding, in its place, ''An educational institution'', and removing ''the school'' and adding, in its place, ''the educational institution''.

e. Adding authority citations following paragraphs (e) through (j), respectively.

f. In paragraph (f), removing ''veteran'' each place that it appears and adding, in its place, ''veteran, reservist,'', and removing ''school'' each place that it appears and adding, in its place, ''educational institution''.

g. In paragraphs (g) and (h), removing ''the school'' each place that it appears

and adding, in its place, ''the educational institution''.

h. In paragraph (g), in its heading, removing ''school'' and adding, in its place, ''educational institution'' and, in its text, removing ''The school'' and adding, in its place, ''The educational institution''.

i. In paragraph (i), removing ''school and'' and adding, in its place, ''educational institution and''.

j. In paragraph (j), removing ''a school's'' and adding, in its place, ''an educational institution's''.

The additions and revisions read as follows:

§ 21.4009 Waiver or recovery of overpayments.

For the purposes of this section, ''educational institution'' includes an organization or entity offering licensing or certification tests.

* * * * *

(c) *Committee on School Liability.* (1) Each VA Regional Processing Office shall have a Committee on School Liability. For the purposes of this section, the Manila Regional Office is considered the VA Regional Processing Office of jurisdiction for educational institutions located in the Philippines.

(2) The Secretary delegates to each Committee on School Liability, and to any panel that the chairperson of the Committee may designate and draw from the Committee, the authority to find whether an educational institution is liable for an overpayment.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 512(a), 3034(a), 3241, 3685, 3689(d))

(d) *Initial decision.* (1) The Education Officer of the VA Regional Processing Office of jurisdiction, or the Service Center Manager when the Manila Regional Office is considered the VA Regional Processing Office of jurisdiction, will decide whether there is evidence that would warrant a finding that an educational institution is potentially liable for an overpayment.

(2) Following each finding of potential liability, the Finance Officer of the VA Regional Processing Office of jurisdiction will notify the educational institution in writing of VA's intent to apply the liability provisions of paragraph (a) of this section. The notice will—

(i) Identify the students who were overpaid;

(ii) Identify the veterans and eligible persons who took the licensing or certification test and were overpaid;

(iii) Set out in the case of each student, or in the case of each veteran or eligible person who took the test, the educational institution's actions or omissions which resulted in the finding that the educational institution was potentially liable for the overpayment; and

(iv) State that VA will determine liability on the basis of the evidence of record unless the VA Regional Processing Office of jurisdiction receives additional evidence or a request for a hearing within 30 days of the date the educational institution received the notice.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 512(a), 3034(a), 3241, 3685, 3689(d))

(e) * * *

(Authority: 38 U.S.C. 512(a), 3685, 3689)

(f) * * *

(Authority: 38 U.S.C. 3685, 3689)

(g) * * *

(Authority: 38 U.S.C. 512(a), 3685, 3689)

(h) * * *

(Authority: 38 U.S.C. 512(a), 3685, 3689)

(i) * * *

(Authority: 38 U.S.C. 512(a), 3685, 3689)

(j) * * *

(Authority: 38 U.S.C. 512(a), 3685, 3689)

11. Section 21.4131 is amended by:

a. Revising the introductory text.

b. Redesignating paragraph (a)(1) introductory text and paragraphs (a)(1)(i) through (a)(1)(iii) as paragraph (a)(1)(i) and paragraphs (a)(1)(i)(A) through (a)(1)(i)(C), respectively; redesignating paragraph (a)(2) introductory text and paragraphs (a)(2)(i) and (a)(2)(ii) as paragraph (a)(1)(ii) and paragraphs (a)(1)(ii)(A) and (a)(1)(ii)(B), respectively; and adding new paragraph (a)(1) introductory text and new paragraph (a)(2).

c. Revising the authority citation following paragraph (a).

d. Redesignating paragraph (d)(1) introductory text and paragraphs (d)(1)(i) through (d)(1)(iv) as paragraph (d)(1)(i) and paragraphs (d)(1)(i)(A) through (d)(1)(i)(D), respectively; redesignating paragraph (d)(2) introductory text and paragraphs (d)(2)(i) and (d)(2)(ii) as paragraph (d)(1)(ii) and paragraphs (d)(1)(ii)(A) and (d)(1)(ii)(B), respectively; and adding new paragraph (d)(1) introductory text and new paragraph (d)(2).

e. Revising the authority citation following paragraph (d).

The revisions and additions read as follows:

§ 21.4131 Commencing dates.

VA will determine under this section the commencing date of an award or increased award of educational assistance provided pursuant to subpart C or G. When more than one paragraph in this section applies, VA will award educational assistance using the latest of the applicable commencing dates.

(a) * * *

(1) *For other than licensing or certification tests.*

* * * * *

(2) *For licensing or certification tests.* VA will award educational assistance for the cost of a licensing or certification test only when the veteran or servicemember takes such test—

(i) While the test is approved under 38 U.S.C. chapter 36;

(ii) While the veteran or servicemember is eligible for educational assistance under this subpart; and

(iii) No more than one year before the date VA receives a claim for reimbursement of the cost of the test.

(Authority: 38 U.S.C. 3672, 3689, 5110, 5113)

* * * * *

(d) * * *

(1) *For other than licensing or certification tests.*

* * * * *

(2) *For licensing or certification tests.* VA will award educational assistance for the cost of a licensing or certification test only when the veteran or servicemember takes such test—

(i) While the test is approved under 38 U.S.C. chapter 36;

(ii) While the veteran or servicemember is eligible for educational assistance under this subpart; and

(iii) No more than one year before the date VA receives a claim for reimbursement of the cost of the test.

(Authority: 38 U.S.C. 3512, 3672, 3689, 5110, 5113)

§ 21.4146 [Amended]

12. In § 21.4146, paragraph (c) is amended by removing ''institution'' both places it appears, and adding, in its place, ''institution (other than an organization or entity offering a licensing or certification test)''.

13. Section 21.4150 is amended by:

a. In the introductory text of paragraph (c), removing ''will, with respect to a State, be deemed to refer to VA when that State:'' and adding, in its place, ''will be deemed to refer to VA:''.

b. Redesignating paragraphs (c)(1) and (2) as paragraphs (c)(1)(i) and (ii), respectively.

c. In newly redesignated paragraph (c)(1)(ii), removing ''§ 21.4153 of this part.'' and adding, in its place, ''§ 21.4153; and''.

d. Adding paragraph (c)(1) introductory text, new paragraph (c)(2), and paragraph (g).

e. Revising the cross reference at the end of the section.

The additions and revision read as follows:

§ 21.4150 Designation.

* * * * *

(c) * * *

(1) With respect to a State, when that State:

* * * * *

(2) When VA has approval, disapproval, or suspension authority (under paragraphs (d), (e), (f), or (g) of this section, § 21.4152, or as otherwise provided by law).

* * * * *

(g) Approval under 38 U.S.C. 3689 of a licensing or certification test offered by any agency or instrumentality of the Federal government will be under the authority of the Secretary.

(Authority: 38 U.S.C. 3689)

Cross Reference: *Course and licensing and certification test approval; jurisdiction and notices.* See § 21.4250.

14. Section 21.4151 is amended by:

a. In paragraph (b)(3), removing the word ''and''.

b. Redesignating paragraph (b)(4) and its authority citation as paragraph (b)(6) and revising the authority citation following newly redesignated paragraph (b)(6).

c. Adding new paragraph (b)(4) and paragraph (b)(5).

The additions and revision read as follows:

§ 21.4151 Cooperation.

* * * * *

(b) * * *

(4) Determining those licensing and certification tests that may be approved for cost reimbursement to veterans and eligible persons;

(5) Ascertaining whether an organization or entity offering an approved licensing or certification test complies at all times with the provisions of 38 U.S.C. 3689; and

(6) * * *

(Authority: 38 U.S.C. 3672, 3673, 3674, 3689)

* * * * *

§ 21.4152 [Amended]

15. Section 21.4152(b)(5) is amended by removing ''schools or courses'' both times it appears and adding, in its place, ''schools, courses, or licensing or certification tests''.

16. Section 21.4153 is amended by:

a. Adding introductory text.

b. Removing the authority citation following paragraph (a)(1)(ii).

c. Revising the authority citation following paragraph (a)(2)(ii).

The revisions and addition read as follows:

§ 21.4153 Reimbursement of expenses.

For the purposes of this section, other than paragraph (d)(4) of this section, ''educational institution'' includes an organization or entity offering licensing or certification tests.

(a) * * *

(2) * * *

(ii) * * *

(Authority: 38 U.S.C. 3674, 3689)

* * * * *

17. Section 21.4154 is amended by revising the information collection approval parenthetical at the end of the section to read as follows:

§ 21.4154 Report of activities.

* * * * *

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0051.)

18. Section 21.4200 is amended by:

a. In paragraph (a)(5), removing ''during the period beginning on November 2, 1994, and ending on September 30, 1996''.

b. Adding introductory text.

c. Revising paragraph (c).

d. Adding paragraphs (ee), (ff), (gg), (hh), and (ii).

The revision and additions read as follows:

§ 21.4200 Definitions.

The definitions in this section apply to this subpart, except as otherwise provided. The definitions of terms defined in this section also apply to subparts C, F, G, H, K, and L if they are not otherwise defined for purposes of those subparts.

* * * * *

(c) *Training establishment.* The term *training establishment* means any establishment providing apprentice or other training on-the-job, including those under the supervision of a college, university, any State department of education, any State apprenticeship agency, any State board of vocational education, any joint apprenticeship committee, the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. chapter 4C, or any agency of the Federal government authorized to supervise such training.

(Authority: 38 U.S.C. 3452(e), 3501(a)(9))

* * * * *

(ee) *Certification test.* The term *certification test* means a test an individual must pass in order to receive a certificate that provides an affirmation of an individual's qualifications in a specified occupation.

(Authority: 38 U.S.C. 3452(b), 3501(a)(5), 3689)

(ff) *Licensing test.* The term *licensing test* means a test offered by a State, local, or Federal agency, the passing of which is a means, or part of a means, to obtain a license. That license must be required by law in order for the individual to practice an occupation in the political jurisdiction of the agency offering the test.

(Authority: 38 U.S.C. 3452(b), 3501(a)(5), 3689)

(gg) *Organization or entity offering a licensing or certification test.* (1) The *term organization or entity offering a licensing or certification test* means:

(i) An organization or entity that causes a licensing test to be given and that will issue a license to an individual who passes the test;

(ii) An organization or entity that causes a certification test to be given and that will issue a certificate to an individual who passes the test; or

(iii) An organization or entity that administers a licensing or certification test for the organization or entity that will issue a license or certificate, respectively, to the individual who passes the test, provided that the administering organization or entity can provide all required information and certifications under § 21.4268 to the State approving agency and to VA.

(2) This term does not include:

(i) An organization or entity that develops and/or proctors a licensing or certification test but does not issue the license or certificate; or

(ii) An organization or entity that administers a test but does not issue the license or certificate if that administering organization or entity cannot provide all required information and certifications under § 21.4268 to the State approving agency and to VA.

(Authority: 38 U.S.C. 3452(b), 3501(a)(5), 3689)

(hh) *Tuition assistance top-up.* The term *tuition assistance top-up* means a payment of basic educational assistance to meet all or a portion of the charges of an educational institution for the education or training of a servicemember that are not met by the Secretary of the military department concerned under 10 U.S.C. 2007(a) or (c).

(Authority: 38 U.S.C. 3014(b))

(ii) *VA Regional Processing Office.* The term *VA Regional Processing Office*

means a VA office where claims for educational assistance under 38 U.S.C. chapters 30, 32, and 35 and 10 U.S.C. chapter 1606 are allowed or disallowed.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241, 3685, 3689)

* * * * *

19. Section 21.4206 is amended by:

a. In the introductory text and paragraph (a), removing ''Chapter'' and ''Chapters'' each place that they appear, and adding, in their place, ''chapter'' and removing ''on October 31 of that'' and adding, in its place, ''during that calendar''.

b. Revising paragraph (b).

The revision reads as follows:

§ 21.4206 Reporting fee.

* * * * *

(b) In computing the reporting fee VA will not count a veteran or servicemember whose only receipt of educational assistance under 38 U.S.C. chapter 30 during a calendar year was tuition assistance top-up.

(Authority: 38 U.S.C. 3014(b), 3684(c))

* * * * *

20. Section 21.4209 is amended by:

a. In the introductory text of paragraph (a), removing ''educational institutions'' and adding, in its place, ''an educational institution, including for purposes of this section an organization or entity offering a licensing or certification test,''.

b. In paragraph (a)(1), removing ''Chapter 1606 of Title 10 U.S.C. or Chapters 30, 32, 34, 35, or 36 of Title 38 U.S.C.'' and adding, in its place, ''10 U.S.C. chapter 1606 or 38 U.S.C. chapter 30, 32, 34, 35, or 36;''.

c. In paragraph (a)(2), removing the period at the end of the paragraph and adding, in its place, ''; and'' and removing the authority citation following paragraph (a)(2).

d. Adding paragraph (a)(3).

e. In paragraph (b) introductory text, paragraph (c), and paragraph (d) introductory text, removing ''will'' each place that it appears and adding, in its place, ''must'', and removing ''school'' and adding, in its place, ''educational institution''.

f. In paragraph (b)(1), removing the period and adding, in its place, a semicolon, and removing ''veterans'' and adding, in its place, ''veterans, reservists,''.

g. In paragraph (b)(2), removing the period and adding, in its place, a semicolon, and removing ''veterans'' and adding, in its place, ''veterans, reservists,'', and removing ''school'' and adding, in its place, ''educational institution''.

h. In paragraph (b)(3), removing ''veteran's'' and adding, in its place, ''veteran's, reservist's,'', and removing the period and adding a semicolon in its place.

i. In paragraph (b)(4), adding a semicolon at the end of the paragraph.

j. In paragraph (b)(5), removing the period and adding ''; and'' in its place.

k. Revising paragraph (b)(7).

l. Revising paragraph (f).

m. Adding an information collection approval parenthetical at the end of the section.

The additions and revisions read as follows:

§ 21.4209 Examination of records.

(a) * * *

(3) The records of other individuals who took a licensing or certification test that VA believes are necessary to ascertain whether the veterans and eligible persons taking such test were reimbursed the correct amount.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3689, 3690)

(b) * * *

(7) Records necessary to demonstrate compliance with the requirements of § 21.4268.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3689, 3690)

* * * * *

(f) *Retention of records.* (1) Except as provided in paragraph (f)(2) of this section, an educational institution must keep records and accounts, including those pertaining to students not receiving benefits from VA, as described in this section, pertaining to each period of enrollment of a veteran, reservist, or eligible person. If those records are not available electronically, the paper records must be kept intact and in good condition at the educational institution for at least 3 years following the end of each enrollment period. If the records are stored electronically, the paper records may be stored at another site. The electronic records must be easily accessible at the educational institution for at least 3 years following the end of each enrollment period.

(2) An organization or entity offering a licensing or certification test must keep records and accounts intact and in good condition that are needed to show that veterans and eligible persons have been paid correctly for taking licensing or certification tests. The organization or entity must keep those records, at a site mutually agreed on, for at least 3 years following the date of the test.

(3) An educational institution will not be required under this section to retain records for longer than 3 years unless the educational institution receives from the Government Accountability Office or VA not later than 30 days before the end of the 3-year period a written request for longer retention.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3689, 3690)

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–XXXX.)

21. Section 21.4210 is amended by:

a. Revising the section heading, the heading of paragraph (a), and paragraphs (a)(1) and (a)(2)(ii).

b. In paragraph (b), designating the introductory text following the paragraph heading as paragraph (b)(1) introductory text; redesignating paragraphs (b)(1) and (b)(2) as paragraphs (b)(1)(i) and (b)(1)(ii), respectively; and adding a new paragraph (b)(2) immediately after the authority citation following paragraph (b)(1)(ii).

c. Revising the authority citation following paragraph (c) and revising paragraph (d)(1) introductory text.

d. Redesignating paragraphs (d)(1)(i), (d)(1)(ii), (d)(2), and (d)(3) as paragraphs (d)(2)(i), (d)(2)(ii), (d)(3), and (d)(4), respectively.

e. Adding new paragraphs (d)(1)(i) and (d)(1)(ii); paragraph (d)(1)(iii); and a new paragraph (d)(2) introductory text.

f. In newly redesignated paragraph (d)(2)(i), removing ''and 21.4264'' and adding, in its place, ''21.4264, and 21.4268''.

g. Revising the authority citation following paragraph (d).

h. In paragraphs (e)(1) and (f), removing ''facility'' each place that it appears and adding, in its place, ''Regional Processing Office''.

i. Immediately after the authority citation following paragraph (e)(2), adding paragraph (e)(3).

j. Revising paragraph (g).

k. In paragraph (h)(1), removing ''course or courses'' and adding, in its place, ''course(s) or test(s)'', and removing ''facility'' and adding, in its place, ''Regional Processing Office''.

l. Adding paragraph (i).

The revisions and additions read as follows:

§ 21.4210 Suspension, discontinuance, and denial of educational assistance payments, and disapproval of enrollments or reenrollments for pursuit of approved courses.

(a) *Overview; explanation of terms used in §§ 21.4210 through 21.4216.* (1) VA may pay educational assistance to a reservist under 10 U.S.C. chapter 1606 for the reservist's pursuit of a course approved in accordance with the

provisions of 38 U.S.C. chapter 36. VA may pay educational assistance under 38 U.S.C. chapter 32 or 35 to a veteran or eligible person for the individual's pursuit of a course approved in accordance with the provisions of 38 U.S.C. chapter 36 or if the individual has taken a licensing or certification test approved in accordance with the provisions of 38 U.S.C. chapter 36. VA may pay educational assistance under 38 U.S.C. chapter 30 to a veteran or servicemember for the individual's pursuit of a course approved in accordance with the provisions of 38 U.S.C. chapter 36; if the individual has taken a licensing or certification test approved in accordance with the provisions of 38 U.S.C. chapter 36; or if the individual is entitled to be paid benefits (tuition assistance top-up) to meet all or a portion of an educational institution's charges for education or training that the military department concerned has not covered under tuition assistance. Except for tuition assistance top-up, where courses do not need to be approved, a State approving agency designated by VA, or in some instances VA, approves the course or test for payment purposes. Notwithstanding such approval, VA, as provided in paragraphs (b), (c), and (d) of this section, may suspend, discontinue, or deny payment of benefits to any or all otherwise eligible individuals for pursuit of a course or training approved under 38 U.S.C. chapter 36, and for taking a licensing or certification test approved under 38 U.S.C. chapter 36.

(2) * * *

(ii) The term ''educational institution'' includes a training establishment, or organization or entity offering a licensing or certification test; and

* * * * *

(b) * * *

(2) VA may deny payment of educational assistance to a specific individual for taking a licensing or certification test if, following an examination of the individual's case, VA has credible evidence affecting that individual that—

(i) The test fails to meet any of the requirements of 38 U.S.C. 3689; or

(ii) The organization or entity offering the individual's test has violated any of the requirements of 38 U.S.C. 3689.

(Authority: 38 U.S.C. 3689)

(c) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689, 3690)

(d) * * *

(1) The Director of the VA Regional Processing Office of jurisdiction may:

(i) Suspend payments of educational assistance to all veterans, servicemembers, reservists, or eligible persons already enrolled in a course;

(ii) Disapprove all further enrollments or reenrollments of individuals seeking VA educational assistance for pursuit of the course (except for enrollments and reenrollments of servicemembers seeking to be paid benefits (tuition assistance top-up) to meet all or a portion of an educational institution's charges for education or training that the military department concerned has not covered under tuition assistance); and

(iii) Suspend payments of educational assistance to all veterans, servicemembers, or eligible persons who may take a licensing or certification test after a date that the Director may determine.

(2) Except as provided in paragraphs (d)(3) and (i) of this section, the decision to act as described in paragraph (d)(1) of this section must be based on evidence of a substantial pattern of veterans, servicemembers, reservists, or eligible persons enrolled in the course or taking the test receiving educational assistance to which they are not entitled because:

* * * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 512(a), 3034(a), 3241(a), 3680A(d), 3684, 3685, 3689, 3690, 3696, 5301)

(e) * * *

(3) If VA receives a claim for educational assistance for the taking by an individual of a licensing or certification test, and the individual took the licensing or certification test during a period when payment for taking such test was suspended, the Director will inform the individual in writing of the fact of the suspension and the reasons why payments were suspended.

(Authority: 38 U.S.C. 3689, 3690)

* * * * *

(g) *Referral to the Committee on Educational Allowances.* The Director of the VA Regional Processing Office of jurisdiction will refer the following matters to the Committee on Educational Allowances as provided in § 21.4212:

(1) A suspension under paragraph (d) of this section of payments of educational assistance to all veterans, servicemembers, reservists, or eligible persons already enrolled in a course;

(2) A disapproval under paragraph (d) of this section of all further enrollments or reenrollments of individuals seeking VA educational assistance for pursuit of the course (except for enrollments and reenrollments of servicemembers seeking to be paid tuition assistance top-up benefits to meet all or a portion of an educational institution's charges for education or training that the military department concerned has not covered under tuition assistance); and

(3) A suspension under paragraph (d) of this section of payments of educational assistance to all veterans, servicemembers, or eligible persons who may take a licensing or certification test after a date that the Director has determined.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689, 3690)

* * * * *

(i) *This section does not apply to disapproval of courses based on conflicts of interests.* VA will disapprove courses when required by § 21.4005(d) without applying the provisions of paragraphs (a) through (h) of this section.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3034(a), 3241, 3683(b))

22. Section 21.4211 is amended by:

a. Redesignating paragraph (b)(2) and the authority citation following paragraph (b)(2) as paragraph (b)(3).

b. Revising the section heading, paragraphs (a) and (b)(1), and the authority citations following paragraphs (b), (c), (d), and (e).

c. Adding a new paragraph (b)(2).

d. In paragraphs (d), (e)(1), and (e)(2)(iii), removing ''facility'' each place that it appears and adding, in its place, ''Regional Processing Office.''

The revisions and addition read as follows:

§ 21.4211 Composition, jurisdiction, and duties of Committee on Educational Allowances.

(a) *Authority.* (1) 38 U.S.C. 3690 authorizes VA to discontinue educational benefits to veterans, servicemembers, reservists, or eligible persons when VA finds that:

(i) The program of education or course in which such individuals are enrolled fails to meet a requirement of 38 U.S.C. chapter 30, 32, 34, 35, or 36, or 10 U.S.C. chapter 1606, or the regulations in this part; or

(ii) An educational institution has violated any such statute or regulation, or fails to meet such a statutory or regulatory requirement.

(2) This authority does not extend to enrollments and reenrollments of individuals seeking to be paid tuition assistance top-up benefits to meet all or a portion of an educational institution's charges for education or training that the military department concerned has not covered under tuition assistance.

(3) 38 U.S.C. 3689 and 3690 further authorize VA to deny payment to servicemembers or veterans for

licensing or certification tests when VA finds that either the test or the organization or entity offering the test fails to meet a requirement of 38 U.S.C. 3689 or the applicable regulations of this part.

(4) Sections 21.4210 through 21.4216 implement the authority discussed in paragraphs (a)(1) and (a)(3) of this section.

(5) Each VA Regional Processing Office shall have a Committee on Educational Allowances. For the purposes of this section, the Manila Regional Office is considered the VA Regional Processing Office of jurisdiction for educational institutions located in the Philippines. The Committee's findings of fact and recommendations will be provided to the Director of the VA Regional Processing Office.

(6) The Secretary of Veterans Affairs delegates to each Director of a VA Regional Processing Office the authority to suspend or discontinue payment of educational benefits, to disapprove enrollments or reenrollments, or to deny payment of benefits for tests.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 512(a); 3034(a), 3241(a), 3689(d), 3690)

(b) * * *

(1) The Committee on Educational Allowances is established to assist the Director of the VA Regional Processing Office of jurisdiction in deciding in a specific case whether—

(i) Educational assistance should be discontinued to all individuals enrolled in any course or courses an educational institution offers; and

(ii) If appropriate, whether approval of all further enrollments or reenrollments in the course or courses an educational institution offers should be denied to veterans, servicemembers, reservists, or other eligible persons pursuing those courses under programs VA administers; or

(iii) Payment should be denied to all servicemembers and veterans for taking a specific licensing or certification test.

(2) A Director's decision described in paragraph (b)(1) of this section must be based on a finding that the educational institution is not meeting, or has violated, a requirement of 38 U.S.C. chapter 30, 32, 34, 35, or 36, or 10 U.S.C. chapter 1606, or the regulations in this part.

* * * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(c) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(d) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(e) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

23. Section 21.4212 is amended by:

a. In paragraph (a)(5), removing ''discontinued and approval of new enrollments or reenrollments denied.'' and adding, in its place, ''discontinued; approval of new enrollments should be denied; and/or payment to individuals for licensing or certification tests should be denied, as appropriate.''.

b. Revising the authority citation.

c. In paragraphs (a) introductory text and (b)(1)(iii), removing ''facility'' each place that it appears and adding, in its place, ''Regional Processing Office''.

The revision reads as follows:

§ 21.4212 Referral to Committee on Educational Allowances.

* * * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

24. In § 21.4213, the authority citation is revised to read as follows:

§ 21.4213 Notice of hearing by Committee on Educational Allowances.

* * * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

25. Section 21.4214 is amended in paragraphs (b), (e), (k), (o), and (p) by removing ''facility'' each place that it appears and adding, in its place, ''Regional Processing Office'', and by revising the authority citations for paragraphs (a) through (p) to read as follows:

§ 21.4214 Hearing rules and procedures for Committee on Educational Allowances.

(a) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(b) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(c) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(d) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(e) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(f) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(g) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(h) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(i) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(j) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(k) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(l) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(m) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(n) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(o) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(p) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

26. Section 21.4215 is amended in paragraphs (b)(1) introductory text, (c), (d), (e)(1), (e)(2) introductory text, and (e)(3) by removing ''facility'' each place that it appears and adding, in its place, ''Regional Processing Office'', and by revising the section heading, paragraph (a), and the authority citations for paragraphs (b), (c), (d), and (e) to read as follows:

§ 21.4215 Decision of Director of VA Regional Processing Office of jurisdiction.

(a) *Decision.* The Director of the VA Regional Processing Office of jurisdiction will render a written decision on the issue or issues of discontinuance or denial that were the subject of the Committee on Educational Allowances proceedings.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(b) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(c) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(d) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

(e) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

27. Section 21.4216 is amended in paragraph (c) by removing ''facility'' and adding, in its place, ''Regional Processing Office'', and by revising the section heading, paragraph (a), and the authority citation at the end of paragraph (c) to read as follows:

§ 21.4216 Review of decision of Director of VA Regional Processing Office of jurisdiction.

(a) *Decision is subject to review by the Director, Education Service.* At the request of the educational institution the Director, Education Service will review a decision of a Director of a VA Regional Processing Office of jurisdiction to discontinue payments; to disapprove new enrollments or reenrollments; or to deny payment of benefits for licensing or certification tests. This review will be based on the evidence of record when the Director of the VA Regional Processing Office of jurisdiction made that decision. It will not be *de novo* in nature and no hearing on the issue will be held. When reviewing a decision to deny payment for licensing or certification tests, the Director, Education Service may seek the advice of the Professional Certification and Licensure Advisory Committee established under 38 U.S.C. 3689(e).

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), (e), 3690)

* * * * *

(c) * * *

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3689(d), 3690)

28. Section 21.4234 is amended by:

a. In paragraph (a)(1), removing ''educational professional'' and adding, in its place, ''educational, professional,''.

b. In paragraph (a)(2) introductory text, removing the period and adding a colon in its place.

c. In paragraph (a)(2)(i), removing the period and adding a semicolon in its place.

d. In paragraph (a)(2)(ii), removing the comma at the end of the paragraph and adding a semicolon in its place.

e. In paragraph (a)(2)(iii), removing ''program, or'' and adding, in its place, ''program;''.

f. In paragraph (a)(2)(iv), removing the period and adding ''; or''.

g. Adding paragraph (a)(2)(v), an authority citation following paragraph (e), and an information collection approval parenthetical at the end of the section.

The additions read as follows:

§ 21.4234 Change of program.

(a) * * *

(2) * * *

(v) An enrollment or reenrollment of a servicemember seeking to be paid tuition assistance top-up benefits to meet all or a portion of an educational institution's charges for education or training that the military department concerned has not covered under tuition assistance.

(Authority: 38 U.S.C. 3691)

* * * * *

(e) * * *

(Authority: 38 U.S.C. 3691)

* * * * *

(The Office of Management and Budget has approved the information collection provisions in this section under control numbers 2900–0074 and 2900–0099.)

29. Section 21.4250 is amended by:

a. Revising the section heading and paragraphs (a) and (b)(1).

b. In paragraph (b)(2), removing ''course'' and adding, in its place, ''course or licensing or certification test''.

c. Removing the authority citation following paragraph (c)(2)(ii).

d. In paragraph (c)(2)(iv), removing ''36; and'' and adding, in its place, ''36;''.

e. In paragraph (c)(2)(v), removing the period and adding ''; and'' in its place.

f. Removing the authority citation at the end of paragraph (c)(2)(v).

g. Immediately after paragraph (c)(2)(v), adding paragraph (c)(2)(vi).

h. Revising the cross reference at the end of the section.

i. Immediately following the cross reference at the end of the section, adding an information collection approval parenthetical.

The revisions and addition read as follows:

§ 21.4250 Course and licensing and certification test approval; jurisdiction and notices.

(a) *General.* The statements made in this paragraph are subject to exceptions found in paragraph (c) of this section.

(1) If an educational institution offers a resident course in a State, only the State approving agency for the State where the course is being offered may approve the course for VA training. If the State approving agency chooses to approve a resident course (other than a flight course) not leading to a standard college degree, it must also approve the class schedules of that course.

(2) If an educational institution with a main campus in a State offers a resident course not located in a State, only the State approving agency for the State where the educational institution's main campus is located may approve the course for VA training. If the State approving agency chooses to approve a resident course (other than a flight course) not leading to a standard college degree, it must also approve the class schedules of that course.

(3) If an educational institution offers a course by independent study or by correspondence, only the State approving agency for the State where the educational institution's main campus is located may approve the course for VA training.

(4) If a training establishment offers a program of apprenticeship or other on-job training, only the State approving agency for the State where the training will take place may approve the course for VA training.

(5) Except as provided in paragraph (a)(6)(ii) of this section, if a State or political subdivision of a State offers a licensing test, only the State approving agency for the State where the license will be valid may approve the test for VA payment.

(6)(i) If an organization or entity offers a licensing or certification test and applies for approval of that test, only the State approving agency for the State where the organization or entity has its headquarters may approve the test and the organization or entity offering the test for VA payment. This approval will be valid wherever the test is given.

(ii) If the organization or entity offering a licensing or certification test does not apply for approval, and a State or political subdivision of a State requires that an individual take the test in order to obtain a license, the State approving agency for the State where the license will be valid may approve the test for VA payment. This approval will be valid for the purpose of VA payment only if the veteran takes the test in the State or political subdivision of the State where the license is valid.

(7) A course approved under 38 U.S.C. chapter 36 will be deemed to be approved for purposes of 38 U.S.C. chapter 35.

(8) Any course that was approved under 38 U.S.C. chapter 33 (as in effect before February 1, 1965), or under 38 U.S.C. chapter 35 before March 3, 1966, and was not or is not disapproved for failure to meet any of the requirements of the applicable chapters, will be deemed to be approved for purposes of 38 U.S.C. chapter 36.

(9) VA may make tuition assistance top-up payments of educational assistance to an individual to meet all or a portion of an educational institution's charges for education or training that the military department concerned has not covered under tuition

assistance, even though a State approving agency has not approved the course in which the individual was enrolled.

(Authority: 38 U.S.C. 3014(b), 3670, 3672(a))

(b) * * *

(1) *Notice of approval.* (i) Each State approving agency must provide to VA:

(A) A list of schools specifying which courses it has approved;

(B) A list of licensing and certification tests and organizations and entities offering these tests that it has approved; and

(C) Any other information that it and VA may determine to be necessary.

(ii) The lists and information must be provided on paper or electronically as VA may require.

* * * * *

(c) * * *

(2) * * *

(vi) Any licensing or certification test and any organization or entity offering such a test if—

(A) The organization or entity is an agency of the Federal government;

(B) The headquarters of the organization or entity offering the test is not located in a State; or

(C) The State approving agency that would, under paragraph (a)(5) or (a)(6) of this section, have approval jurisdiction for the test has declined to perform the approval function for licensing or certification tests and the organizations or entities offering these tests.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3476, 3523, 3672, 3673, 3689)

Cross Reference: *Designation.* See § 21.4150.

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–XXXX.)

30. Section 21.4251 is amended by adding introductory text to read as follows:

§ 21.4251 Minimum period of operation requirement for educational institutions.

The provisions of this section do not apply to licensing or certification tests or to the organizations or entities offering those tests. For information on the minimum period of operation requirement that applies to licensing or certification tests, see § 21.4268.

* * * * *

31. Section 21.4252 is amended by:

a. Revising the section heading.

b. Revising the heading of paragraph (h) and adding introductory text.

c. Revising paragraph (h)(1).

d. Redesignating paragraph (h)(2) as paragraph (h)(3) and revising the introductory text.

e. Adding new paragraph (h)(2).

f. Revising the authority citation following paragraph (h)(3).

g. Adding an information collection approval parenthetical at the end of the section.

The revisions and additions read as follows:

§ 21.4252 Courses precluded; erroneous, deceptive, or misleading practices.

* * * * *

(h) *Erroneous, deceptive, or misleading practices.* For the purposes of this paragraph, ''educational institution'' includes an organization or entity offering licensing or certification tests.

(1) If an educational institution uses advertising, sales, enrollment practices, or candidate handbooks that are erroneous, deceptive, or misleading by actual statement, omission, or intimation, VA will not approve:

(i) An enrollment in any course such an educational institution offers; and

(ii) Payment of educational assistance as reimbursement to a veteran or eligible person for taking a licensing or certification test that the educational institution offers.

(2) VA will use the services and facilities of the Federal Trade Commission, where appropriate, under an agreement:

(i) To carry out investigations; and

(ii) To decide whether an educational institution uses advertising, sales, or enrollment practices, or candidate handbooks, described in paragraph (h)(1) of this section.

(3) Any educational institution offering courses approved for the enrollment of veterans, reservists, and/or eligible persons, or offering licensing or certification tests approved for payment of educational assistance as reimbursement to veterans or eligible persons who take the tests, must maintain a complete record of all advertising, sales materials, enrollment materials, or candidate handbooks (and copies of each) that the educational institution or its agents have used during the preceding 12-month period. The State approving agency and VA may inspect this record. The materials in this record shall include but are not limited to:

* * * * *

(Authority: 38 U.S.C. 3689, 3696)

* * * * *

(The Office of Management and Budget has approved the information collection provisions in this section under control numbers 2900–0073, 2900–0156, and 2900–XXXX.)

32. Section 21.4258 is amended by:

a. Revising paragraphs (a) and (b).

b. Removing paragraph (c).

c. Redesignating paragraph (d) as new paragraph (c).

d. In newly redesignated paragraph (c)(2)(ii), removing ''paragraph (d)(1)'' and adding, in its place, ''paragraph (c)(1)''.

e. In newly redesignated paragraph (c)(3), removing ''paragraph (d)(2)'' and adding, in its place, ''paragraph (c)(2)''.

f. At the end of the section, revising the authority citation and adding an information collection approval parenthetical.

The revisions and addition read as follows:

§ 21.4258 Notice of approval.

(a) *General; letter of approval and other notice of approval requirements.* The State approving agency, upon determining that an educational institution, training establishment, or organization or entity offering a licensing or certification test has complied with all the requirements for approval will—

(1) Notify by letter, as described in paragraph (b) of this section, each such educational institution, training establishment, or organization or entity offering a licensing or certification test; and

(2) Furnish VA an official copy of the letter, any attachments, and any subsequent amendments. In addition, the State approving agency will furnish VA a copy of each such—

(i) Educational institution's approved catalog or bulletin;

(ii) Training establishment's application requesting approval; or

(iii) Organization's or entity's candidate handbook.

(b) *Contents of letter of approval.* The letter of approval will include the following:

(1) For an educational institution: (i) Date of the letter and effective date of approval of courses;

(ii) Proper address and name of the educational institution;

(iii) Authority for approval and conditions of approval, referring specifically to the approved catalog or bulletin;

(iv) Name of each course approved, except that a State approving agency, in lieu of listing the name of each course approved at an institution of higher learning, may identify approved courses by reference to page numbers in the school catalog or bulletin;

(v) Where applicable, enrollment limitations, such as maximum number of students authorized and student-teacher ratio;

(vi) Signature of responsible official of State approving agency; and

(vii) Such other fair and reasonable provisions as are considered necessary by the appropriate State approving agency.

(2) For a training establishment: (i) Date of the letter and effective date of approval of the apprentice or other on-the-job training;

(ii) Proper address and name of the training establishment;

(iii) Authority for approval and conditions of approval;

(iv) Name of the approved program of apprenticeship or other on-the-job training;

(v) Where applicable, enrollment limitations, such as maximum number of trainees authorized;

(vi) Such other fair and reasonable provisions as are considered necessary by the appropriate State approving agency; and

(vii) Signature of responsible official of State approving agency.

(3) For an organization or entity offering a licensing or certification test:

(i) Date of the letter and effective date of approval of test(s);

(ii) Proper name of the organization or entity offering the licensing or certification test(s);

(iii) Name of each test approved indicating whether it is a licensing test or certification test;

(iv) Where applicable, enrollment limitations such as maximum numbers authorized and test taker-test proctor ratio; and

(v) Signature of responsible official of State approving agency.

(Authority: 38 U.S.C. 3672, 3678, 3689)

* * * * *

(20 U.S.C. 1681 *et seq.*; 29 U.S.C. 794; 38 U.S.C. 501, 3671; 42 U.S.C. 2000d, 6101 *et seq.*; 38 CFR parts 18, 18a, 18b)

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0051.)

33. Section 21.4259 is amended by:

a. In paragraph (a) introductory text, removing ''course'' and adding, in its place, ''course or licensing or certification test''.

b. In paragraph (a)(1), removing ''approval of the course for new enrollments'' and adding, in its place, ''approval of a course for new enrollments, or approval of a licensing or certification test,''; and removing ''course fails'' and adding, in its place, ''course or licensing or certification test fails''.

c. In paragraph (a)(2), removing ''course'' and adding, in its place, ''course or licensing or certification test''.

d. In paragraph (a)(3), removing ''school'' and adding, in its place, ''educational institution''.

e. Revising paragraph (b).

f. In paragraph (c), removing ''courses'' and adding, in its place, ''courses or licensing or certification tests''.

g. In paragraph (d), removing ''Chapter 31.'' and adding, in its place, ''38 U.S.C. chapter 31.''.

h. At the end of the section, revising the authority citation and adding an information collection approval parenthetical.

The revisions and additions read as follows:

§ 21.4259 Suspension or disapproval.

* * * * *

(b) Each State approving agency will immediately notify VA of each course, or licensing or certification test, that it has suspended or disapproved.

* * * * *

(Authority: 38 U.S.C. 3679, 3689)

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0051.)

34. Section 21.4266 is amended by revising the cross reference at the end of the section to read as follows:

§ 21.4266 Courses offered at subsidiary branches or extensions.

* * * * *

Cross Reference: *Minimum period of operation requirement for educational institutions.* See § 21.4251.

35. Section 21.4268 is added to read as follows:

§ 21.4268 Approval of licensing and certification tests.

(a) *Authority to approve licensing and certification tests.* (1) Except for approval of the licensing and certification tests and the organizations or entities offering these tests that, as provided in § 21.4250(c)(2), are VA's responsibility, the Secretary of Veterans Affairs delegates to each State approving agency the authority, within the respective State approving agency's jurisdiction provided in § 21.4250(a), to approve licensing and certification tests and to approve the organizations or entities offering licensing and certification tests.

(2) The Secretary of Veterans Affairs delegates to the Under Secretary for Benefits, and to personnel the Under Secretary for Benefits may designate within the Education Service of the Veterans Benefits Administration, the authority to approve the licensing and certification tests and the organizations or entities offering these tests that, as provided in § 21.4250(c)(2)(vi), are VA's responsibility.

(Authority: 38 U.S.C. 512(a), 3689(a)(2))

(b) *Approval of tests.* (1) If an organization or entity wants a licensing or certification test that it offers to be approved for payment of educational assistance, it must apply for approval to the State approving agency having jurisdiction over the locality where the organization or entity has its headquarters. The application must be in the form the State approving agency requires.

(2) In order to be approved for payment of educational assistance to veterans and eligible persons, a licensing or certification test must meet the requirements of paragraph (b) of this section, and the organization or entity offering the test must meet the requirements of paragraph (c) of this section and, if appropriate, the requirements of paragraph (d) of this section.

(i) The State approving agency may approve a licensing or certification test only if—

(A) The test is required under Federal, State, or local law or regulation for an individual to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession; or

(B) The State approving agency decides that the test is generally accepted, in accordance with relevant government, business, or industry standards, employment policies, or hiring practices, as attesting to a level of knowledge or skill required to qualify to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession.

(ii) If a State or political subdivision of a State offers a licensing or certification test, the State approving agency will deem the test to have met the requirements of paragraph (b) of this section.

(3) In considering whether the test is generally accepted, a State approving agency may consider the following:

(i) The nature and number of the entities that recognize the certificate awarded to candidates who pass the test;

(ii) The degree to which employers in the relevant industry accept the certification test;

(iii) Whether major employers in an industry require that their employees obtain the certificate awarded to candidates who pass the test;

(iv) The percentage of people employed in the vocation or profession

who have taken the test and obtained the certificate; or

(v) Any other reasonable criterion that the State approving agency believes will clarify whether the test is generally accepted.

(4) Generally, if a State approving agency approves a certification test, VA will consider that the test is approved for any veteran or eligible person even if he or she takes the test at a location outside the State where the organization or entity offering the test has its headquarters. However, a certification test approval is valid only in the State where the State approving agency has jurisdiction if—

(i) A State licensing agency recognizes the certification test as meeting a requirement for a license and has sought approval for that test; and

(ii) The State approving agency for the State where the licensing agency is located approves that test.

(Authority: 38 U.S.C. 3689)

(c) *Approval of organizations or entities offering licensing or certification tests.* An organization or entity must meet the requirements of this paragraph and, if a nongovernmental organization, of paragraph (d) of this section, in order for the State approving agency to approve a licensing or certification test that the organization or entity offers for payment of educational assistance to veterans and eligible persons who take the test. The organization or entity must—

(1) Maintain appropriate records with respect to all candidates who take the test for a period of not less than three years from the date the organization or entity administers the test to the candidates;

(2) Promptly issue notice of the results of the test to the candidate for the license or certificate;

(3) Have a process to review complaints submitted against the organization or entity with respect to the test or the process for obtaining a license or certificate required for a vocation or profession;

(4) Give to the State approving agency the following information:

(i) A description of the licensing or certification test that the organization or entity offers, including the purpose of the test, the vocational, professional, governmental, and other entities that recognize the test, and the license or certificate issued upon passing the test;

(ii) The requirements to take the test, including the amount of the fee charged for the test and any prerequisite education, training, skills, or other certification; and

(iii) The period for which the license or certificate is awarded is valid, and the requirements for maintaining or renewing the license or certificate; and

(5) Agree to give the following information to VA at VA's request:

(i) The amount of the fee a candidate pays to take a test;

(ii) The results of any test a candidate takes; and

(iii) Personal identifying information of any candidate who applies for reimbursement from VA for a test.

(Authority: 38 U.S.C. 3689(c))

(d) *Approval of nongovernmental organizations or entities offering certification tests.* (1) In addition to complying with the requirements of paragraph (c) of this section, a nongovernmental organization or entity must meet the requirements of paragraph (d) of this section before a certification test it offers can be approved for payment of educational assistance to veterans and eligible persons who take the test. Except as provided in paragraphs (d)(3) and (d)(4) of this section, the organization or entity—

(i) Certifies to the State approving agency that the licensing or certification test offered by the organization or entity is generally accepted, in accordance with relevant government, business, or industry standards, employment policies, or hiring practices, as attesting to a level of knowledge or skill required to qualify to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession;

(ii) Is licensed, chartered, or incorporated in a State and has offered the test for a minimum of two years before the date on which the organization or entity first submits to the State approving agency an application for approval under this section;

(iii) Employs, or consults with, individuals with expertise or substantial experience with respect to all areas of knowledge or skill that are measured by the test and that are required for the license or certificate issued; and

(iv) Has no direct financial interest in—

(A) The outcome of the test; or

(B) An organization that provides the education or training of candidates for licenses or certificates required for a vocation or profession.

(2) At the request of the State approving agency, the organization or entity seeking approval for a licensing or certification test must give such information to the State approving agency as the State approving agency decides is necessary to perform an assessment of—

(i) The test the organization or entity conducts as compared to the level of knowledge or skills that a license or certificate attests; and

(ii) The applicability of the test over such periods of time as the State approving agency decides is appropriate.

(3) The provisions of paragraph (d)(1)(ii) of this section will not prevent the approval of a test if the organization or entity has offered a reasonably related test for at least two years.

(4) The provisions of paragraph (d)(1)(iv) of this section will not prevent the approval of a test if the organization or entity—

(i) Offers a sample test or preparatory materials to a candidate for the test but does not otherwise provide preparatory education or training to the candidate; or

(ii) Has a financial interest in an organization that provides preparatory education or training of a candidate for a test, but that test is advantageous in but not required for practicing a vocation or profession.

(Authority: 38 U.S.C. 3689(c))

(e) *Notice of approval and withdrawal of approval.* The State approving agency must provide notice of an approval of a test as required in § 21.4250(b). If the State approving agency wishes to withdraw approval of a test, it must follow the provisions of § 21.4259.

(Authority: 38 U.S.C. 3689(d))

(f) *A decision to disapprove a test or an organization or entity offering a test may be reviewed.* (1) If an organization or entity offering a test disagrees with a State approving agency's decision to disapprove a test or to disapprove the organization or entity offering the test, it may seek a review of the decision from the Director, Education Service. If the Director, Education Service has acted as the State approving agency, the organization or entity may seek a review of the decision from the Under Secretary for Benefits.

(2) The organization or entity must make its request for a review in writing to the State approving agency. The State approving agency must receive the request within 90 days of the date of the notice to the organization or entity that the test or the organization or entity is disapproved.

(3) The review will be based on the evidence of record at the time the State approving agency made its initial decision. It will not be *de novo* in character.

(4) The Director, Education Service or the Under Secretary for Benefits may seek the advice of the Professional

Certification and Licensure Advisory Committee, established under 38 U.S.C. 3689(e), as to whether the State approving agency's decision should be reversed.

(5) The decision of the Director, Education Service or the Under Secretary for Benefits is the final administrative decision. It will not be subject to further administrative review.

(Authority: 38 U.S.C. 3689)

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–XXXX.)

§ 21.4272 [Amended]

36. In § 21.4272, paragraph (a)(5)(iii) is amended by removing ''§ 21.4252(1), (2) or (3).'' and adding, in its place, ''§ 21.4252(l)(1), (2), or (3).''.

Subpart G—Post-Vietnam Era Veterans' Educational Assistance Under 38 U.S.C. Chapter 32

37. The authority citation for part 21, subpart G is revised to read as follows:

Authority: 38 U.S.C. 501(a), chs. 32, 36, and as noted in specific sections.

38. Section 21.5021 is amended by:

a. Revising the introductory text and paragraphs (k) and (p).

b. In paragraph (q)(3), removing ''636; or'' and adding, in its place, ''636;''.

c. In paragraph (q)(4), removing ''on-job training approved as provided in §§ 21.4261 or 21.4262 of this part as appropriate.'' and adding, in its place, ''training on-the-job approved as provided in § 21.4261 or § 21.4262 as appropriate; or''.

d. Adding paragraph (q)(5) immediately before the authority citation for paragraph (q).

e. Revising the authority citation for paragraph (q).

f. Adding paragraphs (z), (aa), and (bb).

The revisions and additions read as follows:

§ 21.5021 Definitions.

For the purposes of subpart G and payment of benefits under 38 U.S.C. chapter 32, the following definitions apply (see also §§ 21.1029 and 21.4200):

* * * * *

(k) *Benefit payment.* The term *benefit payment* means any educational assistance allowance paid under 38 U.S.C. chapter 32 to a veteran for pursuit of a program of education during a benefit period.

(Authority: 38 U.S.C. 3231, 3232, 3452(b), 3689)

* * * * *

(p) *Training establishment.* The term *training establishment* means any establishment providing apprentice or other training on-the-job, including those under the supervision of a college, university, any State department of education, any State apprenticeship agency, any State board of vocational education, any joint apprenticeship committee, the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. chapter 4C, or any agency of the Federal government authorized to supervise such training.

(Authority: 38 U.S.C. 3202, 3452(e))

(q) * * *

(5) A licensing or certification test, the passing of which demonstrates an individual's possession of the knowledge or skill required to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession, provided that VA or a State approving agency has approved the test and the licensing or credentialing organization or entity that offers the test as provided in 38 U.S.C. 3689.

(Authority: 38 U.S.C. 3202(2), 3452(b), 3689)

* * * * *

(z) *Certification test.* The term *certification test* means a test an individual must pass in order to receive a certificate that provides an affirmation of an individual's qualifications in a specified occupation.

(Authority: 38 U.S.C. 3202, 3452(b), 3501(a)(5), 3689)

(aa) *Licensing test.* The term *licensing test* means a test offered by a State, local, or Federal agency, the passing of which is a means, or part of a means, to obtain a license. That license must be required by law in order for the individual to practice an occupation in the political jurisdiction of the agency offering the test.

(Authority: 38 U.S.C. 3202, 3452(b), 3689)

(bb) *Organization or entity offering a licensing or certification test.* (1) The term *organization or entity offering a licensing or certification test* means:

(i) An organization or entity that causes a licensing test to be given and that will issue a license to an individual who passes the test;

(ii) An organization or entity that causes a certification test to be given and that will issue a certificate to an individual who passes the test; or

(iii) An organization or entity that administers a licensing or certification test for the organization or entity that will issue a license or certificate, respectively, to an individual who passes the test, provided that the administering organization or entity can provide all required information and certifications under § 21.4268 to the State approving agency and to VA.

(2) This term does not include:

(i) An organization or entity that develops and/or proctors a licensing or certification test, but does not issue the license or certificate;

(ii) An organization or entity that administers a test but does not issue the license or certificate, if that administering organization or entity cannot provide all required information and certifications under § 21.4268 to the State approving agency and to VA.

(Authority: 38 U.S.C. 3202, 3452(b), 3689)

39. Section 21.5131 is revised to read as follows:

§ 21.5131 Educational assistance allowance.

(a) *General.* Statements in this section concerning payments of educational assistance allowance assume that the veteran or servicemember:

(1) Is eligible for educational assistance under 38 U.S.C. chapter 32;

(2) Has remaining entitlement; and

(3) Has not passed the 10-year delimiting date and any applicable extension to that date.

(Authority: 38 U.S.C. 3241)

(b) *Payment of educational assistance allowance for pursuit of programs of education and other courses.* (1) VA will pay educational assistance allowance at the rate specified in § 21.5136 or § 21.5138 while the veteran or servicemember is pursuing:

(i) An approved program of education;

(ii) A refresher or deficiency course; or

(iii) Special education or training which is necessary to enable the veteran or servicemember to pursue an approved program of education.

(2) Except as provided in paragraph (c) of this section, VA will not pay educational assistance allowance for pursuit of any course unless the course is:

(i) Part of the veteran's or servicemember's program of education;

(ii) A refresher or deficiency course; or

(iii) Special education or training which is necessary to enable the veteran or servicemember to pursue an approved program of education.

(3) VA may withhold a payment until it receives verification or certification of the veteran's or servicemember's continued enrollment and adjusts accordingly the veteran's or servicemember's account.

(Authority: 38 U.S.C. 3241)

(c) *Payment for taking a licensing or certification test.* VA will pay

educational assistance allowance to an eligible veteran or servicemember who takes an approved licensing or certification test and applies, in accordance with the provisions of § 21.1030(b), for that assistance. VA will not pay educational assistance for a licensing or certification test that neither a State approving agency nor VA has approved.

(Authority: 38 U.S.C. 3689)

40. Section 21.5133 is amended by revising the introductory text, paragraph (a) introductory text, and authority citation to read as follows:

§ 21.5133 Certifications and release of payments.

A veteran or servicemember must be pursuing a program of education in order to receive payment of educational assistance allowance under 38 U.S.C. chapter 32. To ensure that this is the case, the provisions of this section must be met when a veteran or servicemember is seeking such payment.

(a) *General.* VA will pay educational assistance to a veteran or servicemember (other than one pursuing a program of apprenticeship, other on-job training, or a correspondence course; one seeking reimbursement for taking an approved licensing or certification test; or one who qualifies for an advance payment) only after:

* * * * *

(Authority: 38 U.S.C. 3680(g), 3689)

* * * * *

41. Section 21.5137 is added to read as follows:

§ 21.5137 Benefit payments and charges against entitlement for taking an approved licensing or certification test.

(a) *Benefit payments.* The amount of educational assistance allowance VA will pay to a veteran or servicemember for taking an approved licensing or certification test, if the veteran or servicemember is entitled to receive such benefit payments, will be the lowest of the following:

(1) The fee the organization or entity offering the test charges for taking the test;

(2) $2,000; or

(3) The total remaining amount of the veteran's or servicemember's contributions to the fund and the contributions the Secretary of Defense has made to the fund on behalf of the veteran or servicemember.

(Authority: 38 U.S.C. 3222, 3231, 3232(c), 3452(b), 3689)

(b) *Charge against entitlement.* For educational assistance allowance paid for taking an approved licensing or certification test, VA will make a charge against the veteran's or servicemember's entitlement by dividing the amount paid under paragraph (a) of this section by the monthly amount as calculated under § 21.5138(c). The calculation will assume that the veteran or servicemember is a full-time student.

(Authority: 38 U.S.C. 3232(c), 3452(b), 3689)

42. Section 21.5138 is amended by:

a. Revising the introductory text.

b. Revising the introductory text of paragraph (a) and of paragraphs (a)(1) through (a)(5).

c. Revising the introductory text of paragraph (b).

d. In paragraph (c), removing ''The Department of Veterans Affairs'' and adding, in its place, ''Under this section, VA'' and removing ''the Department of Veterans Affairs'' and adding, in its place, ''VA''.

The revisions read as follows:

§ 21.5138 Computation of benefit payments and monthly rates.

Except as provided in §§ 21.5136(b)(1) and 21.5137(a), for purposes of this subpart VA will compute benefit payments and monthly rates as provided in this section.

(Authority: 38 U.S.C. 3231, 3233, 3241, 3491, 3680, 3689)

(a) *Computation of entitlement factor.* (1) For residence training, VA will compute an entitlement factor as follows:

* * * * *

(2) For correspondence training, VA will compute an entitlement factor as follows:

* * * * *

(3) For apprenticeship and other on-job training, VA will compute an entitlement factor as follows:

* * * * *

(4) For cooperative training, VA will compute an entitlement factor as follows:

* * * * *

(5) For flight training, VA will compute an entitlement factor as follows:

* * * * *

(b) *Computation of benefit payment.* Under this section, VA will compute benefit payments as follows:

* * * * *

§ 21.5200 [Amended]

43. Section 21.5200 is amended by:

a. In paragraph (d), removing ''by schools''.

b. In paragraph (j), adding a comma after the word ''jurisdiction''.

c. Removing the information collection approval parenthetical at the end of the section.

44. Section 21.5230 is amended by:

a. In paragraph (a) introductory text, removing ''under chapter 32, title 38 U.S.C., only if it—'' and adding, in its place, ''for a veteran or servicemember under 38 U.S.C. chapter 32, only if—''.

b. In paragraph (a)(1), removing ''Meets'' and adding, in its place, ''The program meets'', and removing ''of this part''.

c. Revising paragraphs (a)(2), (a)(3), and (a)(4).

d. In paragraph (b), removing ''serviceperson'' both places that it appears and adding, in its place, ''servicemember''.

The revisions read as follows:

§ 21.5230 Programs of education.

(a) * * *

(2) Except for a program consisting of a licensing or certification test, the program has an objective as described in § 21.5021(r) or (s);

(3) Any courses, subjects, or licensing or certification tests in the program are approved for VA training; and

(4) Except for a program consisting of a licensing or certification test designed to help the veteran or servicemember maintain employment in a vocation or profession, the veteran or servicemember is not already qualified for the objective of the program.

(Authority: 38 U.S.C. 3202(2), 3689(b))

* * * * *

45. Section 21.5250 is amended by:

a. Revising paragraphs (a)(1), (a)(2), (a)(3), (a)(7), and (a)(14).

b. Adding paragraph (a)(17) immediately before the authority citation for paragraph (a).

The revisions and addition read as follows:

§ 21.5250 Courses.

(a) * * *

(1) Section 21.4250 (except paragraph (c)(1))—Course and licensing and certification test approval; jurisdiction and notices.

(2) Section 21.4251—Minimum period of operation requirement for educational institutions.

(3) Section 21.4252—Courses precluded; erroneous, deceptive, or misleading practices.

* * * * *

(7) Section 21.4256—Correspondence programs and courses.

* * * * *

(14) Section 21.4265—Practical training approved as institutional training or on-job training.

* * * * *

(17) Section 21.4268—Approval of licensing and certification tests.

* * * * *

46. Section 21.5294 is amended by:

a. Revising paragraph (d)(3)(iv) and the authority citation following paragraph (d)(3).

b. Removing paragraph (d)(4).

The revisions read as follows:

§ 21.5294 Transfer of entitlement.

* * * * *

(d) * * *

(3) * * *

(iv) Section 21.5131, and

* * * * *

(Authority: Sec. 903, Pub. L. 96–342, 94 Stat. 1115)

Subpart K—All Volunteer Force Educational Assistance Program (Montgomery GI Bill—Active Duty)

47. The authority citation for part 21, subpart K is revised to read as follows:

Authority: 38 U.S.C. 501(a), chs. 30, 36, and as noted in specific sections.

48. Section 21.7020 is amended by:

a. In the introductory text, removing ''apply. (*See* also additional definitions in § 21.1029).'' and adding, in its place, ''apply:''.

b. In paragraph (b)(15), removing ''provided'' and adding, in its place, ''provided in''.

c. In paragraph (b)(23)(iii), removing the word ''and'' at the end of the paragraph.

d. In paragraph (b)(23)(iv)(B), removing the period and adding ''; and'' in its place.

e. Adding paragraph (b)(23)(v) immediately before the authority citation for paragraph (b)(23).

f. Revising the authority citation for paragraph (b)(23).

g. In paragraph (b)(25)(i)(F), removing the word ''or'', and in paragraph (b)(25)(i)(G), removing the period and adding '', or'' in its place.

h. Adding paragraph (b)(25)(i)(H).

i. Revising the authority citation for paragraph (b)(25).

j. Revising paragraph (b)(37).

k. Adding paragraphs (b)(52), (b)(53), (b)(54), and (b)(55).

The revisions and additions read as follows:

§ 21.7020 Definitions.

* * * * *

(b) * * *

(23) * * *

(v) Includes a licensing or certification test, the passing of which demonstrates an individual's possession of the knowledge or skill required to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession, provided that VA or a State approving agency has approved the test and the licensing or credentialing organization or entity that offers the test as provided in 38 U.S.C. 3689.

(Authority: 38 U.S.C. 3002(3), 3452(b), 3689)

* * * * *

(25) * * *

(i) * * *

(H) A licensing or certification test taken on or after March 1, 2001.

(ii) * * *

(Authority: 38 U.S.C. 3002, 3034, 3452, 3680(g), 3689; Pub. L. 98–525)

* * * * *

(37) *Training establishment.* The term *training establishment* means any establishment providing apprentice or other training on-the-job, including those under the supervision of a college, university, any State department of education, any State apprenticeship agency, any State board of vocational education, any joint apprenticeship committee, the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. chapter 4C, or any agency of the Federal government authorized to supervise such training.

(Authority: 38 U.S.C. 3002, 3452)

* * * * *

(52) *Certification test.* The term *certification test* means a test that an individual must pass in order to receive a certificate that provides an affirmation of an individual's qualifications in a specified occupation.

(Authority: 38 U.S.C. 3002(3), 3452(b), 3689)

(53) *Licensing test.* The term *licensing test* means a test offered by a State, local, or Federal agency, the passing of which is a means, or part of a means, to obtain a license. That license must be required by law in order for the individual to practice an occupation in the political jurisdiction of the agency offering the test.

(Authority: 38 U.S.C. 3002(3), 3452(b), 3689)

(54) *Organization or entity offering a licensing or certification test.* (i) The term organization or entity offering a licensing or certification test means:

(A) An organization or entity that causes a licensing test to be given and that will issue a license to an individual who passes the test;

(B) An organization or entity that causes a certification test to be given and that will issue a certificate to an individual who passes the test; or

(C) An organization or entity that administers a certification test for the organization or entity that will issue a certificate to an individual who passes the test, provided that the administering organization or entity can provide all required information and certifications under § 21.4268 to the State approving agency and to VA.

(ii) This term does not include:

(A) An organization or entity that develops and/or proctors a licensing or certification test, but does not issue the license or certificate; or

(B) An organization or entity that administers a test but does not issue the license or certificate, if that administering organization or entity cannot provide all required information and certifications under § 21.4268 to the State approving agency and to VA.

(Authority: 38 U.S.C. 3002(3), 3452(b), 3689)

(55) *Tuition assistance top-up.* The term *tuition assistance top-up* means a payment of basic educational assistance to meet all or a portion of the charges of an educational institution for the education or training of a servicemember that are not met by the Secretary of the military department concerned under 10 U.S.C. 2007(a) or (c).

(Authority: 38 U.S.C. 3014(b))

* * * * *

§ 21.7032 [Amended]

49. Section 21.7032 is amended by:

a. In paragraph (a), removing ''§ 21.1032.'' and adding, in its place, ''§ 21.1033.''.

b. In paragraph (b)(2), removing ''§ 21.7131(k).'' and adding, in its place, ''§ 21.7131(l).''.

§ 21.7051 [Amended]

50. In § 21.7051, paragraph (a)(1) is amended by removing ''§ 21.1032(c) of this part.'' and adding, in its place, ''§ 21.1033(c).''.

51. Section 21.7075 is added to read as follows:

§ 21.7075 Entitlement to tuition assistance top-up.

An individual who is entitled to educational assistance under 38 U.S.C. chapter 30 is also entitled to 36 months of tuition assistance top-up. This entitlement is parallel to, and does not replace, the entitlement to educational assistance available under § 21.7072. If the individual receives tuition assistance top-up, VA will make a charge against both the entitlement under § 21.7072 and the entitlement under this section. The charge will be as described in § 21.7076(b)(11).

(Authority: 38 U.S.C. 3013, 3014(b), 3032)

52. Section 21.7076 is amended by:

a. In paragraph (a)(2) and the introductory text of paragraph (a)(3),

removing ''service member'' and adding, in its place, ''servicemember''.

b. In paragraph (a)(3)(iii), removing the word ''or'' at the end of the paragraph.

c. In paragraph (a)(3)(iv), removing the period and adding a semicolon in its place.

d. Adding paragraphs (a)(3)(v) and (a)(3)(vi).

e. In paragraph (a)(4)(i), removing ''service members'' and adding, in its place, ''servicemembers''.

f. Revising the authority citation following paragraph (a).

g. Revising paragraph (b)(1) introductory text and the authority citations following paragraphs (b)(2)(ii) and (b)(6)(ii).

h. Adding authority citations following paragraphs (b)(3)(iii), (b)(4), and (b)(5)(ii).

i. Adding paragraphs (b)(10) and (b)(11).

The revisions and additions read as follows:

§ 21.7076 Entitlement charges.

(a) * * *

(3) * * *

(v) Is receiving educational assistance for taking an approved licensing or certification test; or

(vi) Is receiving tuition assistance top-up.

* * * * *

(Authority: 38 U.S.C. 3013, 3014(b), 3014A, 3689)

(b) * * *

(1) Except for those pursuing correspondence training, flight training, apprenticeship or other on-job training; those receiving tuition assistance top-up; those receiving educational assistance for taking an approved licensing or certification test; those receiving tutorial assistance; and those receiving an accelerated payment, VA will make a charge against entitlement:

* * * * *

(2) * * *

(ii) * * *

(Authority: 38 U.S.C. 3013)

(3) * * *

(iii) * * *

(Authority: 38 U.S.C. 3032(c))

(4) * * *

(Authority: 38 U.S.C. 3015(e), 3032(c))

(5) * * *

(ii) * * *

(Authority: 38 U.S.C. 3032(d))

(6) * * *

(ii) * * *

(Authority: 38 U.S.C. 3032(c), 3032(d))

* * * * *

(10) When a servicemember receives tuition assistance top-up, VA will make a charge against his or her entitlement as established under § 21.7072 equal to the number of months and days determined by dividing the total amount paid by an amount equal to the servicemember's monthly rate of basic educational assistance as calculated under § 21.7136. VA will make a charge against his or her tuition assistance top-up entitlement as established under § 21.7075 by subtracting from that entitlement the total number of months and days in the term, quarter, or semester for which the servicemember received tuition assistance.

(Authority: 38 U.S.C. 3014(b))

(11) When a veteran or servicemember receives educational assistance for taking an approved licensing or certification test, VA will make a charge against his or her entitlement equal to the number of months and days determined by dividing the total amount paid by an amount equal to the servicemember's monthly rate of basic educational assistance as calculated under § 21.7136, excluding any additional ''kicker'' that may be paid under § 21.7136(g).

(Authority: 38 U.S.C. 3032(f)(2))

* * * * *

53. Section 21.7110 is revised to read as follows:

§ 21.7110 Selection of a program of education.

(a) *Payments of educational assistance are usually based on pursuit of a program of education.* In order to receive educational assistance under 38 U.S.C. chapter 30, a veteran or servicemember must—

(1) Be pursuing an approved program of education;

(2) Be pursuing refresher or deficiency courses;

(3) Be pursuing other preparatory or special education or training courses necessary to enable the veteran or servicemember to pursue an approved program of education;

(4) Have taken an approved licensing or certification test, for which he or she is requesting reimbursement; or

(5) Be an individual who has taken a course for which the individual received tuition assistance provided under a program administered by the Secretary of a military department under 10 U.S.C. 2007(a) or (c), for which the individual is requesting tuition assistance top-up.

(Authority: 38 U.S.C. 3014, 3023, 3034, 3689)

(b) *Approval of a program of education.* VA will approve a program of education under 38 U.S.C. chapter 30 that a veteran or servicemember selects if:

(1) It meets the definition of a program of education found in § 21.7020(b)(23);

(2) Except for a program consisting of a licensing or certification test, has an objective as described in § 21.7020(b)(13) or (22);

(3) The courses, subjects, or licensing or certification tests in the program are approved for VA training; and

(4) Except for a program consisting of a licensing or certification test designed to help the veteran or servicemember maintain employment in a vocation or profession, the veteran or servicemember is not already qualified for the objective of the program.

(Authority: 38 U.S.C. 3002(3), 3034, 3471, 3689)

54. Section 21.7122 is amended by:

a. Revising paragraphs (a), (b), and (c), and the authority citation for paragraph (e).

b. In paragraph (e)(7), removing the word ''or''.

c. In paragraph (e)(8), removing the period and adding ''; or'' in its place.

d. Adding paragraph (e)(9).

The revisions and addition read as follows:

§ 21.7122 Courses precluded.

(a) *Unapproved courses.* The provisions of this section which refer to a State approving agency will be deemed to refer to VA with respect to a State when that State does not have and fails or declines to create or designate a State approving agency; or fails to enter into an agreement as provided in § 21.4153 (see § 21.4150(c)). Except for payment of tuition assistance top-up, VA will not pay educational assistance for:

(1) An enrollment in any course that a State approving agency has not approved;

(2) A new enrollment in a course while a State approving agency has suspended the course for new enrollments;

(3) Any period within an enrollment in a course if the period occurs after the date a State approving agency disapproves the course; or

(4) Taking a licensing or certification test after the date a State approving agency disapproves the test. See § 21.7220.

(Authority: 38 U.S.C. 3014(b), 3034, 3672)

(b) *Courses outside a program of education.* VA will not pay educational assistance for an enrollment in any course that is not part of a program of

education unless the veteran or servicemember is enrolled in:

(1) A refresher course (including a course which will permit the veteran or servicemember to update knowledge and skills or be instructed in the technological advances which have occurred in the veteran's or servicemember's field of employment);

(2) A deficiency course;

(3) A preparatory, special education, or training course necessary to enable the veteran or servicemember to pursue an approved program of education; or

(4) A course for which the veteran or servicemember is seeking tuition assistance top-up.

(Authority: 38 U.S.C. 3002(3), 3014(b), 3034, 3452(b))

(c) *Erroneous, deceptive, misleading practices.* (1) VA will not pay educational assistance for:

(i) An enrollment in any course offered by an educational institution that uses advertising, sales, or enrollment practices that are erroneous, deceptive, or misleading by actual statement, omission, or intimation.

(ii) Taking a licensing or certification test if the organization or entity offering the test uses advertising or sales practices, or candidate handbooks, that are erroneous, deceptive, or misleading by actual statement, omission, or intimation.

(2) VA will apply the provisions of § 21.4252(h) in making these payment decisions.

(Authority: 3034, 3689(d), 3696)

* * * * *

(e) * * *

(9) Taking a licensing or certification test after the date the State approving agency suspends approval of the test.

(Authority: 38 U.S.C. 3002(3), 3034, 3672(a), 3676, 3680(a), 3680A(a), 3680A(f), 3680(g), 3689(d))

55. Section 21.7124 is revised to read as follows:

§ 21.7124 Overcharges.

(a) *Overcharges by educational institutions may result in the disapproval of enrollments.* VA may disapprove an educational institution for further enrollments when the educational institution charges or receives from a veteran or servicemember tuition and fees that exceed the established charges which the educational institution requires from similarly circumstanced nonveterans enrolled in the same course.

(Authority: 38 U.S.C. 3034, 3690(a))

(b) *Overcharges by organizations or entities offering licensing or certification tests may result in disapproval of tests.* VA may disapprove an organization or entity offering a licensing or certification test when the organization or entity offering the test charges or receives from a veteran or servicemember fees which exceed the established fees that the organization or entity requires from similarly circumstanced nonveterans taking the same test.

(Authority: 38 U.S.C. 3689(d), 3690(a))

56. Section 21.7131 is amended by:

a. Revising the introductory text.

b. Redesignating paragraph (a)(1) introductory text and paragraphs (a)(1)(i) through (a)(1)(v) as paragraph (a)(1)(i) and paragraphs (a)(1)(i)(A) through (a)(1)(i)(E), respectively; redesignating paragraph (a)(2) introductory text and paragraphs (a)(2)(i) and (a)(2)(ii) as paragraph (a)(1)(ii) and paragraphs (a)(1)(ii)(A) and (a)(1)(ii)(B), respectively; and adding a paragraph (a)(1) heading and new paragraph (a)(2).

c. Revising the authority citation following paragraph (a).

d. Removing the information collection approval parenthetical following paragraph (p).

The revisions and additions read as follows:

§ 21.7131 Commencing dates.

VA will determine under this section the commencing date of an award or increased award of educational assistance. When more than one paragraph in this section applies, VA will award educational assistance using the latest of the applicable commencing dates.

(a) * * *

(1) *For other than licensing or certification tests.*

* * * * *

(2) *For licensing or certification tests.* VA will award educational assistance for the cost of a licensing or certification test only when the veteran or servicemember takes such test—

(i) While the test is approved under 38 U.S.C. chapter 36;

(ii) While the veteran or servicemember is eligible for educational assistance under this subpart; and

(iii) No more than one year before the date VA receives a claim for reimbursement of the cost of the test.

(Authority: 38 U.S.C. 3014, 3023, 3034, 3672, 3689, 5110, 5113)

* * * * *

§ 21.7135 [Amended]

57. Section 21.7135 is amended by:

a. In the introductory text of paragraph (i), removing ''§ 21.4211(d) and (g)'' and adding, in its place, ''§§ 21.4215(d) and 21.4216''.

b. In paragraph (i)(2), removing ''§ 21.4211(d) and (g)'' and adding, in its place, ''§ 21.4215(d)''.

c. In paragraph (j)(1), removing ''director'' and adding, in its place, ''Director''.

d. In paragraphs (j) and (k), removing ''facility'' each place that it appears, and adding, in its place, ''Regional Processing Office''.

58. Section 21.7140 is amended by:

a. Adding an authority citation for paragraph (b).

b. Revising paragraph (c) introductory text, paragraph (c)(1) introductory text, and the authority citation following paragraph (c)(1)(ii).

c. Adding paragraphs (c)(4) and (c)(5), and, at the end of the section, an information collection approval parenthetical.

The revisions and additions read as follows:

§ 21.7140 Certifications and release of payments.

* * * * *

(b) * * *

(Authority: 38 U.S.C. 3014A)

(c) *Other payments.* Except for an individual who is seeking tuition assistance top-up an individual must be pursuing a program of education in order to receive payments of educational assistance under 38 U.S.C. chapter 30. To ensure that this is the case, the provisions of this paragraph must be met.

(1) VA will pay educational assistance to a veteran or servicemember (other than one pursuing a program of apprenticeship, other on-job training, or a correspondence course; one seeking tuition assistance top-up; one seeking reimbursement for taking an approved licensing or certification test; one who qualifies for an advance payment; one who qualifies for an accelerated payment; or one who qualifies for a lump sum payment) only after:

(i) * * *

(ii) * * *

(Authority: 38 U.S.C. 3680(g), 3689)

* * * * *

(4) VA will pay educational assistance to a veteran or servicemember as reimbursement for taking an approved licensing or certification test only after the veteran or servicemember has submitted to VA a copy of the veteran's or servicemember's official test results and, if not included in the results, a copy of another official form (such as a receipt or registration form) that together must include:

(i) The name of the test;

(ii) The name and address of the organization or entity issuing the license or certificate;

(iii) The date the veteran or servicemember took the test; and

(iv) The cost of the test.

(Authority: 38 U.S.C. 3689)

(5) VA will pay educational assistance for tuition assistance top-up only after the individual has submitted to VA a copy of the form(s) that the military service with jurisdiction requires for tuition assistance and that had been presented to the educational institution, covering the course or courses for which the claimant wants tuition assistance top-up. If the form(s) submitted did not contain the amount of tuition assistance charged to the individual, VA may delay payment until VA obtains that information from the educational institution. Examples of these forms include:

(i) DA Form 2171, Request for Tuition Assistance—Army Continuing Education System;

(ii) AF Form 1227, Authority for Tuition Assistance—Education Services Program;

(iii) NAVMC 10883, Application for Tuition Assistance, and either NAVEDTRA 1560/5, Tuition Assistance Authorization or NAVMC (page 2), Tuition Assistance Authorization;

(iv) Department of Homeland Security, USCG CG–4147, Application for Off-Duty Assistance; and

(v) Request for Top-Up: eArmyU Program.

(Authority: 38 U.S.C. 5101(a))

* * * * *

(The Office of Management and Budget has approved the information collection provisions in this section under control numbers 2900–XXXX and 2900–XXXX.)

59. Section 21.7142 is revised to read as follows:

§ 21.7142 Accelerated payments, payment of tuition assistance top-up, and licensing or certification test reimbursement.

(a) *Amount of accelerated payment.* An accelerated payment will be the lesser of—

(1) The amount equal to 60 percent of the charged tuition and fees for the term, quarter, or semester (or the entire program of education for those programs not offered on a term, quarter, or semester basis), or

(2) The aggregate amount of basic educational assistance to which the individual remains entitled under 38 U.S.C. chapter 30 at the time of the payment.

(Authority: 38 U.S.C. 3014A)

(b) *Amount of tuition assistance top-up.* The amount of tuition assistance top-up VA will pay to an individual for a course is the lowest of the following:

(1) All of the charges of the educational institution for the individual's education or training that the Secretary of the military department concerned has not paid under 10 U.S.C. 2007(a) or 2007(c);

(2) That portion of the charges of the educational institution for the individual's education that the Secretary of the military department concerned has not paid under 10 U.S.C. 2007(a) or 2007(c) and for which the individual has stated to VA that he or she wishes to receive payment;

(3) An amount VA will determine by multiplying the individual's remaining months and days of entitlement to educational assistance as provided under § 21.7072 or § 21.7073 by the individual's monthly rate of basic educational assistance as provided under § 21.7136 or § 21.7137, as appropriate;

(4) An amount VA will determine by multiplying the individual's remaining months and days of entitlement to tuition assistance top-up as provided under § 21.7075 by the individual's monthly rate of basic educational assistance as provided under § 21.7136 or § 21.7137, as appropriate; or

(5) An amount VA will determine by—

(i) Dividing the total number of days from the date on which the individual became eligible for educational assistance under the Montgomery GI Bill—Active Duty by the number of days in the term during which the individual took the course or course for which he or she wants tuition assistance top-up; and

(ii) Multiplying the result by the amount stated in paragraph (a)(1) or (a)(2) of this section, as appropriate.

(Authority: 38 U.S.C. 3014(b))

(c) *Amount of reimbursement for taking a licensing or certification test.* The amount of educational assistance VA will pay as reimbursement for taking an approved licensing or certification test is the lowest of the following:

(1) The fee that the licensing or certification organization offering the test charges for taking the test;

(2) $2,000; or

(3) An amount VA will determine by multiplying the veteran's or servicemember's remaining months and days of entitlement to educational assistance as provided under § 21.7072 or § 21.7073 by the veteran's or servicemember's monthly rate of basic educational assistance as provided under § 21.7136 or § 21.7137, as appropriate.

(Authority: 38 U.S.C. 3032(f))

60. Section 21.7150 is amended by:

a. Removing ''The'' and adding, in its place, ''Except for a veteran or servicemember seeking tuition assistance top-up or reimbursement for taking an approved licensing or certification test, the''.

b. Revising the authority citation.

The revision reads as follows:

§ 21.7150 Pursuit.

* * * * *

(Authority: 38 U.S.C. 3034(b))

61. Section 21.7152 is amended by:

a. In the introductory text, removing ''As stated in § 21.7140 of this part'' and adding, in its place, ''Except as stated in § 21.7140''.

b. Revising paragraph (a).

The revision reads as follows:

§ 21.7152 Certification of enrollment.

* * * * *

(a) *Educational institutions must certify most enrollments.* VA does not, as a condition of payment of tuition assistance top-up or advance payment, require educational institutions to certify the enrollments of veterans or servicemembers who either are seeking tuition assistance top-up or, in the cases described in § 21.7151, are seeking an advance payment. VA does not require organizations or entities offering a licensing or certification test to certify the fact that the veteran or servicemember took the test. In all other cases the educational institution must certify the veteran's or servicemember's enrollment before he or she may receive educational assistance. This certification must be in a form specified by the Secretary and contain such information as the Secretary may specify.

(Authority: 38 U.S.C. 3014(b), 3031, 3034, 3482(g), 3680, 3687, 3689, 5101(a))

* * * * *

62. Section 21.7220 is amended by:

a. Revising paragraphs (b)(1) and (b)(2).

b. In paragraphs (b)(3) through (b)(10), removing the commas at the end of the paragraphs and adding semicolons in their places.

c. In paragraph (b)(11), removing the period and adding ''; and'' in its place.

d. Adding paragraph (b)(12) immediately before the authority citation for paragraph (b).

The revisions and addition read as follows:

§ 21.7220 Course approval.

* * * * *

(b) * * *

(1) Section 21.4250 (except paragraph (c)(1))—Jurisdiction for course and

licensing and certification test approval and approval notices;

(2) Section 21.4251—Minimum period of operation requirement for educational institutions;

* * * * *

(12) Section 21.4268—Approval of licensing and certification tests.

* * * * *

[FR Doc. 06–1219 Filed 2–21–06; 8:45 am]

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Federal Register

Wednesday,
February 22, 2006

Part III

Department of Defense

Department of the Army

32 CFR Part 518

The Freedom of Information Act Program; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 518

RIN 0702–AA45

The Freedom of Information Act Program

AGENCY: Department of the Army, DoD.

ACTION: Final Rule.

SUMMARY: The Department of the Army is revising our rule in support of the Freedom of Information Act as required by public law and updating the provisions for access and release of information from all Army information systems (automated and manual) that further supports the Army's Records Management Program. This rule finalizes the proposed rule that was published in the **Federal Register** on December 28, 2004.

DATES: *Effective Date:* March 24, 2006.

ADDRESSES: The Administrative Assistant to the Secretary of the Army, (AASA), The Records and Programs Agency, (RPA), U.S. Army Freedom of Information and Privacy Office, ATTN: JDRP–RDF, Casey Bldg., Suite 144, 7701 Telegraph Road, Alexandria, VA 22315–3905.

FOR FURTHER INFORMATION CONTACT: U.S. Army Freedom of Information and Privacy Office, (703) 428–6508.

SUPPLEMENTARY INFORMATION:

A. Background

In the December 28, 2004, issue of the **Federal Register**, (69 FR 77836), the Department of the Army issued a proposed rule to revise 32 CFR 518. This final rule prescribes procedures and responsibilities of the Freedom of Information Act, in accordance with the Electronic Freedom of Information Act (FOIA) Amendments of 1996. The Electronic Freedom of Information Act Amendments of 1996 changed the response time from 10 to 20 days, required Multitrack processing of FOIA requests, required an Electronic FOIA Reading Room, and changed the requirements for the Annual Report and the timetable for that report from calendar to fiscal year. The Department of the Army received responses from two commenters. No substantial changes are required at this time; however proposed administrative changes were accepted and made to the final rule. One commenter expressed support for the proposed rule. The second commenter proposed several changes which would require the revision of the Freedom of Information Act which is outside the scope of the proposed rule.

B. Regulatory Flexibility Act

The Department of the Army has determined that the Regulatory Flexibility Act does not apply because the rule does not have a significant economic impact on a substantial number of small entities within the meaning to the Regulatory Flexibility Act, 5 U.S.C. 601–612.

C. Paperwork Reduction Act

The Department of the Army has determined that the Paperwork Reduction Act does not apply because the rule does not impose recordkeeping or information collection requirements from contractors or members of the public.

D. Executive Order 12866

The Department of the Army has determined that according to the criteria defined in Executive Order 12866, this rule is not a significant regulatory action.

Donald C. Hakenson,

Acting Chief, U.S. Army Freedom of Information and Privacy Office.

List of Subjects in 32 CFR Part 518

Freedom of Information Act. Administrative practices and procedures.

■ For the reasons stated in the preamble, the Department of the Army revises 32 CFR part 518—The Army Freedom of Information Act Program as follows:

PART 518—THE FREEDOM OF INFORMATION ACT PROGRAM

Subpart A—General Provisions

Sec.
518.1 Purpose.
518.2 References.
518.3 Explanation of abbreviations and terms.
518.4 Responsibilities.
518.5 Authority.
518.6 Public information.
518.7 FOIA terms defined.
518.8 Freedom of Information requirements.

Subpart B—FOIA Reading Rooms

518.9 Reading room.
518.10 ''(a)(2)'' Materials.
518.11 Other materials.

Subpart C—Exemptions

518.12 General.
518.13 FOIA exemptions.

Subpart D—For Official Use Only

518.14 General.

Subpart E—Release and Processing Procedures

518.15 General provisions.
518.16 Initial determinations.
518.17 Appeals.
518.18 Judicial actions.

Subpart F—Fee Schedule

518.19 General provisions.
518.20 Collection of fees and fee rates.
518.21 Collection of fees and fee rates for technical data.

Subpart G—Reports

518.22 Reports control.
518.23 Annual report content.

Appendices to Part 518

Appendix A to Part 518—References.
Appendix B to Part 518—Addressing FOIA Requests.

Authority: 5 U.S.C. 551, 552, 552a, 5101–5108, 5110–5113, 5115, 5332–5334, 5341–42, 5504–5509, 7154; 10 U.S.C. 130, 1102, 2320–2321, 2328; 18 U.S.C. 798, 3500; 31 U.S.C. 3710; 35 U.S.C. 181–188; 42 U.S.C. 2162; 44 U.S.C. 33; and Executive Order 12600.

Subpart A—General provisions

§ 518.1 Purpose.

This part provides policies and procedures for implementation of the Freedom of Information Act (5 U.S.C. 552, as amended) and Department of Defense Directive (DoDD) 5400.7 and promotes uniformity in the Department of Defense (DoD) Freedom of Information Act (FOIA) Program. This Army regulation implements provisions for access and release of information from all Army information systems (automated and manual) in support of Army Information Management (AR 25–1).

§ 518.2 References.

Required and related publications are listed in Appendix A of this part.

§ 518.3 Explanation of abbreviations and terms.

Abbreviations and special terms used in this part are explained in the glossary of AR 25–55.

§ 518.4 Responsibilities.

(a) The Administrative Assistant to the Secretary of the Army (AASA) is responsible for issuing policy and establishing guidance for the Army FOIA Program. AASA has the responsibility to approve exceptions to this regulation that are consistent with controlling law and regulations. AASA may delegate the approval authority, in writing, to a division chief, under its supervision, within that agency in the grade of O6 or civilian equivalent.

(b) The Administrative Assistant to the Secretary of the Army, (AASA), The Records and Programs Agency, (RPA), Records Management and Declassification Agency (RMDA), is responsible for developing and

recommending policy to AASA concerning the Army FOIA program and overall execution of the program under the policy and guidance of AASA.

(c) The Chief of Information Officer (CIO), G6 will provide oversight of the FOIA program as necessary in compliance with Federal Statutes, regulations, Office of Management and Budget (OMB), and the Office of Secretary of Defense (OSD).

(d) Heads of Army Staff agencies, field operating agencies, major Army commands (MACOMS), and subordinate commands are responsible for the supervision and execution of the FOIA program in functional areas and activities under their command.

(e) Heads of Joint Service agencies or commands for which the Army is the Executive Agent, or otherwise has responsibility for providing fiscal, logistical, or administrative support, will adhere to the policies and procedures in this regulation.

(f) Commander, Army and Air Force Exchange Service (AAFES), is responsible for the supervision of the FOIA program within that command pursuant to this part.

§ 518.5 Authority.

(a) This part governs written FOIA requests from members of the public. It does not preclude the release of personnel or other records to agencies or individuals in the Federal Government for use in official work.

(b) Soldiers and civilian employees of the Department of the Army (DA) may, as private citizens, request DA or other agencies' records under the FOIA. They must prepare requests at their own expense and on their own time. They may not use Government equipment, supplies, or postage to prepare personal FOIA requests. It is not necessary for soldiers or civilian employees to go through the chain of command to request information under the FOIA.

(c) Requests for DA records processed under the FOIA may be denied only in accordance with the FOIA (5 U.S.C. 552(b)), as implemented by this part. Guidance on the applicability of the FOIA is also found in the Federal Acquisition Regulation (FAR).

(d) Release of some records may also be affected by the programs that created them. They are discussed in the following regulations:

(1) AR 20–1 (Inspector General activities and procedures);

(2) AR 27–10 (military justice);

(3) AR 27–20 (claims);

(4) AR 27–40 (litigation: release of information and appearance of witnesses);

(5) AR 27–60 (intellectual property);

(6) AR 36–2 (Government Accounting Office audits);

(7) AR 40–66, AR 40–68, and AR 40–400 (medical records);

(8) AR 70–31 (technical reports);

(9) AR 20–1, AR 385–40 and DA Pam 385–40 (aircraft accident investigations);

(10) AR 195–2 (criminal investigation activities);

(11) AR 190–45 (Military Police records and reports);

(12) AR 360–1 (Army public affairs: public information, general policies on release of information to the public);

(13) AR 380–5 and DoD 5200.1–R (national security classified information);

(14) AR 380–5 paragraph 7–101e (policies and procedures for allowing persons outside the Executive Branch to do unofficial historical research in classified Army records);

(15) AR 380–10 (Technology Transfer for disclosure of information and contacts with foreign representatives;

(16) AR 381–45 (U.S. Army Intelligence and Security Command investigation files);

(17) AR 385–40 (safety reports and records);

(18) AR 600–8–104 (military personnel information management records);

(19) AR 600–85 (alcohol and drug abuse records);

(20) AR 608–19 (family advocacy records); and

(21) AR 690 (series civilian personnel records, FAR, DoD Federal Acquisition Regulation Supplement (DFARS) and the Army Federal Acquisition Regulation Supplement (AFARS) procurement matters).

§ 518.6 Public information.

(a) *Public information.* The public has a right to information concerning the activities of its Government. Army policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A record requested by a member of the public who follows rules established by proper authority in DA shall not be withheld in whole or in part unless the record is exempt from mandatory partial or total disclosure under the FOIA. As a matter of policy, Army activities shall make discretionary disclosures of exempt records or information only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. Activities must be prepared to present a sound legal basis in support of their determinations. In order that the public may have timely information concerning Army activities, records requested through public information channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request. Prompt responses to requests for information from news media representatives should be encouraged to eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Similarly, requests from other members of the public for information that would not be withheld under the FOIA should continue to be honored through appropriate means without requiring the requester to invoke the FOIA.

(b) *FOIA handbook.* The Department of the Army Freedom of Information Act/Privacy Act (DA FOIA/PA) Office shall prepare, in addition to FOIA regulations, a handbook for the use of the public in obtaining information from its organizations. This handbook will be a short, simple explanation of what the FOIA is designed to do, and how a member of the public can use it to access government records. The DA FOIA/PA Office handbook will explain the types of records that can be obtained through FOIA requests, why some records cannot, by law, be made available, and how the Army activity determines whether or not the record can be released. The handbook will also explain how to make a FOIA request, how long the requester can expect to wait for a reply, and appeal rights. The handbook will supplement other information locator systems, such as the Government Information Locator Service (GILS), and explain how a requester can obtain more information about those systems. The handbook will be available on paper and through electronic means and contain the following additional information, complete with electronic links to the below elements: the location of reading room and the types and categories of information available; the location of the World Wide Web page; a reference to the Army FOIA regulation and how to obtain a copy; a reference to the Army FOIA annual report and how to obtain a copy; and the location of the GILS page. The DA FOIA handbook, ''A Citizen's Guide to Request Army Records Under the Freedom of Information Act (FOIA),'' can be accessed on-line at *http://www.rmda.belvoir.army.mil/.* ''The Major Automated Information Systems

Descriptions'' can be accessed at *http://www.defenselink.mil/pubs/foi.*

(c) *Control system.* A request for records that invokes the FOIA shall enter a formal control system designed to ensure accountability and compliance with the FOIA. Any request for Army records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of this part, unless otherwise required.

§ 518.7 FOIA terms defined.

(a) *FOIA request.* A written request for Army records that reasonably describes the record(s) sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), an organization, or a business, but not including a Federal Agency or a fugitive from the law, that either explicitly or implicitly invokes the FOIA, DoDD 5400.7, DoD 5400.7–R, this part, or Army Activity supplementing regulations or instructions. All requesters should also indicate a willingness to pay fees associated with the processing of their request. Requesters may ask for a waiver of fees, but should also express a willingness to pay fees in the event of a waiver denial. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically (such as e-mail). Requests received by facsimile or electronically must have a postal mailing address included since it may not be practical to provide a substantive response electronically. The request is considered properly received, or perfected, when the conditions in this paragraph have been met and the request arrives at the FOIA office of the Activity in possession of the records.

(b) *Agency record.* The products of data compilation, such as all books, papers, maps, photographs, and machine readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in DA possession and control at the time the FOIA request is made.

(1) The following are not included within the definition of the word ''record'': Objects or articles, such as structures, furniture, vehicles and equipment, whatever their historical value, or value as evidence; Anything that is not a tangible or documentary record, such as an individual's memory or oral communication; Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use. Personal papers fall into three categories: Those created before entering Government service; private materials brought into, created, or received in the office that were not created or received in the course of transacting Government business; and work-related personal papers that are not used in the transaction of Government business in accordance with Public Law 86–36, National Security Information Exemption.

(2) A record must exist and be in the possession and control of DA at the time of the request to be considered subject to this part and the FOIA. There is no obligation to create or compile a record to satisfy a FOIA request.

(3) Hard copy or electronic records that are subject to FOIA requests under 5 U.S.C. 552 (a)(3), and that are available to the public through an established distribution system such as the Government Printing Office (GPO), **Federal Register**, National Technical Information Service (NTIS), or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, Army Activities shall provide the requester with guidance, inclusive of any written notice to the public, on how to obtain the information. However, if the requester insists that the request be processed under the FOIA, then the request shall be processed under the FOIA. If there is any doubt as to whether the request must be processed, contact DA, FOIA/PA Office.

(c) *Army activity.* A specific area of organizational or functional responsibility within DA, authorized to receive and act independently on FOIA requests.

(d) *Initial denial authority (IDA).* An official who has been granted authority by the Secretary of the Army to deny records requested under the FOIA based on one or more of the nine categories of exemptions from mandatory disclosure. An IDA also: Denies a fee category claim by a requester; denies a request for expedited processing due to demonstrated compelling need; denies a request for a waiver or reduction of fees; reviews a fee estimate; and confirms that no records were located in response to a request.

(e) *Appellate authority.* The Secretary of the Army or designee having jurisdiction for this purpose over the record, or any of the other adverse determinations. The DA appellate authority is the Office of the Army General Counsel (OGC).

(f) *Administrative appeal.* A request by a member of the general public, made under the FOIA, asking the appellate authority of the Army to reverse a decision to: Withhold all or part of a requested record; deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need; deny a request for waiver or reduction of fees; deny a request to review an initial fee estimate; and confirm that no records were located during the initial search. Requesters also may appeal the failure to receive a response determination within the statutory time limits, a fee estimate, and any determination that the requester believes is adverse in nature.

(g) *Public interest.* The interest in obtaining official information that sheds light on an activity's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or official's own conduct.

(h) *Electronic record.* Records (including e-mail) that are created, stored, and retrievable by electronic means.

(i) *Federal agency.* As defined by 5 U.S.C. 552 (f)(1), a Federal agency is any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(j) *Law enforcement investigation.* An investigation conducted by a command or activity for law enforcement purposes relating to crime, waste, fraud or national security. Such investigations may include gathering evidence for criminal prosecutions and for civil or regulatory proceedings.

§ 518.8 Freedom of Information requirements.

(a) *Compliance with the FOIA.* Army personnel are expected to comply with the FOIA, this part, and Army FOIA policy in both letter and spirit. This strict adherence is necessary to provide uniformity in the implementation of the Army FOIA Program and to create conditions that will promote public trust.

(b) *Openness with the public.* The DA shall conduct its activities in an open manner consistent with the need for

security and adherence to other requirements of law and regulation. Records not specifically exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

(1) *Operations Security (OPSEC).* DA officials who release records under the FOIA must also consider OPSEC. The Army implementing directive is AR 530–1.

(2) *DA Form 4948–R.* This form lists references and information frequently used for FOIA requests related to OPSEC. Persons who routinely deal with the public (by telephone or letter) on such requests should keep the form on their desks as a guide.

(c) *Avoidance of procedural obstacles.* Army Activities shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DA records promptly. The Army shall provide assistance to requesters to help them understand and comply with procedures established by this part and any supplemental regulations published by the Army Activities. Coordination of referral of requests with DA FOIA/PA Office should be made telephonically in order to respond to the requester in a timelier manner. Requests will not be mailed to the DA FOIA/PA Office for disposition or coordination with other IDAs.

(d) *Prompt action on requests and final response determinations.* Generally, when a member of the public complies with the procedures established in this part or instructions for obtaining DA records, and after the request is received by the official designated to respond, Army Activities shall endeavor to provide a final response determination within the statutory 20 working days. If a significant number of requests, or the complexity of the requests prevent a final response determination within the statutory time period, Army Activities shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system. A final response determination is notification to the requester that the records are released or partially released, or will be released on a certain date, or the records are withheld under an appropriate FOIA exemption, or the records cannot be provided for one or more of the other reasons. Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination pursuant to the FOIA. If a request fails to meet minimum requirements as set forth, Activities shall contact the requester and inform the requester what would be required to perfect or correct the request, or to limit the scope to allow for the most expeditious response. The statutory 20 working day time limit applies upon receipt of a perfected or correct FOIA request. Before mailing a final response determination and those records or portions thereof deemed releasable, records custodians will obtain a written legal opinion from their servicing judge advocate concerning the releasibility of the requested records. The legal opinion must cite specific exemptions, appropriate justification, and identify if the records were processed under the FOIA, PA (including the applicable systems notice), or both.

(1) *Multi-track processing.* When an Army Activity has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing. Army Activities may establish as many processing queues as they wish; however, as a minimum, three processing tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request. One track shall be a processing queue for simple requests, one track for complex requests, and one track shall be a processing queue for expedited processing. Determinations as to whether a request is simple or complex shall be made by each Army Activity. Army Activities shall provide a requester whose request does not qualify for the fastest queue an opportunity to limit the scope of the request in order to qualify for the fastest queue. This multitrack processing system does not obviate an Activity's' responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

(2) *Expedited processing.* A separate queue shall be established for requests meeting the test for expedited processing. Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the Army Activity's office that will determine whether to grant expedited processing. Once the Army Activity has determined to grant expedited processing, the request shall be processed as soon as practicable. Actions by Army Activities to initially deny or affirm the initial denial on appeal of a request for expedited processing and a failure to respond in a timely manner shall be subject to judicial review. Initial determination of denials of expedited processing will be immediately forwarded to the IDA for action. If the IDA upholds the denial, the requester will be informed of his or her right to appeal.

(i) *Imminent threat.* Compelling need means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(ii) *Alleged Federal Government activity.* Compelling need also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

(iii) *General public interest.* Urgently needed means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

(iv) *Certified statement.* A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of his or her knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(v) *Other reasons for expedited processing.* Another reason that merits expedited processing by Army FOIA offices is an imminent loss of

substantial due process rights. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his or her knowledge. The statement mentioned in paragraph (iv) of this section must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for this reason, the request may be processed in the expedited processing queue behind those requests qualifying for compelling need.

(vi) *Administrative appeals.* These same procedures also apply to requests for expedited processing of administrative appeals.

(e) *Use of exemptions.* It is Army policy to make records publicly available, unless the record qualifies for exemption under one or more of the nine exemptions. Discretionary releases of information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. When Army activities determine to withhold information using one of the nine exemptions, the Department of Justice (DOJ) will defend the position unless it is found to be lacking a Sound Legal Basis for denial.

(1) Parts of a requested record may be exempt from disclosure under the FOIA. The proper DA official may delete exempt information and release the remainder to the requester. The proper official also has the discretion under the FOIA to release exempt information when appropriate; he or she must exercise this discretion in a reasonable manner, within regulations consistent with current policy considerations. The excised copies shall clearly reflect the denied information by the use of brackets, indicating the removal of information. Bracketed areas must be sufficiently removed so as to reveal no information. The best means to ensure illegibility is to cut out the information from a copy of the document and reproduce the appropriate pages.

(2) If the document is declassified, all classification markings shall be lined through with a single black line, which will allow the markings to be read. The document shall then be stamped ''Unclassified.''

(f) *Public domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available in the DA reading room in paper form, as well as electronically, to facilitate public access. Exempt records disclosed without authorization by the appropriate Army FOIA official do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this part apply if the same individual seeks the records in a private or personal capacity.

(g) *Creating a record.* A record must exist and be in the possession and control of DA at the time of the search to be considered subject to this part and the FOIA. There is no obligation to create or compile a record to satisfy a FOIA request. An Army Activity, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee that would be charged for providing the existing record. Fee assessments shall be in accordance with subpart F of this part.

(1) Concerning electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, Army Activities should apply a standard of reasonableness.

(2) If the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not being a normal business as usual approach. As used in this sense, a significant expenditure of resources in both time and/or manpower that would cause a significant interference with the operation of the Army Activity's automated information system would not be a business as usual approach.

(h) *Description of requested record.* Identification of the record desired is the responsibility of the requester. The requester must provide a description of the desired record that enables the Government to locate the record with a reasonable amount of effort. In order to assist Army Activities in conducting more timely searches, requesters should endeavor to provide as much identifying information as possible. When an Army Activity receives a request that does not reasonably describe the requested record, it shall contact the requester and afford the requester the opportunity to perfect the request. Army Activities are not obligated to act on the request until the requester perfects the request. When practicable, Army Activities shall contact the requester to aid in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the Act. DA FOIA officials will reply to unclear requests by: Describing the defects in the requests; explaining the types of information described below, and ask the requester for such information; and explaining that no action will be taken on the request until the requester replies to the letter.

(1) The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories: Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date of record creation, and originator; Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(2) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit an organized, non random search based on the Army Activity's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit an inference of the Category I elements needed to conduct such a search.

(3) The following guidelines deal with requests for personal records. Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records in a PA system of records that can be retrieved by personal identifiers need be searched. However, if an Army Activity has reason to believe that records on the requester may exist in a record system other than a PA system, the Army Activity shall search that system under the provisions of the FOIA. In either case, Army Activities may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the PA. If the record is required to be released under the FOIA, the Privacy Act does not bar its disclosure.

(4) The previous guidelines notwithstanding, the decision of the Army Activity concerning reasonableness of description must be based on knowledge of its files. If the description enables Army Activity personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle an Army Activity to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the Army Activity's staff to reasonably ascertain and locate which records are being requested.

(i) *Referrals.* The Army FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If an Army Activity receives a request for records originated by another Army Activity, it will contact the Army Activity to determine if it also received the request, and if not, obtain concurrence from the other Army Activity to refer the request. An Army Activity shall refer a FOIA request for a classified record that it holds to another Army Activity, DoD Component, or agency outside the DoD, if the record originated in another Army Activity or DoD Component or outside agency, or if the classification is derivative. In this situation, provide the record and a release recommendation on the record with the referral action. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve Army Activities from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, Army Activities shall still coordinate with the originator of the information prior to making a release determination. A request received by an Army Activity having no records responsive to a request shall be referred routinely to another Army Activity, if the other Army Activity has reason to believe it has the requested records. Prior to notifying a requester of a referral to another Army Activity, the Army Activity receiving the initial request shall consult with the other Army Activity to determine if that Army Activity's association with the material is exempt. If the association is exempt, the Army Activity receiving the initial request will protect the association and any exempt information without revealing the identity of the protected Army Activity. The protected Army Activity should be responsible for submitting the justifications required in any litigation. Any Army Activity receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. Army Activities making referrals of requests for records shall include with the referral, a point of contact by name, a telephone number, and an e-mail address. If the office receiving the FOIA request does not know where the requested records are located, that activity will contact the DA, FOIA/PA Office, to determine the office where the request should be referred.

(1) An Army Activity shall refer for response directly to the requester a FOIA request for a record that it holds to another Army Activity or agency outside the Army, if the record originated in the other Army Activity or outside agency. Whenever a record or a portion of a record is referred to another Army Activity or to a Government Agency outside of the Army for a release determination and direct response, the requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

(2) An Army Activity may refer a request for a record that it originated to another Army Activity or agency when the other Army Activity or agency has a valid interest in the record, or the record was created for the use of the other Army Activity or agency. In such situations, provide the record and a release recommendation on the record with the referral action. Include a point of contact with the telephone number. An example of such a situation is a request for audit reports prepared by the U.S. Army Audit Agency. These advisory reports are prepared for the use of contracting officers and their release to the audited contractor shall be at the discretion of the contracting officer. A FOIA request shall be referred to the appropriate Army Activity and the requester shall be notified of the referral, unless exempt information would be revealed. Another example is a record originated by an Army Activity or agency that involves foreign relations, and could affect an Army Activity or organization in a host foreign country. Such a request and any responsive records may be referred to the affected Army Activity or organization for consultation prior to a final release determination within DA.

(3) Within DA, an Army Activity shall ordinarily refer a FOIA request and a copy of the record it holds but that originated with another Army Activity or that contains substantial information obtained from another Army Activity, to that Activity for direct response, after direct coordination and obtaining concurrence from the Activity. The requester then shall be notified of such referral. Army Activities shall not, in any case, release or deny such records without prior consultation with the other Army Activity.

(4) Army Activities that receive referred requests shall answer them in accordance with the time limits established by the FOIA, this part, and their multitrack processing queues, based upon the date of initial receipt of the request at the referring Activity or agency.

(5) Agencies outside DA that are subject to the FOIA.

(i) An Army Activity may refer a FOIA request for any record that originated in an agency outside DA or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the Army Activity must respond to the request.

(ii) An Army Activity shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to DA for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, an Army Activity may only respond directly to the requester after coordination with the outside agency.

(6) Army Activities that receive requests for records of the National Security Council (NSC), the White House, or the White House Military Office (WHMO) shall process the requests. Army records in which the NSC or White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in Army Activity's files shall be forwarded through DA, FOIA/PA Office, to the Washington Headquarters Services, Office For Freedom of Information and Security Review (OFOISR). The OFOISR shall coordinate with the NSC, White House, or WHMO and return the records to the originating agency after coordination.

(7) To the extent referrals are consistent with the policies expressed by this section, referrals between offices

of the same Army Activity are authorized.

(8) On occasion, the DA receives FOIA requests for Government Accountability Office (GAO) records containing Army information. Even though the GAO is outside the Executive Branch, and not subject to the FOIA, all FOIA requests for GAO documents containing Army information received either from the public or on referral from the GAO shall be processed under the provisions of the FOIA.

(j) *Authentication.* Records provided under this part shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official Government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. Army Activities may charge for the service at a rate of $5.20 for each authentication.

(k) *Records management.* FOIA records shall be maintained and disposed of in accordance with the National Archives and Records Administration (NARA) General Records Schedule and DoD Component records schedules.

(l) *Record-keeping requirements in accordance with the Army Records Information Management System (ARIMS).* The records listed below are required by ARIMS in the conduct of the daily business of the Army to provide adequate and proper documentation to protect the rights and interests of individuals and the Federal Government. The full description of the records and their disposition is found at *https://www2.arims.army.mil.*

(1) FOIA requests, access, and denials;

(2) FOIA administrative files;

(3) FOIA appeals;

(4) FOIA controls;

(5) FOIA reports;

(6) Access to information files;

(7) Safeguarded nondefense information releases;

(8) Nonsafeguarded information releases;

(9) Unauthorized disclosure reports;

(10) Acknowledgement; and

(11) Initial Denial Authority designations/appointments.

(m) *Relationship between the FOIA and the Privacy Act (PA).* Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records, nor are all of them aware of appeal procedures. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the below guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts.

(1) If the record is required to be released under the FOIA, the PA does not bar its disclosure. Unlike the FOIA, the PA applies only to U.S. citizens and aliens lawfully admitted for permanent residence.

(2) Requesters who seek records about themselves contained in a PA system of records and who cite or imply only the PA, will have their requests processed under the provisions of both the PA and the FOIA. If the PA system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and if the records, or any portion thereof, are exempt under the FOIA, the requester shall be so advised with the appropriate PA and FOIA exemption. Appeals shall be processed under both Acts.

(3) Requesters who seek records about themselves that are not contained in a Privacy Act system of records and who cite or imply the PA will have their requests processed under the provisions of the FOIA, since the PA does not apply to these records. Appeals shall be processed under the FOIA.

(4) Requesters who seek records about themselves that are contained in a PA system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the PA and the FOIA. If the PA system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and if the records, or any portion thereof, are exempt under the FOIA, the requester shall be so advised with the appropriate PA and FOIA exemption. Appeals shall be processed under both Acts.

(5) Requesters who seek access to agency records that are not part of a PA system of records, and who cite or imply the PA and FOIA, will have their requests processed under the FOIA since the PA does not apply to these records. Appeals shall be processed under the FOIA. Requesters who seek access to agency records and who cite or imply the FOIA will have their requests and appeals processed under the FOIA.

(6) Requesters shall be advised in the final response letter, which Act(s) was (were) used, inclusive of appeal rights as outlined in paragraphs (m)(1) through (5) of this section.

(n) *Non-responsive information in responsive records.* Army Activities shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should Army Activities desire to withhold non-responsive information, the following steps shall be accomplished:

(1) Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to delete the non-responsive information without a FOIA exemption. Reflect this concurrence in the response letter.

(2) If the responsive record is unclassified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information that is not exempt. For non-responsive information that is exempt, notify the requester that even if the information were determined responsive, it would likely be exempt under (state appropriate exemption(s)). Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(3) If the responsive record is classified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all unclassified responsive and non-responsive information that is not exempt. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester that even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552(b)(1), and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(o) *Honoring form or format requests.* Army Activities shall provide the record in any form or format requested by the requester if the record is readily reproducible in that form or format. Army Activities shall make reasonable efforts to maintain their records in forms or formats that are reproducible. In responding to requests for records, Army Activities shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the Army Activities' automated information system. Such determinations shall be made on a case-by-case basis.

Subpart B—FOIA Reading Rooms

§ 518.9 Reading room.

(a) *Reading room location.* The DA shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the records described in paragraphs (b)(1) through (4) of this section. In addition to the records described, DA may elect to

place other records in their reading room, and also make them electronically available to the public. The Army may share reading room facilities with DoD Components if the public is not unduly inconvenienced, and also may establish decentralized reading rooms. When appropriate, the cost of copying may be imposed on the person requesting the material in accordance with the provisions of subpart F of this part. The Army FOIA Public Reading Room is operated by the DA, FOIA/PA Office.

(b) *Record availability.* The FOIA requires that records described in 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) created on or after November 1, 1996, shall be made available electronically, as well as in hard copy in the FOIA reading room for inspection and copying, unless such records are published and copies are offered for sale. All portions determined to be exempt in accordance with 5 U.S.C. 552 (reference (a)) shall be deleted from all 5 U.S.C. 552(a)(2) records made available to the general public. In every case, justification for the deletion must be fully explained in writing, and the extent of such deletion shall be indicated on the record that is made publicly available, unless such indication would harm an interest protected by an exemption under which the deletion was made. If technically feasible, the extent of the deletion in electronic records or any other form of record shall be indicated at the place in the record where the deletion was made. However, the Army may publish in the **Federal Register** a description of the basis upon which it will delete identifying details of particular types of records to avoid clearly unwarranted invasions of privacy, or competitive harm to business submitters. In appropriate cases, the Army may refer to this description rather than write a separate justification for each deletion. 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) records are:

(1) *(a)(2)(A) records.* Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications;

(2) *(a)(2)(B) records.* Statements of policy and interpretations that have been adopted by the agency that are not published in the **Federal Register**; and

(3) *(a)(2)(C) records.* Administrative staff manuals and instructions, or portions thereof that establish Army policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the Army. Examples of manuals and instructions not normally made available are:

(i) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criteria for defense, prosecution, or settlement of cases; and

(ii) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and intelligence activities.

(4) *(a)(2)(D) records.* Those 5 U.S.C. 552(a)(3) records, which because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. These records are referred to as FOIA-processed (a)(2) records.

(i) Army Activities shall decide on a case by case basis whether records fall into this category, based on previous experience of the Army Activity with similar records; particular circumstances of the records involved, including their nature and the type of information contained in them; or the identity and number of requesters and whether there is widespread press, historic, or commercial interest in the records.

(ii) This provision is intended for situations where public access in a timely manner is important, and it is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. Army Activities may remove the records from this access medium when the appropriate officials determine that access is no longer necessary.

(iii) Should a requester submit a FOIA request for FOIA-processed (a)(2) records, and insist that the request be processed, Army Activities shall process the FOIA request. However, Army Activities have no obligation to process a FOIA request for 5 U.S.C. 552(a)(2)(A), (B), and (C) records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

§ 518.10 ''(a)(2)'' Materials.

(a) The DA FOIA/PA Office shall maintain in the facility an index of materials described in paragraphs (b)(1) through (4) of § 518.9, that are issued, adopted, or promulgated after July 4, 1967. No ''(a)(2)'' materials issued, promulgated, or adopted after July 4, 1967 that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967 need not be indexed, but must be made available upon request if not exempted under this part.

(b) The DA FOIA/PA Office shall promptly publish quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of ''(a)(2)'' materials or supplements thereto unless it publishes in the **Federal Register** an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in subpart F of this part.

(c) Each index of ''(a)(2)'' materials or supplement thereto shall be arranged topically or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for Army convenience.

(d) A general index of FOIA-processed (a)(2) records shall be made available to the public, both in hard copy and electronically.

§ 518.11 Other materials.

(a) Any available index of Army material published in the **Federal Register**, such as material required to be published by section 552(a)(1) of the FOIA, shall be made available in the Army FOIA Public Reading Room, and electronically to the public.

(b) Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, ''(a)(1)'' materials shall, when feasible, be made available to the public in FOIA reading rooms for inspection and copying, and by electronic means. Examples of ''(a)(1)'' materials are descriptions of an agency's central and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

Subpart C—Exemptions

§ 518.12 General.

Records that meet the exemption criteria of the FOIA may be withheld from public disclosure and need not be published in the **Federal Register**, made available in a library reading room, or provided in response to a FOIA request.

§ 518.13 FOIA exemptions.

The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law. A discretionary release of a record to one requester shall prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related to that which has been the subject of a discretionary release. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest. However, if the subject of the record is the requester for the record and the record is contained in a PA system of records, it may only be denied to the requester if withholding is both authorized by AR 25–71 and by a FOIA exemption.

(a) *Number 1 (5 U.S.C. 552 (b)(1)).* Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1–R. Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1–R apply. If the information qualifies as exemption 1 information, there is no discretion regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

(1) The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, Army Activities shall neither confirm nor deny the existence or nonexistence of the record being requested. A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no record'' response when a record does not exist, and a ''refusal to confirm or deny'' when a record does exist will itself disclose national security information.

(2) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or relationship that meets the standard for classification under an existing executive order for classification and DoD 5200.1–R, and is not otherwise revealed in the individual items of information.

(b) *Number 2 (5 U.S.C. 552(b)(2)).* Those related solely to the internal personnel rules and practices of the DoD or any of its Components. This exemption has two profiles, high (b)(2) and low (b)(2). Activities are encouraged to consult the DA, FOIA/PA Office, and the U.S. DoJ ''Freedom of Information Act Guide & Privacy Act Overview'' for a more in depth discussion on the legal history of the use of the low (b)(2) exemption. When only a minimal Government interest would be affected (administrative burden), Army Activities shall apply the sound legal basis standard regarding disclosure of the information. Army Activities shall apply the low 2 exemption as applicable.

(1) Records qualifying under high (b)(2) are those containing or constituting statutes, rules, regulations, orders, manuals, directives, instructions, security classification guides, and sensitive but unclassified information related to America's homeland security and critical infrastructure information the release of which would allow circumvention of these records thereby substantially hindering the effective performance or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records of a significant function of the DA. Examples include:

(i) Those operating rules, guidelines, and manuals for Army investigators, inspectors, auditors, or examiners that must remain privileged in order for the Army Activity to fulfill a legal requirement;

(ii) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion; and

(iii) Computer software, the release of which would allow circumvention of a statute, DoD or Army rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

(2) Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings. Army Activities shall apply the low 2 exemption as applicable.

(c) *Number 3 (5 U.S.C. 552(b)(3)).* Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. The DA, FOIA/PA Office, maintains a list of (b)(3) statutes used within the DoD, and provides updated lists of these statutes to Army Activities on a periodic basis. A few examples of such statutes are:

(1) Personnel in Overseas, Sensitive, or Routinely Deployable Units: nondisclosure of personally identifying information, 10 U.S.C. 130(b). Additionally, the names and duty addresses (postal and/or e-mail) of Army military and civilian personnel who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy and may also be withheld in accordance with FOIA Exemption 3. Names and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption, in accordance with 10 U.S.C. 130 'Personnel in Overseas, Sensitive, or Routinely Deployable Units';

(2) Classification and Declassification of Restricted Data, 42 U.S.C. 2162;

(3) Disclosure of Classified Information, 18 U.S.C. 798(a);

(4) Authority to Withhold from Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoDD 5230.25;

(5) Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants, 10 U.S.C. 1102(f);

(6) Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128;

(7) Protection of Intelligence Sources and Methods, 50 U.S.C. 403–3(c)(6);

(8) Prohibition on Release of Contractor Submitted Proposals, 10 U.S.C. 2305(g);

(9) Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information, 41 U.S.C. 423; and

(10) Secrecy of Certain Inventions and Filing Applications in a Foreign Country, 35 U.S.C. 181–188. Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(d) *Number 4 (5 U.S.C. 552(b)(4)).* Those containing trade secrets or commercial or financial information that an Army Activity receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information, impair the Government's ability to obtain necessary information in the future, or impair some other legitimate Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm. If the information qualifies as exemption 4 information, there is no discretion in its release. Examples include:

(1) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals set forth in or incorporated by reference in a contract entered into between the Army Activity and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. Additionally, when the provisions of 10 U.S.C. 2305(g) and 41 U.S.C. 423 are met, certain proprietary and source selection information may be withheld under exemption 3;

(2) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor;

(3) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged;

(4) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the DA;

(5) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress;

(6) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320–2311 and DoD Federal Acquisition Regulation Supplement (DFARS), subpart 27.4. Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 U.S.C. 130 and DoDD 5230.25;

(7) Computer software, which is copyrighted in accordance with 17 U.S.C. 106, 'Exclusive rights in Copyrighted Works, the disclosure of which would have an adverse impact on the potential market value of a copyrighted work; and

(8) Proprietary information submitted strictly on a voluntary basis, absent any exercised authority prescribing criteria for submission. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Submission of information under these authorities is not voluntary.

(e) *Number 5 (5 U.S.C. 552(b)(5)).* Those containing information considered privileged in litigation, primarily under the deliberative process privilege. Except as provided in paragraphs (e)(1) through (5) of this section, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters that are reflected in deliberative records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 552(e)), or within or among Army Activities. In order to meet the test of this exemption, the record must be both deliberative in nature, as well as part of a decision-making process. Merely being an internal record is insufficient basis for withholding under this exemption. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. Discretionary disclosure decisions should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

(1) Examples of the deliberative process include:

(i) The non-factual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions;

(ii) Advice, suggestions, or evaluations prepared on behalf of the DA by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations;

(iii) Those non-factual portions of evaluations by DoD Component personnel of contractors and their products;

(iv) Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions;

(v) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest;

(vi) Those portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more Army Activities, when these records have traditionally been treated by the courts as privileged against disclosure in litigation; and

(vii) Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

(2) If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the Army, then it should not be withheld under the FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil discovery where a party's particularized showing of need might override a privilege, then the record may be withheld. Discovery is the formal process by which litigants obtain information from each other for use in

the litigation. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

(3) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(4) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(5) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

(f) *Number 6 (5 U.S.C. 552(b)(6)).* Information in personnel and medical files, as well as similar personal information in other files, and lists of personally identifying information of Army personnel, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of Records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. If the information qualifies as exemption 6 information, there is no discretion regarding its release.

(1) Examples of other files containing personal information similar to that contained in personnel and medical files include:

(i) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information; and

(ii) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(2) Army components shall ordinarily withhold lists of names (including active duty military, civilian employees, contractors, members of the National Guard and Reserves, and military dependents) and other personally identifying information, including lists of e-mail addresses of personnel currently or recently assigned within a particular component, unit, organization, or office within the Army. Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned. This includes lists of home addresses and military quarters' addressees without the occupant's name.

(i) *Privacy Interest.* A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(ii) The right to privacy of deceased persons is not entirely settled, but the majority rule is that death extinguishes their privacy rights. However, particularly sensitive, graphic, personal details about the circumstances surrounding an individual's death may be withheld when necessary to protect the privacy interests of surviving family members. Even information that is not particularly sensitive in and of itself may be withheld to protect the privacy interests of surviving family members if disclosure would rekindle grief, anguish, pain, embarrassment, or cause a disruption of their peace of minds. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures of the deceased's social security number may be made to the immediate next of kin.

(iii) A clearly unwarranted invasion of the privacy of third parties identified in a personnel, medical or similar record constitutes a basis for deleting those reasonably segregable portions of that record. When withholding third party personal information from the subject of the record and the record is contained in a Privacy Act system of records, consult with legal counsel.

(iv) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Army Activities shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a ''Glomar'' response, and exemption 6 must be cited in the response. Additionally, in order to ensure personal privacy is not violated during referrals, Army Activities shall coordinate telephonically or in person with other Army Activities or DoD Components or Federal Agencies before referring a record that is exempt under the ''Glomar'' concept. *See Phillippi* v. *CIA,* 546 F.2d 1009 (DC Cir. 1976).

(v) A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no records'' response when a record does not exist and a ''refusal to confirm or deny'' when a record does exist will itself disclose personally private information. Refusal to confirm or deny should not be used when:

(A) The person whose personal privacy is in jeopardy has provided the requester a waiver of his or her privacy rights;

(B) The person initiated or directly participated in an investigation that lead to the creation of an agency record seeks access to that record; or

(C) The person whose personal privacy is in jeopardy is deceased, the Agency is aware of that fact, and disclosure would not invade the privacy of the deceased's family.

(g) *Number 7 (5 U.S.C. 552(b)(7)).* Records or information compiled for law enforcement purposes, *i.e.*, civil, criminal, or military, including the implementation of Executive Orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes. With the exception of parts (C) and (F), this exemption is discretionary. If information qualifies as exemption (7)(C) or (7)(F) information, there is no discretion in its release.

(1) This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

(i) Could reasonably be expected to interfere with law enforcement proceedings (5 U.S.C. 552(b)(7)(A));

(ii) Would deprive a person of the right to a fair trial or to an impartial adjudication (5 U.S.C. 552(b)(7)(B));

(iii) Could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a living person, or to surviving family members of an individual identified in such a record (5 U.S.C. 552(b)(7)(C));

(iv) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Activities shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a ''Glomar'' response, and exemption (7)(C) must be cited in the response. Additionally, in order to ensure personal privacy is not violated during referrals, Army Activities shall coordinate with other Army Activities or DoD Components or Federal Agencies before referring a record that is exempt under the ''Glomar'' concept;

(v) A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no records'' response when a record does not exist and a ''refusal to confirm or deny'' when a record does exist will itself disclose personally private information;

(vi) Refusal to confirm or deny should not be used when the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or the person whose personal privacy is in jeopardy is deceased, and the Agency is aware of that fact and disclosure would not invade the privacy of the deceased's family;

(vii) Could reasonably be expected to disclose the identity of a confidential source, including a source within DoD, a State, local, or foreign agency or authority, or any private institution that furnishes the information on a confidential basis; and could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation (5 U.S.C. 552(b)(7)(D));

(viii) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law (5 U.S.C. 552(b)(7)(E)); or

(ix) Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

(2) Some examples of exemption 7 are:

(i) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related Government litigation or adjudicative proceedings;

(ii) The identity of firms or individuals being investigated for alleged irregularities involving contracting with the DoD when no indictment has been obtained or any civil action filed against them by the United States; and

(iii) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within an Army Activity or a DoD Component, or a lawful national security intelligence investigation conducted by an authorized agency or office within an Army Activity or a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(3) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500), is not diminished.

(4) Excluded from exemption 7 are two situations applicable to DoD. (Activities considering invoking an exclusion based on the following scenarios should first consult through legal counsel, to the DoJ, Office of Information and Privacy (DoJ OIP).

(i) Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Activities may, during only such times as that circumstance continues, treat the records or information as not subject to the FOIA. In such a situation, the response to the requester will state that no records were found.

(ii) Whenever informant records maintained by a criminal law enforcement organization within an Army Activity or a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Activity may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7), the response to the requester will state that no records were found.

(h) *Number 8 (5 U.S.C. 552 (b)(8)).* Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(i) *Number 9 (5 U.S.C. 552 (b)(9)).* Those containing geological and geophysical information and data (including maps) concerning wells.

Subpart D—For Official Use Only

§ 518.14 General.

Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public because disclosure would cause harm to an interest protected by one or more FOIA exemptions 2 through 9 (see Subpart C of this part) shall be considered as being for official use only (FOUO). No other material shall be considered FOUO and FOUO is not authorized as an additional form of classification to protect national security interests. Additional information on FOUO and other controlled, unclassified information may be found in DoD 5200.1-R, ''Information Security Program'' or by contacting the DA FOIA/PA Office.

Subpart E—Release and Processing Procedures

§ 518.15 General provisions.

(a) Since the policy of the DoD is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for an Army record made under the provisions of 5 U.S.C. 552 (a)(3) of the FOIA may be denied only when:

(1) The record is subject to one or more of the exemptions of the FOIA;

(2) The record has not been described well enough to enable the Army Activity to locate it with a reasonable amount of effort by an employee familiar with the files; or

(3) The requester has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee imposed by the instructions of the Army Activity concerned. When personally identifiable information in a record is

requested by the subject of the record or his attorney, notarization of the request, or a statement certifying under the penalty of perjury that their identity is true and correct may be required. Additionally, written consent of the subject of the record is required for disclosure from a PA system of records, to include the subject's attorney.

(4) Release of information under the FOIA can have an adverse impact on OPSEC. The Army implementing directive for OPSEC is AR 530–1. It requires that OPSEC points of contact be named for all HQDA staff agencies and for all commands down to battalion level. The FOIA official for the staff agency or command will use DA Form 4948–R to announce the OPSEC/FOIA advisor for the command. Persons named as OPSEC points of contact will be OPSEC/FOIA advisors. Command OPSEC/FOIA advisors should implement the policies and procedures in AR 530–1, consistent with this part and with the following considerations:

(i) Documents or parts of documents properly classified in the interest of national security must be protected. Classified documents may be released in response to a FOIA request only under AR 380–5, Chapter III. AR 380–5 provides that if parts of a document are not classified and can be segregated with reasonable ease, they may be released, but parts requiring continued protection must be clearly identified.

(ii) The release of unclassified documents could violate national security. When this appears possible, OPSEC/FOIA advisors should request a classification evaluation of the document by its proponent under AR 380–5, paragraphs 2–204, 2–600, 2–800, and 2–801. In such cases, other FOIA exemptions may also apply.

(iii) A combination of unclassified documents, or parts of them, could combine to supply information that might violate national security if released. When this appears possible, OPSEC/FOIA advisors should consider classifying the combined information per AR 380–5, paragraph 2–211.

(iv) A document or information may not be properly or currently classified when a FOIA request for it is received. In this case, the request may not be denied on the grounds that the document or information is classified except in accordance with Executive Order 12958 as amended, section 1.6(d), and AR 380–5, paragraph 2–204, and with approval of the Army OGC.

(5) OPSEC/FOIA advisors will; advise persons processing FOIA requests on related OPSEC requirements; help custodians of requested documents prepare requests for classification evaluations; and help custodians of requested documents identify the parts of documents that must remain classified under this section and AR 380–5.

(6) OPSEC/FOIA advisors do not, by their actions, relieve FOIA personnel and custodians processing FOIA requests of their responsibility to protect classified or exempted information.

(b) The provisions of the FOIA are reserved for persons with private interests as opposed to U.S. Federal Agencies seeking official information. Requests from private persons will be made in writing, and should clearly show all other addressees within the Federal Government to which the request was also sent. This procedure will reduce processing time requirements, and ensure better inter- and intra-agency coordination. However, if the requester does not show all other addressees to which the request was also sent, Army Activities shall still process the request. Army Activities should encourage requesters to send requests by mail, facsimile, or by electronic means. Disclosure of records to individuals under the FOIA is considered public release of information, except as provided in this paragraph. DA officials will release the following records, upon request, to the persons specified below, even though these records are exempt from release to the general public. The statutory 20 working day limit applies.

(1) *Medical records.* Commanders or chiefs of medical treatment facilities will release information:

(i) On the condition of sick or injured patients to the patient's relatives to the extent permitted by law and regulation.

(ii) That a patient's condition has become critical to the nearest known relative or to the person the patient has named to be informed in an emergency.

(iii) That a diagnosis of psychosis has been made to the nearest known relative or to the person named by the patient.

(iv) On births, deaths, and cases of communicable diseases to local officials (if required by local laws).

(v) Copies of records of present or former soldiers, dependents, civilian employees, or patients in DA medical facilities will be released to the patient or to the patient's representative on written request. The attending physician can withhold records if he or she thinks that release may injure the patient's mental or physical health; in that case, copies of records will be released to the patient's next of kin or legal representative or to the doctor or dentist chosen by the patient. If the patient is adjudged insane, or dies, the copies will be released, on written request, to the patient's next of kin or legal representative.

(vi) Copies of records may be given to a Federal or State hospital or penal institution if the person concerned is an inmate or patient there.

(vii) Copies of records or information from them may be given to authorized representatives of certain agencies. The National Academy of Sciences, the National Research Council, and other accredited agencies are eligible to receive such information when they are engaged in cooperative studies, with the approval of The Surgeon General of the Army. However, certain information on drug and alcohol use cannot be released. AR 600–85 covers the Army's substance abuse program.

(viii) Copies of pertinent parts of a patient's records can be furnished to the staff judge advocate or legal officer of the command in connection with the Government's collection of a claim. If proper, the legal officer can release this information to the tortfeasor's insurer without the patient's consent.

Note: Information released to third parties must be accompanied by a statement of the conditions of release. The statement will specify that the information not be disclosed to other persons except as privileged communication between doctor and patient.

(2) *Military personnel records.* Military personnel records will be released under these conditions:

(i) DA must provide specific information about a person's military service (statement of military service) in response to a request by that person or with that person's written consent to his or her legal representative;

(ii) Papers relating to applications for, designation of beneficiaries under, and allotments to pay premiums for, National Service Life Insurance or Serviceman's Group Life Insurance will be released to the applicant or to the insured. If the insured is adjudged insane (evidence of an insanity judgment must be included) or dies, the records will be released, on request, to designated beneficiaries or to the next of kin;

(iii) Copies of DA documents that record the death of a soldier, a dependent, or a civilian employee will be released, on request, to that person's next of kin, life insurance carrier, and legal representative. A person acting on behalf of someone else concerned with the death (e.g., the executor of a will) may also obtain copies by submitting a written request that includes evidence of his or her representative capacity. That representative may give written consent for release to others; or

(iv) Papers relating to the pay and allowances or allotments of a present or

former soldier will be released to the soldier or his or her authorized representative. If the soldier is deceased, these papers will be released to the next of kin or legal representatives.

(3) *Civilian personnel records.* Civilian Personnel Officers (CPO) with custody of papers relating to the pay and allowances or allotments of current or former civilian employees will release them to the employee or his or her authorized representative. If the employee is deceased, these records will be released to the next of kin or legal representative. However, a CPO cannot release statements of witnesses, medical records, or other reports or documents pertaining to compensation for injuries or death of a DA civilian employee.

(4) *Accused persons.* Release of information to the public concerning accused persons before determination of the case. Such release may prejudice the accused's opportunity for a fair and impartial determination of the case. The following procedures apply:

(i) The following information concerning persons accused of an offense may be released by the convening authority to public news agencies or media. The accused's name, grade or rank, unit, regular assigned duties, and other information as allowed by AR 25–71, paragraph 3–3a. The substance or text of the offense of which the person is accused. The identity of the apprehending or investigating agency and the length or scope of the investigation before apprehension. The factual circumstances immediately surrounding the apprehension, including the time and place of apprehension, resistance, or pursuit. The type and place of custody, if any;

(ii) *Information that will not be released.* Before evidence has been presented in open court, subjective observations or any information not incontrovertibly factual will not be released. Background information or information relating to the circumstances of an apprehension may be prejudicial to the best interests of the accused, and will not be released unless it serves a law enforcement function. The following kinds of information will not be released: Observations or comments on an accused's character and demeanor, including those at the time of apprehension and arrest or during pretrial custody. Statements, admissions, confessions, or alibis attributable to an accused, or the fact of refusal or failure of the accused to make a statement. Reference to confidential sources, investigative techniques and procedures, investigator notes, and activity files. This includes reference to fingerprint tests, polygraph examinations, blood tests, firearms identification tests, or similar laboratory tests or examinations. Statements as to the identity, credibility, or testimony of prospective witnesses. Statements concerning evidence or argument in the case, whether or not that evidence or argument may be used at the trial. Any opinion on the accused's guilt. Any opinion on the possibility of a plea of guilty to the offense charged, or of a plea to a lesser offense;

(iii) *Other considerations.* Photographing or televising the accused. DA personnel should not encourage or volunteer assistance to news media in photographing or televising an accused or suspected person being held or transported in military custody. DA representatives should not make photographs of an accused or suspect available unless a law enforcement function is served. Requests from news media to take photographs during courts-martial are governed by AR 360–1;

(iv) *Fugitives from justice.* This section does not restrict the release of information to enlist public aid in apprehending a fugitive from justice; or

(v) *Exceptional cases.* Permission to release information from military personnel records to public news agencies or media may be requested from The Judge Advocate General (TJAG). Requests for information from military personnel records will be processed according to this part.

(5) *Litigation, tort claims, and contract disputes.* Release of information or records under this section are subject to the time limitations prescribed by the FOIA. The requester must be advised of the reasons for nonrelease or referral.

(i) *Litigation.* Each request for a record related to pending litigation involving the United States will be referred to the staff judge advocate or legal officer of the command. He or she will promptly inform the Litigation Division, U.S. Army Legal Services Agency (USALSA), of the substance of the request and the content of the record requested. (Mailing address: U.S. Army Litigation Center, 901 N. Stuart Street, Arlington, VA 22203–1837. If information is released for use in litigation involving the United States, the Chief, Army Litigation Division (AR 27–40, para 1–4d) must be advised of the release. He or she will note the release in such investigative reports. Information or records normally exempted from release (*i.e.*, personnel and medical records) may be releasable to the judge or court concerned, for use in litigation to which the United States is not a party. Refer such requests to the local staff judge advocate or legal officer, who will coordinate it with the Litigation Center, USALSA.

(ii) *Tort claims.* A claimant or a claimant's attorney may request a record that relates to a pending administrative tort claim filed against the DA. Refer such requests promptly to the claims approving or settlement authority that has monetary jurisdiction over the pending claim. These authorities will follow AR 27–20. The request may concern an incident in which the pending claim is not as large as a potential claim; in such a case, refer the request to the authority that has monetary jurisdiction over the potential claim. A potential claimant or his or her attorney may request information under circumstances clearly indicating that it will be used to file a tort claim, though none has yet been filed. Refer such requests to the staff judge advocate or legal officer of the command. That authority, when subordinate, will promptly inform the Chief, U.S. Army Claims Service (USACS), of the substance of the request and the content of the record. (Mailing address: U.S. Army Claims Service, ATTN: JACS–TCC, Fort George G. Meade, MD 20755–5360. IDA officials who receive requests will refer them directly to the Chief, USACS. They will also advise the requesters of the referral and the basis for it. The Chief, USACS, will process requests according to this part and AR 27–20, paragraph 1–10.

(iii) *Contract disputes.* Each request for a record that relates to a potential contract dispute or a dispute that has not reached final decision by the contracting officer will be treated as a request for procurement records and not as litigation. However, the officials will consider the effect of release on the potential dispute. Those officials may consult with the USALSA, Contract Appeals Division. (Mailing address: U.S. Army Legal Services Agency, ATTN: JALS–CA, 901 North Stuart Street, Arlington, VA 22203. If the request is for a record that relates to a pending contract appeal to the Armed Services Board of Contract Appeals, or to a final decision that is still subject to appeal (*i.e.*, 90 days have not lapsed after receipt of the final decision by the contractor) then the request will be: Treated as involving a contract dispute; and referred to the USALSA, Contract Appeals Division.

(6) *Special nuclear material.* Dissemination of unclassified information concerning physical protection of special nuclear material.

(i) Unauthorized dissemination of unclassified information pertaining to security measures, including security

plans, procedures, and equipment for the physical protection of special nuclear material, is prohibited under 10 U.S.C. 128.

(ii) This prohibition shall be applied by the Deputy Chief of Staff, G–3 as the IDA, to prohibit the dissemination of any such information only if and to the extent that it is determined that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of illegal production of nuclear weapons, theft, diversion, or sabotage of special nuclear materials, equipment, or facilities.

(iii) In making such a determination, Army personnel may consider what the likelihood of an illegal production, theft, diversion, or sabotage would be if the information proposed to be prohibited from dissemination were at no time available for dissemination.

(iv) Army personnel shall exercise the foregoing authority to prohibit the dissemination of any information described so as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security, and upon a determination that the unauthorized dissemination of such information could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of illegal production of nuclear weapons, theft, diversion, or sabotage of special nuclear materials, equipment, or facilities.

(v) Army employees shall not use this authority to withhold information from the appropriate committees of Congress.

(7) *Names and duty addresses.* Lists of names, including telephone directories, organizational charts, and/or staff directories published by installations or activities, and other personally identifying information will ordinarily be withheld when requested under the FOIA. This does not preclude a discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as general officers, public affairs officers, and other personnel designated as official command spokespersons. The IDA for telephone directories is delegated to the DA, FOIA/PA Office. Public Affairs Offices may, after careful analysis, release information determined to have legitimate news value, such as notices of personnel reassignments to new units or installations within the continental United States, results of selection/promotion boards, school graduations/completions, and awards and similar personal achievements. They may release the names and duty addresses of key officials, if such release is determined to be in the interests of advancing official community relation's functions.

(c) *Requests from government officials.* Requests from officials of State or local Governments for Army Activity records shall be considered the same as any other requester. Requests from members of Congress not seeking records on behalf of a Congressional Committee, Subcommittee, either House sitting as a whole, or made on behalf of their constituents shall be considered the same as any other requester. Requests from officials of foreign governments shall be considered the same as any other requester; however, Army Intelligence elements are statutorily prohibited from releasing records responsive to requests made by any foreign government or a representative of a foreign government. Requests from officials of foreign governments that do not invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

(d) *Privileged release outside of the FOIA to U.S. government officials.* Records exempt from release to the public under the FOIA may be disclosed in accordance with Army regulations to agencies of the Federal Government, whether legislative, executive, or administrative, as follows:

(1) In response to a request of a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoDD 5400.4. The Army implementing directive is AR 1–20. Commanders or chiefs will notify the Chief of Legislative Liaison of all releases of information to members of Congress or staffs of congressional committees. Organizations that in the normal course of business are required to provide information to Congress may be excepted. Handle requests by members of Congress (or staffs of congressional committees) for inspection of copies of official records as follows:

(i) National security classified records, follow AR 380–5;

(ii) Civilian personnel records, members of Congressional Committees, Subcommittees, or Joint Committees may examine official personnel folders to the extent that the subject matter falls within their established jurisdictions, as permitted by 5 CFR 297.401(i);

(iii) *Information related to disciplinary action.* This paragraph refers to records of trial by courts-martial; nonjudicial punishment of military personnel under the Uniform Code of Military Justice, Article 15; nonpunitive measures such as administrative reprimands and admonitions; suspensions of civilian employees; and similar documents. If DA has specific instructions on the request, the following will apply. Subordinate commanders will not release any information without securing the consent of the proper installation commander. The installation commander may release the information unless the request is for a classified or ''FOUO'' document. In that case the commander will refer the request promptly to the Chief of Legislative Liaison for action, including the recommendations of the transmitting agency and copies of the requested records with the referral.

(iv) *Military personnel records.* Only HQDA can release information from these records. Custodians will refer all requests from Congress directly and promptly to the Chief of Legislative Liaison, HQDA, Washington DC 20310–1600.

(v) *Criminal investigation records.* Only the Commanding General, U.S. Army Criminal Investigation Command (USACIDC), can release any USACIDC-originated criminal investigation file. For further information, see AR 195–2.

(vi) *Other exempt records.* Commanders or chiefs will refer requests for all other categories of exempt information directly to the Chief of Legislative Liaison. They will include a copy of the material requested and, as appropriate, recommendations concerning release or denial.

(vii) *All other records.* The commander or chief with custody of the records will furnish all other information promptly; to other Federal Agencies, both executive and administrative, as determined by the head of an Army Activity or designee; or in response to an order of a Federal court, Army Activities shall release information along with a description of the restrictions on its release to the public;

(viii) *Disciplinary actions and criminal investigations.* Requests for access to, or information from, the records of disciplinary actions or criminal investigations will be honored if proper credentials are presented. Representatives of the Office of Personnel Management may be given information from personnel files of employees actually employed at organizations or activities. Each such

request will be considered on its merits. The information released will be the minimum required in connection with the investigation being conducted.

(ix) *Other types of requests.* All other official requests received by DA elements from agencies of the executive branch (including other military departments) will be honored, if there are no compelling reasons to the contrary. If there are reasons to withhold the records, the requests will be submitted for determination of the propriety of release to the appropriate addresses shown in Appendix B of this part.

(2) Army Activities shall inform officials receiving records under the provisions of this section that those records are exempt from public release under the FOIA. Army Activities also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1–R, and information contained in Privacy Act systems of records is subject to DoD 5400.11–R.

(e) *Consultation with affected DoD component.* (1) When an Army Activity receives a FOIA request for a record in which an affected Army or DoD organization (including a Combatant Command) has a clear and substantial interest in the subject matter, consultation with that affected Army or DoD organization is required. As an example, where an Army Activity receives a request for records related to DoD operations in a foreign country, the cognizant Combatant Command for the area involved in the request shall be consulted before a release is made. Consultations may be telephonic, electronic, or in hard copy.

(2) The affected Activity shall review the circumstances of the request for host-nation relations, and provide, where appropriate, FOIA processing assistance to the responding DoD Component regarding release of information. Responding Army Activities shall provide copies of responsive records to the affected DoD Component when requested. The affected DoD Component shall receive a courtesy copy of all releases in such circumstances.

(3) Nothing in § 518.19 shall impede the processing of the FOIA request initially received by an Army Activity.

§ 518.16 Initial determinations.

(a) *Initial denial authority.* The DA officials are designated as the Army's only IDAs. Only an IDA, his or her delegate, or the Secretary of the Army can deny FOIA requests for DA records. Each IDA will act on direct and referred requests for records within his or her area of functional responsibility. (See the proper AR in the 10 series for full discussions of these areas. Included are records created or kept within the IDA's area of responsibility; records retired by, or referred to, the IDA's headquarters or office; and records of predecessor organizations. If a request involves the areas of more than one IDA, the IDA to whom the request was originally addressed will normally respond to it; however, the affected IDAs may consult on such requests and agree on responsibility for them. IDAs will complete all required coordination at initial denial level. This includes classified records retired to the NARA when a mandatory declassification review is necessary. Requests and/or responsive documents should not be sent to the DA FOIA/PA Office for initial denial authority or to forward to other offices within the DA.

(b) FOIA requesters may ultimately appeal if they are dissatisfied with adverse determinations. It is crucial to forward complete packets to the IDAs. Ensure cover letters list all attachments and describe from where the records were obtained, *i.e.*, a PA system of records (including the applicable systems notice), or other. If a FOIA action is complicated, include a chronology of events to assist the IDA in understanding what happened in the course of processing the FOIA request. If a file does not include documentation described below, include the tab, and insert a page marked ''not applicable'' or ''not used.'' The order and contents of FOIA file attachments follow: (Tab A or 1) The original FOIA request and envelope (if applicable); (Tab B or 2) The response letter; (Tab C or 3) Copies of all records entirely released, single-sided; (Tab D or 4) Copies of administrative processing documents, including extension letters and ''no records'' certificates, in chronological order; (Tab E or 5) Copies of all records partially released or entirely denied, single-sided. For partially released records, mark in yellow highlighter (or other readable highlighter) those portions withheld; and (Tab F or 6) Legal opinions(s).

(c) The initial determination of whether to make a record available or grant a fee waiver upon request may be made by any suitable official designated by the Army Activity in published regulations. The presence of the marking ''FOUO'' does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under this part is applicable and should be invoked. IDAs may delegate all or part of their authority to a division chief under its supervision within the Agency in the grade of 05/civilian equivalent. Requests for delegation authority below this level must be submitted, after coordination, to the DA FOIA/PA Office, with detailed justification, for approval. Such delegations must not slow FOIA actions. If an IDA's delegate denies a FOIA or fee waiver request, the delegate must clearly state that he or she is acting for the IDA and identify the IDA by name and position in the written response to the requester. IDAs will send only the names, offices, and telephone numbers of their delegates to the DA, FOIA/PA Office. IDAs will keep this information current.

(d) The officials designated by Army Activities to make initial determinations should consult with public affairs officers (PAOs) to become familiar with subject matters that are considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action may be challenged in the media. A FOIA release or denial action, appeal, or court review may generate public or press interest. In such case, the IDA (or delegate) should consult the Chief of Public Affairs or the command or organization PAO. The IDA should inform the PAO contacted of the issue and obtain advice and recommendations on handling its public affairs aspect. Any advice or recommendations requested or obtained should be limited to this aspect. Coordination must be completed within the statutory 20 working day FOIA response limit. (The point of contact for the Army Chief of Public Affairs is HQDA (SAPA–OSR), Washington DC 20310–1500). If the request involves actual or potential litigation against the United States, release must be coordinated with The Judge Advocate General (TJAG).

(e) The following officials are designated IDAs for the areas of responsibility outlined below:

(1) The Administrative Assistant to the Secretary of the Army is authorized to act for the Secretary of the Army on requests for all records maintained by the Office of the Secretary of the Army and its serviced activities as well as requests requiring the personal attention of the Secretary of the Army. This also includes civilian Equal Employment Opportunity (EEO) actions. (See DCS, G–1 for military Equal Opportunity (EO) actions). The Administrative Assistant to the Secretary of the Army has delegated its authority to the Chief

Attorney and Legal Services Directorate, U.S. Army Resources & Programs Agency. (See DCS, G–1 for military Equal Opportunity (EO) actions).

(2) The Assistant Secretary of the Army (Financial Management and Comptroller) is authorized to act on requests for finance and accounting records. Requests for CONUS finance and accounting records should be referred to the Defense Finance and Accounting Service (DFAS). The Chief Attorney and Legal Services Directorate, acts on requests for non-finance and accounting records of the Assistant Secretary of the Army (Financial Management and Comptroller).

(3) The Assistant Secretary of the Army (Acquisition, Logistics, & Technology) is authorized to act on requests for procurement records other than those under the purview of the Chief of Engineers and the Commander, U.S. Army Materiel Command. The Chief Attorney and Legal Services Directorate, acts on requests for non-procurement records of the Assistant Secretary of the Army (Acquisition, Logistics and Technology).

(4) The Deputy Assistant Secretary of the Army (Civilian Personnel Policy)/ Director of Civilian Personnel, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) is authorized to act on requests for civilian personnel records, personnel administration and other civilian personnel matters, except for EEO (civilian) matters which will be acted on by the Administrative Assistant to the Secretary of the Army. The Deputy Assistant Secretary of the Army (Civilian Personnel Policy)/Director of Civilian Personnel has delegated this authority to the Chief, Policy and Program Development Division.

(5) The Chief Information Officer, G–6 is authorized to act on requests for records pertaining to Army Information Technology, command, control communications and computer systems and the Information Resources Management Program (automation, telecommunications, visual information, records management, publications and printing).

(6) The Inspector General is authorized to act on requests for all Inspector General Records.

(7) The Auditor General is authorized to act on requests for records relating to audits done by the U.S. Army Audit Agency under AR 10–2. This includes requests for related records developed by the Audit Agency.

(8) The Director of the Army Staff is authorized to act on requests for all records of the Chief of Staff and its Field Operating Agencies. The Director of the Army Staff has delegated its authority to the Chief Attorney and Legal Services Directorate, U.S. Army Resources & Programs Agency. The Chief Attorney and Legal Services Director, U.S. Army Resources & Programs Agency acts on requests for records of the Chief of Staff and its Field Operating Agencies. (See TJAG for the (GOMO) actions).

(9) The Deputy Chief of Staff, G–3 is authorized to act on requests for records relating to International Affairs policy, planning, integration and assessments, strategy formulation, force development, individual and unit training policy, strategic and tactical command and control systems, nuclear and chemical matters, use of DA forces.

(10) The Deputy Chief of Staff, G–8 is authorized to act on requests for records relating to programming, material integration and externally directed reviews.

(11) The Office of the Deputy Chief of Staff, G–1 is authorized to act on the following records: Personnel board actions, Equal Opportunity (military) and sexual harassment, health promotions, physical fitness and well being, command and leadership policy records, HIV and suicide policy, substance abuse programs except for individual treatment records which are the responsibility of the Surgeon General, retiree benefits, services, and programs, (excluded are individual personnel records of retired military personnel, which are the responsibility of the U.S. Army Human Resources Command–St. Louis (AHRC–STL), DA dealings with Veterans Affairs, U.S. Soldier's and Airmen's Home, retention, promotion, and separation; recruiting and MOS policy issues, personnel travel and transportation entitlements, military strength and statistics, The Army Librarian, demographics, and Manprint.

(12) The Deputy Chief of Staff, G–4 is authorized to act on requests for records relating to DA logistical requirements and determinations, policy concerning materiel maintenance and use, equipment standards, and logistical readiness.

(13) The Chief of Engineers is authorized to act on requests for records involving civil works, military construction, engineer procurement, and ecology; and the records of the U.S. Army Engineer divisions, districts, laboratories, and field operating agencies.

(14) The Surgeon General, Commander, U.S. Army Medical Command, is authorized to act on requests for medical research and development records, and the medical records of active duty military personnel, dependents, and persons given physical examination or treatment at DA medical facilities, to include alcohol and drug treatment/test records.

(15) The Chief of Chaplains is authorized to act on requests for records involving ecclesiastical relationships, rites performed by DA chaplains, and nonprivileged communications relating to clergy and active duty chaplains' military personnel files.

(16) The Judge Advocate General is authorized to act on requests for records relating to claims, courts-martial, legal services, administrative investigations, and similar legal records. TJAG is also authorized to act on requests for the GOMO actions and records described elsewhere in this regulation, especially if those records relate to litigation in which the United States has an interest. In addition, TJAG is authorized to act on requests for records that are not within the functional areas of responsibility of any other IDA, including, but not limited to requests for records for Commands, and activities.

(17) The Chief, National Guard Bureau, is authorized to act on requests for all personnel and medical records of retired, separated, discharged, deceased, and active Army National Guard military personnel, including technician personnel, unless such records clearly fall within another IDA's responsibility. This authority includes, but is not limited to, National Guard organization and training files; plans, operations, and readiness files, policy files, historical files, files relating to National Guard military support, drug interdiction, and civil disturbances; construction, civil works, and ecology records dealing with armories, facilities within the States, ranges, etc. Equal Opportunity investigative records; aviation program records and financial records dealing with personnel, operation and maintenance, and equipment budgets.

(18) The Chief of Army Reserve is authorized to act on requests for all personnel and medical records of retired, separated, discharged, deceased, and reserve component military personnel, and all U.S. Army Reserve (USAR) records, unless such records clearly fall within another IDA's responsibility. Records under the responsibility of the Chief of Army Reserve include records relating to USAR plans, policies, and operations; changes in the organizational status of USAR units; mobilization and demobilization policies, active duty tours, and the Individual Mobilization Augmentation program.

(19) The Commander, United States Army Materiel Command (AMC) is authorized to act on requests for the

records of AMC headquarters and to subordinate commands, units, and activities that relate to procurement, logistics, research and development, and supply and maintenance operations.

(20) The Provost Marshal General (PMG) is authorized to act on all requests for provost marshal activities and law enforcement functions for the army, all matters relating to police intelligence, physical security, criminal investigations, corrections and internment (to include confinement and correctional programs for U.S. prisoners, criminal investigations, provost marshal activities, and military police support. The PMG is responsible for the Office of Security, Force Protection, and Law Enforcement Division and is the functional proponent for AR 190-series (Military Police) and 195-series (Criminal Investigation), AR 630–10 Absent Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings, and AR 633–30, Military Sentences to Confinement.

(21) The Commander, U.S. Army Criminal Investigation Command (USACIDC), is authorized to act on requests for criminal investigative records of USACIDC headquarters, its subordinate activities, and military police reports. This includes criminal investigation records, investigation-in-progress records, and all military police records and reports.

(22) The Commander, United States Army Human Resources Command (USAHRC), is authorized to act on requests for military personnel files relating to active duty (other than those of reserve and retired personnel) military personnel matters, personnel locator, physical disability determinations, and other military personnel administration records; records relating to military casualty and memorialization activities; heraldic activities, voting, records relating to identification cards, naturalization and citizenship, commercial solicitation, Military Postal Service Agency and Army postal and unofficial mail service.

(23) The Commander, USARC-StL has been delegated authority to act on behalf of the USAHRC for requests concerning all personnel and medical records of retired, separated, discharged, deceased, and reserve component military personnel, unless such records clearly fall within another IDA's authority. The authority does not include records relating to USAR plans, policies, and operations; changes in the organizational status of USAR units, mobilization and demobilization policies; active duty tours, and the individual mobilization augmentation program.

(24) The Assistant Chief of Staff for Installation Management (ACSIM) is authorized to act on requests for records relating to planning, programming, execution and operation of Army installations. This includes base realignment and closure activities, environmental activities other than litigation, facilities and housing activities, and installation management support activities.

(25) The Commander, United States Army Intelligence and Security Command, is authorized to act on requests for intelligence and security records, foreign scientific and technological records, intelligence training, intelligence threat assessments, and foreign liaison information.

(26) The Commander, U.S. Army Safety Center, is authorized to act on requests for Army safety records.

(27) The Commander, United States Army Test and Evaluation Command (ATEC), is authorized to act on requests for the records of ATEC headquarters, its subordinate commands, units, and activities that relate to test and evaluation operations.

(28) The General Counsel, Army and Air Force Exchange Service (AAFES), is authorized to act on requests for AAFES records, under AR 60–20/AFR 147–14.

(29) Special IDA authority for time-event related records may be designated on a case-by-case basis. These will be published in the **Federal Register.** You may contact the DA, FOIA/PA Office to obtain current information on special delegations.

(f) *Reasons for Not Releasing a Record.* The following are reasons for not complying with a request for a record under 5 U.S.C. 552(a)(3).

(1) *No Records.* A reasonable search of files failed to identify responsive records. The records custodian will prepare a detailed no records certificate. This certificate must include, at a minimum, what areas or offices were searched and how the search was conducted (manually, by computer, etc.). The certificate will be signed by the records custodian and will include his or her grade and title. The original certificate will be forwarded to the IDA. Preprinted ''check-the-block'' or ''fill-in-the-blank'' no records certificates are not authorized.

(2) *Referrals.* The request is transferred to another Army Activity or DoD Component, or to another Federal Agency.

(3) *Request Withdrawn.* The request is withdrawn by the requester.

(4) *Fee-Related Reason.* The requester is unwilling to pay fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with the fee estimate.

(5) *Records not Reasonably Described.* A record has not been described with sufficient particularity to enable the Army or DoD Component to locate it by conducting a reasonable search.

(6) *Not a Proper FOIA Request for Some Other Reason.* The requester has failed unreasonably to comply with procedural requirements, other than fee-related, imposed by this part or Army Activity supplementing regulations.

(7) *Not an Agency Record.* The information requested is not a record within the meaning of the FOIA and this part.

(8) *Duplicate Request.* The request is a duplicate request (e.g., a requester asks for the same information more than once). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, and courier) at the same or different times.

(9) *Other (Specify).* Any other reason a requester does not comply with published rules other than those outlined in paragraphs (f)(1) through (8) of this section.

(10) *Partial or Total Denial.* The record is denied in whole or in part in accordance with procedures set forth in the FOIA.

(g) *Denial tests.* To deny a requested record that is in the possession and control of an Army Activity, it must be determined that the record is exempt under one or more of the exemptions of the FOIA. An outline of the FOIA's exemptions is contained in subpart C of this part.

(h) *Reasonably segregable portions.* Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester when it reasonably can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. Unless indicating the extent of the deletion would harm an interest protected by an exemption, the amount of deleted information shall be indicated on the released portion of paper records by use of brackets or darkened areas indicating removal of information. In no case shall the deleted areas be left ''white'' without the use of brackets to show the bounds of deleted information. In the case of electronic deletion, or deletion in audiovisual or microfiche records, if technically feasible, the amount of redacted information shall be indicated at the place in the record such deletion was made, unless including the indication would harm an interest protected by the

exemption under which the deletion is made. This may be done by use of brackets, shaded areas, or some other identifiable technique that will clearly show the limits of the deleted information. When a record is denied in whole, the response advising the requester of that determination will specifically state that it is not reasonable to segregate portions of the record for release.

(i) *Response to requester.* Whenever possible, initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 20 working days after receipt of a proper request by the official designated to respond. When an Army Activity has a significant number of pending requests which prevent a response determination within the 20 working day period, the requester shall be so notified in an interim response, and advised whether their request qualifies for the fast track or slow track within the Army Activity's multitrack processing system. Requesters who do not meet the criteria for fast track processing shall be given the opportunity to limit the scope of their request in order to qualify for fast track processing.

(1) When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with preliminary procedural requirements.

(2) When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the name and title or position of the official who made the determination, and shall explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal. The requester specifically shall be informed of the exemptions on which the denial is based, inclusive of a brief statement describing what the exemption(s) cover. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable Executive Order criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. The requester shall also be advised of the opportunity and procedures for appealing an unfavorable determination to a higher final authority within the Army Activity. The IDA will inform the requester of his or her right to appeal, in whole or part, the denial of the FOIA or fee waiver request and that the appeal must be sent through the IDA to the Secretary of the Army (ATTN: OGC).

(3) The final response to the requester should contain information concerning the fee status of the request, consistent with the provisions of subpart F, of this part. When a requester is assessed fees for processing a request, the requester's fee category shall be specified in the response letter. Activities also shall provide the requester with a complete cost breakdown (e.g., 115 pages of office reproduction at $0.15 per page; 5 minutes of computer search time at $43.50 per minute, 3 hours of professional level search at $44 per hour, etc.) in the response letter.

(4) The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this part; e.g., 5 U.S.C. 552 (b)(1). Merely referring to a classification; to a ''FOUO'' marking on the requested record; or to this part or an Army Activity's regulation does not constitute a proper citation or explanation of the basis for invoking an exemption.

(5) When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

(6) When denying a request for records, in whole or in part, an Army Activity shall make a reasonable effort to estimate the volume of the records denied and provide this estimate to the requester, unless providing such an estimate would harm an interest protected by an exemption of the FOIA. This estimate should be in number of pages or in some other reasonable form of estimation, unless the volume is otherwise indicated through deletions on records disclosed in part.

(7) When denying a request for records in accordance with a statute qualifying as a FOIA exemption 3 statute, Army Activities shall, in addition to stating the particular statute relied upon to deny the information, also state whether a court has upheld the decision to withhold the information under the particular statute, and a concise description of the scope of the information being withheld.

(j) *Extension of time.* In unusual circumstances, when additional time is needed to respond to the initial request, the Army Activity shall acknowledge the request in writing within 20 working days, describe the circumstances requiring the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional working days, except as provided below:

(1) With respect to a request for which a written notice has extended the time limits by 10 additional working days, and the Activity determines that it cannot make a response determination within that additional 10 working day period, the requester shall be notified and provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request. Refusal by the requester to reasonably modify the request or arrange for an alternative time frame shall be considered a factor in determining whether exceptional circumstances exist with respect to Army Activity's request backlogs. Exceptional circumstances do not include a delay that results from predictable activity backlogs, unless the Army Activity demonstrates reasonable progress in reducing its backlog.

(2) Unusual circumstances that may justify delay are: The need to search for and collect the requested records from other facilities that are separate from the office determined responsible for a release or denial decision on the requested information; the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are requested in a single request; and the need for consultation, which shall be conducted with all practicable speed, with other agencies having a substantial interest in the determination of the request, or among two or more Army Activities or DoD Components having a substantial subject-matter interest in the request.

(3) Army Activities may aggregate certain requests by the same requester, or by a group of requesters acting in concert, if the Army Activity reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances set forth in paragraph (j)(2) of this section, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated. If the requests are aggregated under these conditions, the requester or requesters shall be so notified.

(4) In cases where the statutory time limits cannot be met and no informal extension of time has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester with a request that he agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the

initial decision after it is made. Army Activities are reminded that the requester still retains the right to treat this delay as a de facto denial with full administrative remedies. Only the responsible IDA can extend it, and the IDA must first coordinate with the OGC.

(5) As an alternative to the taking of formal extensions of time the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

(k) *Misdirected requests.* Misdirected requests shall be forwarded promptly to the Army Activity or other Federal Agency with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester shall not begin until the request is received by the Army Activity that manages the records requested.

(l) *Records of non-U.S. Government source.* When a request is received for a record that falls under exemption 4, that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, the source of the record or information [also known as ''the submitter'' for matters pertaining to proprietary data under 5 U.S.C. 552, FOIA, Exemption (b)(4)] and E.O. 12600], shall be notified promptly of that request and afforded reasonable time (14 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4) of 5 U.S.C. 552, The FOIA. If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under FOIA. When a substantial issue has been raised, the Army Activity may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making an agency determination. When the source seeks a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request normally shall not be taken until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the submitter shall be promptly notified of this action.

(1) If the submitted information is a proposal in response to a solicitation for a competitive proposal, and the proposal is in the possession and control of DA (see 10 U.S.C. 2305(g)), the proposal shall not be disclosed, and no submitter notification and subsequent analysis is required. The proposal shall be withheld from public disclosure pursuant to 10 U.S.C. 2305(g) and exemption (b)(3) of the FOIA. This statute does not apply to bids, unsolicited proposals, or any proposal that is set forth or incorporated by reference in a contract between an Army Activity and the offeror that submitted the proposal. In such situations, normal submitter notice shall be conducted except for sealed bids that are opened and read to the public. The term, proposal, means information contained in or originating from any proposal, including a technical, management, or cost proposal submitted by an offeror in response to solicitation for a competitive proposal, but does not include an offeror's name or total price or unit prices when set forth in a record other than the proposal itself. Submitter notice, and analysis as appropriate, are required for exemption (b)(4) matters that are not specifically incorporated in 10 U.S.C. 2305(g).

(2) If the record or information was submitted on a strictly voluntary basis, absent any exercised authority that prescribes criteria for submission, and after consultation with the submitter, it is absolutely clear that the record or information would customarily not be released to the public, the submitter need not be notified. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Records or information submitted under these authorities are not voluntary in nature. When it is not clear whether the information was submitted on a voluntary basis, absent any exercised authority, and whether it would customarily be released to the public by the submitter, notify the submitter and ask that it describe its treatment of the information, and render an objective evaluation. If the decision is made to release the information over the objection of the submitter, notify the submitter and afford the necessary time to allow the submitter to seek a restraining order, or take court action to prevent release of the record or information.

(3) The coordination provisions of this section also apply to any non-U.S. Government record in the possession and control of the Army or DoD from multi-national organizations, such as the North Atlantic Treaty Organization (NATO), United Nations Commands, the North American Aerospace Defense Command (NORAD), the Inter-American Defense Board, or foreign governments. Coordination with foreign governments under the provisions of this section may be made through Department of State, or the specific foreign embassy.

(m) *File of initial denials.* Copies of all initial withholdings or denials shall be maintained by each Army Activity in a form suitable for rapid retrieval, periodic statistical compilation, and management evaluation. Records denied for any of the reasons contained in § 518.20 shall be maintained for a period of six years to meet the statute of limitations requirement. Records will be maintained in accordance with AR 25–400–2.

(n) *Special mail services.* Army Activities are authorized to use registered mail, certified mail, certificates of mailing, and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence. The requester shall be notified that they are responsible for the full costs of special services.

(o) *Receipt accounts.* The Treasurer of the United States has established two accounts for FOIA receipts, and all money orders or checks remitting FOIA fees should be made payable to the U.S. Treasurer. These accounts shall be used for depositing all FOIA receipts, except receipts for industrially funded and non-appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Industrially funded and non-appropriated funded activity FOIA receipts shall be deposited to the applicable fund.

(1) Receipt Account 3210 Sale of Publications and Reproductions, FOIA. This account shall be used when depositing funds received from providing existing publications and forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles. Deliver collections within 30 calendar days to the servicing finance and accounting office.

(2) Receipt Account 3210 Fees and Other Charges for Services, FOIA. This account is used to deposit search fees,

fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could not be filled with existing publications or forms.

§ 518.17 Appeals.

(a) *General.* If the official designated by the Army Activity to make initial determinations on requests for records declines to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision may be appealed by the requester, in writing, to a designated appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disapproval of a request for waiver or reduction of fees, disputes regarding fee estimates, review on an expedited basis a determination not to grant expedited access to agency records, for no record determinations when the requester considers such responses adverse in nature, not providing a response determination to a FOIA request within the statutory time limits, or any determination found to be adverse in nature by the requester. Upon an IDA's receipt of a no records determination appeal, the IDA will direct the records custodian to conduct another records search and certify, in writing, that it has made a good faith effort that reasonably could be expected to produce the information requested. If no records are again found, the original no records certificate will be forwarded to the IDA for inclusion in the appeals packet. When denials have been made under the provisions of the FOIA and the PA, and the denied information is contained in a PA system of records, appeals shall be processed under both the FOIA and the PA. If the denied information is not maintained in a PA system of records, the appeal shall be processed under the FOIA. If a request is merely misaddressed, and the receiving Army Activity or DoD Component simply advises the requester of such and refers the request to the appropriate Army or DoD Component, this shall not be considered a no record determination.

(1) Appeals of adverse determinations from denial of records or ''no record'' determination, received by Army IDAs must be forwarded through the denying IDA to the Secretary of the Army (ATTN: OGC). On receipt of an appeal, the IDA will—

(i) Send the appeal to the Office of the Secretary of the Army, OGC, together with a copy of the documents that are the subject of the appeal. The cover letter will list all attachments and describe from where the records were obtained, i.e., a PA system of records (including the applicable systems notice, or other. If a file does not include documentation described below, include the tab, and insert a page marked ''not applicable'' or ''not used.'' The order and contents of FOIA file attachments follow: (Tab A or 1) The original FOIA request and envelope (if applicable); (Tab B or 2) The IDA denial letter; (Tab C or 3) Copies of all records entirely released, single-sided; (Tab D or 4) Copies of administrative processing documents, including extension letters and ''no records'' certificates, in chronological order; (Tab E or 5) Copies of all records partially denied or completely denied, single-sided. For records partially denied, mark in yellow highlighter (or other readable highlighter) those portions withheld; and (Tab F or 6) Legal opinions(s); and

(ii) Assist the OGC as requested during his or her consideration of the appeal.

(2) Appeals of denial of records made by the OGC, AAFES, shall be made to the Secretary of the Army when the Commander, AAFES, is an Army officer. Appeals of denial of records made by the OGC, AAFES, shall be made to the Secretary of the Air Force when the Commander is an Air Force officer.

(b) *Time of receipt.* A FOIA appeal has been received by an Army Activity when it reaches the office of an appellate authority having jurisdiction, the OGC. Misdirected appeals should be referred expeditiously to the OGC.

(c) *Time limits.* The requester shall be advised to file an appeal so that it is postmarked no later than 60 calendar days after the date of the initial denial letter. If no appeal is received, or if the appeal is postmarked after the conclusion of this 60-day period, the case may be considered closed. However, exceptions to the above may be considered on a case-by-case basis. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the date of the final response. Records that are denied shall be retained for a period of six years to meet the statute of limitations requirement. Final determinations on appeals normally shall be made within 20 working days after receipt. When an Army Activity has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multitrack processing system, based at a minimum, on the three processing tracks established for initial requests. All of the provisions of the FOIA apply also to appeals of initial determinations, to include establishing additional processing queues as needed.

(d) *Delay in responding to an appeal.* If additional time is needed due to the unusual circumstances the final decision may be delayed for the number of working days (not to exceed 10), that were not used as additional time for responding to the initial request. If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The Army Activity will continue to process the case expeditiously.

(e) *Response to the requester.* When the appellate authority (OGC) makes a final determination to release all or a portion of records withheld by an IDA, a written response and a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees. Final refusal of an appeal must be made in writing by the appellate authority or by a designated representative. The response, at a minimum, shall include the following:

(1) The basis for the refusal shall be explained to the requester in writing, both with regard to the applicable statutory exemption or exemptions invoked under provisions of the FOIA, and with respect to other appeal matters;

(2) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification;

(3) The final denial shall include the name and title or position of the official responsible for the denial;

(4) In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain

meaningful portions that are reasonably segregable;

(5) When the denial is based upon an exemption 3 statute, the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld; or

(6) The response shall advise the requester of the right to judicial review.

(f) *Consultation.* Final refusal involving issues not previously resolved or that the Army Activity knows to be inconsistent with rulings of other DoD Components ordinarily should not be made before consultation with the Army OGC. Tentative decisions to deny records that raise new or significant legal issues of potential significance to other Agencies of the Government shall be provided to the Army OGC.

§ 518.18 Judicial actions.

(a) This section states current legal and procedural rules for the convenience of the reader. The statements of rules do not create rights or remedies not otherwise available, nor do they bind the DA or DoD to particular judicial interpretations or procedures. A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component or an appellate designee or when the Army Activity has failed to respond within the time limits prescribed by the FOIA and in this part.

(b) The requester may bring suit in the U.S. District Court in the district, in which the requester resides or is the requester's place of business, in the district in which the record is located, or in the District of Columbia.

(c) The burden of proof is on the Army Activity to justify its refusal to provide a record. The court shall evaluate the case de novo (anew) and may elect to examine any requested record in camera (in private) to determine whether the denial was justified.

(d) When an Army Activity has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, to include negotiating with the requester to modify the scope of their request, the court may retain jurisdiction and allow the Activity additional time to complete its review of the records.

(1) If the court determines that the requester's complaint is substantially correct, it may require the U. S. to pay reasonable attorney fees and other litigation costs.

(2) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether Army Activity personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit Systems Protection Board shall conduct an investigation to determine whether or not disciplinary action is warranted. The Army Activity is obligated to take the action recommended by the special counsel.

(3) The court may punish the responsible official for contempt when an Army Activity fails to comply with the court order to produce records that it determines have been withheld improperly.

(e) *Non-U. S. Government source information.* A requester may bring suit in an U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. Such source shall be notified promptly of the court action. When the source advises that it is seeking court action to prevent release, the Army Activity shall defer answering or otherwise pleading to the complainant as long as permitted by the Court or until a decision is rendered in the court action of the source, whichever is sooner.

(f) *FOIA litigation.* Personnel responsible for processing FOIA requests at the DoD Component level shall be aware of litigation under the FOIA. Such information will provide management insights into the use of the nine exemptions by Component personnel. Whenever a complaint under the FOIA is filed in an U.S. District Court, the Army Activity named in the complaint shall forward a copy of the complaint by any means to HQDA, OTJAG (DAJA–LT), with an information copy to the Army OGC. In the DA, HQDA OTJAG (DAJA–LT), WASH D.C. 20310–2210 is also responsible for forwarding this information to the Office of the Army OGC and to the DA FOIA/PA Office.

(1) *Bases for FOIA Lawsuits.* In general, there are four categories of complaints in a FOIA lawsuit: failure to respond to a request within time frames established in the FOIA statute; challenge to the adequacy of search for responsive records; challenge to application of a FOIA Exemption; and procedural challenges, such as application of waiver of fees. The guidance below is intended to cover all categories of complaints. In responding to litigation support requests, bear in mind the type of complaint that has given rise to the lawsuit and provide information, which addresses the specific reason(s) for the complaint.

(2) *Responsibility for FOIA litigation.* For the Army, under the general oversight of the OGC, FOIA litigation is the responsibility of the General Litigation Branch, Army Litigation Division. If you are notified of a FOIA lawsuit involving the Army, contact the General Litigation Branch immediately at: U.S. Army Litigation Center, General Litigation Branch (JALS–LTG), 901 North Stuart Street, Suite 700, Arlington, VA 22203–1837. The General Litigation Branch will provide guidance on gathering information and assembling a litigation report necessary to respond to FOIA litigation.

(3) *Litigation reports for FOIA lawsuits.* As with any lawsuit, the Army Litigation Division and DOJ will require a litigation report. This report should be prepared with the assistance, and under the supervision of, the legal advisor. For general guidance on litigation reports, see Army Regulation 27–40, paragraph 3–9. Unlike the usual 60-day time period to respond to complaints under the Federal Rules of Civil Procedure, complaints under the FOIA must be answered within 30 days of the service of the complaint. Therefore, it is imperative to contact the Litigation Division immediately and to begin preparing the litigation report without delay.

(4) *Specific guidance for FOIA litigation reports.* The following is specific guidance for preparing a litigation report in FOIA Litigation. The required material should be indexed and assembled under the following categories:

(i) *Statement of facts.* (Tab A). Provide a chronological statement of all facts related to the FOIA request, beginning with receipt of the request, responses to the request, and searches for responsive records. The statement of facts should refer to supporting enclosed exhibits whenever possible.

(ii) *Responses to pleadings.* (Tab B). If you have been provided a copy of the complaint, provide a line-by-line answer to the factual statements in the pleadings, along with recommendations on whether to admit or deny the allegation.

(iii) *Memorandum of law.* (Tab C). No memorandum of law is necessary in FOIA lawsuits. If records were withheld, provide a written statement explaining the FOIA Exemption used to withhold the information and the rationale for its application in the particular facts of your case. Include

here a copy of any legal review regarding the withholding of the records.

(iv) *Potential witness information.* (Tab D). List the names, addresses, telephone number, facsimile number and e-mail addresses of all potential witnesses. At a minimum, this must include all of the following: the FOIA Officer or Coordinator or other person responsible for processing FOIA requests; the individual(s) who actually conducted the search for responsive records; the legal advisor(s) who reviewed or provided advice on the request; and the point of contact at any office or agency to which the FOIA request was referred.

(v) *Exhibits.* (Tab E). Provide copies of all correspondence regarding the FOIA request. This includes all correspondence between the agency and the requester, including any enclosures; any referrals or forwarding of the request to other agencies or offices; copies of all documents released to the requester pursuant to the request in litigation. If any information is withheld or redacted, provide a complete copy of all withheld information. Identify withheld information by placing brackets around all information withheld and note in the margins of the document the specific FOIA exemption applied to deny release of the document; all records and correspondence forwarded to the IDA, if applicable; all appeals by the requester; if the withheld document is classified, provide a summary of each document withheld. The Summary of classified documents should include the following:

(A) The classification of the document;

(B) The date of the document;

(C) The number of pages of the document;

(D) The author or creator of the document;

(E) The intended or actual recipient of the document;

(F) The subject of the document and an unclassified description of the document sufficient to inform the court of the nature of the contents of the document; and

(G) An explanation of the reason for withholding, including the specific provision(s) of Executive Order 12,958 which permit classification of the information.

(vi) *Draft declarations.* (Tab F). A declaration is a statement for use in litigation made under penalty of perjury pursuant to specific statutory authority (28 U.S.C. 1746) which need not be notarized. Declarations may be used by the Army to support a motion to dismiss or to grant summary judgment. Depending on the basis for the lawsuit, with the assistance of their legal advisor, witnesses should prepare a draft declaration to be included with the litigation report.

(vii) The following is some general guidance on the content of a declaration in FOIA litigation. Identify the declarant and describe his or her qualifications and responsibilities as they relate to the FOIA; provide a statement indicating that the declarant is familiar with the specific request and the general subject matter of the records; include a statement of the searcher's understanding of the exact nature of the request, including any modification (narrowing or expanding the search based on communications with the requester); generally, the factual portion of the declaration should be organized as a chronological statement beginning with receipt of the request; provide a specific description of the system of records searched; and provide a description of procedures used to search for the requested records, (manual search of records, computer database search, etc.). This portion of the declaration is especially important when no records are found. The declaration must reflect an adequate and reasonable search for records in locations where responsive records are likely to be found.

(5) *Special guidance for initial denial authorities.* If any information was withheld, the IDA or person with specific knowledge of the withholding must provide a specific statement of any Exemptions to the FOIA, which were applied to the records.

(i) *Withheld records.* For withheld records, describe in reasonably specific detail all records or parts of records withheld. If the number of records is extensive, use an index of the records and consider numbering the documents to facilitate reference. It is also permissible (and frequently helpful) to include redacted portions of records withheld as attachments or exhibits to the declarations.

(ii) *Exemptions.* Include in the declaration a specific statement demonstrating that all the elements of each FOIA exemption are met.

(iii) *Segregation.* The FOIA requires that all information not subject to an exemption to the FOIA, which can be reasonably segregated from exempt information, must be released to FOIA requesters. In any instance where an entire document is withheld, the individual authorizing the withholding must specifically address that segregation and release of non-exempt material was not possible without rendering the record essentially meaningless. If applicable, this issue must be specifically addressed in the declaration.

(iv) *Sound Legal Basis.* Army policy promotes careful consideration of FOIA requests and discretionary decisions to disclose information protected under the FOIA. Discretionary disclosures should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. The decision to withhold records, in whole or in part, otherwise exempt from disclosure under the FOIA must exhibit a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

Subpart F—Fee Schedule

§ 518.19 General provisions.

(a) *Authorities.* The FOIA, as amended; the Paperwork Reduction Act (44 U.S.C. 35), as amended; the PA of 1974, as amended; the Budget and Accounting Act of 1921 and the Budget and Accounting Procedures Act, as amended (see 31 U.S.C.); and 10 U.S.C. 2328).

(b) *Application.* The fees described in this Subpart apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines. They reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as DoD 7000.14–R, which does not supersede the collection of fees under the FOIA. Nothing in this subpart shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records. A ''statute specifically providing for setting the level of fees for particular types of records'' (5 U.S.C. 552 FOIA, (a)(4)(A)(vi)) means any statute that enables a Government Agency such as the GPO or the NTIS, to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

(1) The term ''direct costs'' means those expenditures an Activity actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

(2) The term ''search'' includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions thereof are responsive to the request. Activities should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Activity and the requester. For example, Activities should not engage in line-by-line searches, when duplicating an entire document known to contain responsive information, would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time.

(3) The term ''duplication'' refers to the process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper copy, microfiche, audiovisual, or machine-readable documentation (*e.g.*, magnetic tape or disc), among others. Every effort will be made to ensure that the copy provided is in a form that is reasonably useable, the requester shall be notified that the copy provided is the best available and that the Activity's master copy shall be made available for review upon appointment. For duplication of computer-stored records, the actual cost, including the operator's time, shall be charged. In practice, if an Activity estimates that assessable duplication charges are likely to exceed $25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with Activity personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(4) The term ''review'' refers to the process of examining documents located in response to a FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does not include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may be assessed only for the initial review. Activities may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption, which is subsequently determined not to apply, may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(c) *Fee restrictions.* No fees may be charged by any Army Activity if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the exception of requesters seeking documents for a commercial use, Activities shall provide the first two hours of search time, and the first one hundred pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved two hours and fifteen minutes of search time, and resulted in one hundred and twenty-five pages of documents, an Activity would determine the cost of only ten minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than the cost to the Activity for billing the requester and processing the fee collected, no charges would result.

(1) Requesters receiving the first two hours of search and the first one hundred pages of duplication without charge are entitled to such only once per request. Consequently, if an Activity, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another Army Activity or DoD Component, or another Federal Agency for action their portion of the request, the referring Activity shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

(2) The elements to be considered in determining the ''cost of collecting a fee'' are the administrative costs to the Activity of receiving and recording a remittance, and processing the fee for deposit in the Department of Treasury's special account. The cost to the Department of Treasury to handle such remittance is negligible and shall not be considered in the Activity's determinations.

(3) For the purposes of these restrictions, the word ''pages'' refers to paper copies of a standard size, which will normally be ''8½ x 11'' or ''11 x 14''. Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction.

(4) In the case of computer searches, the first two free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal $40.00 (two hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time. In the event the direct operating cost of the hardware configuration cannot be determined, computer search shall be based on the salary scale of the operator executing the computer search.

(d) *Fee waivers.* Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters when the Activity determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of DA and is not primarily in the commercial interest of the requester.

(1) When assessable costs for a FOIA request total $15.00 or less, fees shall be waived automatically for all requesters, regardless of category.

(2) Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis. Disclosure of the information ''is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government.''

(i) Activities should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of DA or DoD. Requests for records in the possession of the Army or DoD, which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value, will likely not contribute to public understanding of the operations or activities of either DA or DoD. An example of such records might be press clippings, magazine

articles, or records forwarding a particular opinion or concern from a member of the public regarding an Army or DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of either DA or DoD; however, the age of a particular record shall not be the sole criteria for denying relative significance under this factor. It is possible to envisage an informative issue concerning the current activities of DA or DoD, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester's stated purpose for desiring the records and the potential for public understanding of the operations and activities of DA or DoD.

(ii) The informative value of the information to be disclosed requires a close analysis of the substantive contents of a record, or portion of the record, to determine whether disclosure is meaningful, and shall inform the public on the operations or activities of DA or DoD. While the subject of a request may contain information that concerns operations or activities of DA or DoD, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily redacted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of DA or DoD must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of DA or DoD.

(iii) The contribution to an understanding of the subject by the general public is likely to result from disclosure that will inform, or have the potential to inform the public, rather than simply the individual requester or small segment of interested persons. The identity of the requester is essential in this situation in order to determine whether such requester has the capability and intention to disseminate the information to the public. Mere assertions of plans to author a book, researching a particular subject, doing doctoral dissertation work, or indigence are insufficient without demonstrating the capacity to further disclose the information in a manner that will be informative to the general public. Requesters should be asked to describe their qualifications, the nature of their research, the purpose of the requested information, and their intended means of dissemination to the public.

(iv) Activities must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding, which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing previously unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public? A decision regarding significance requires objective judgment, rather than subjective determination, and must be applied carefully to determine whether disclosure will likely lead to a significant public understanding of the issue. Activities shall not make value judgments as to whether the information is important enough to be made public.

(3) Disclosure of the information ''is not primarily in the commercial interest of the requester.''

(i) If the request is determined to be of a commercial interest, Activities should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profit-making organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether the requester is of a commercial nature, Activities may draw inference from the requester's identity and circumstances of the request. Activities are reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefit must clearly override any personal or non-profit interest.

(ii) Once a requester's commercial interest has been determined, Activities should then determine if the disclosure would be primarily in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest becomes secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest primarily of a commercial nature.

(4) Activities are reminded that the factors and examples used in this section are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to whether to charge or waive the fee cannot be clearly resolved, Activities should rule in favor of the requester.

(5) In addition, the following additional circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

(i) A record is voluntarily created to prevent an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested; or

(ii) A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (*e.g.* $15.00—$30.00).

(e) *Fee assessment.* Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

(1) In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, Activities shall adhere to the following procedures:

(i) Each request must be analyzed to determine the category of the requester. If the Activity determination regarding the category of the requester is different than that claimed by the requester, the Activity should notify the requester to provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category

justification from the requester, and within a reasonable period of time (*i.e.*, 30 calendar days), the Activity shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination. The requester should be advised that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the Activity;

(ii) Requesters should submit a fee declaration appropriate for the below categories. Commercial requesters should indicate a willingness to pay all search, review and duplication costs. Educational or Noncommercial Scientific Institution or News Media requesters should indicate a willingness to pay duplication charges, if applicable, in excess of 100 pages if more than 100 pages of records are desired. All other requesters should indicate a willingness to pay assessable search and duplication costs;

(iii) Activities must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Activities, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Activities' actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement;

(iv) No Army Activity may require advance payment of any fee; *i.e.*, payment before work is commenced or continued on a request, unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.00. As used in this sense, a timely fashion is 30 calendar days from the date of billing (the fees have been assessed in writing) by the Activity;

(v) Where an Activity estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00, the Activity shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment;

(vi) Where a requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 calendar days from the date of the billing), the Activity may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, and to make an advance payment of the full amount of the estimated fee before the Activity begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717, and confirmed with respective Finance and Accounting Offices;

(vii) After all work is completed on a request, and the documents are ready for release, Activities may request payment before forwarding the documents, particularly for those requesters who have no payment history, or for those requesters who have failed previously to pay a fee in a timely fashion (*i.e.*, within 30 calendar days from the date of the billing;

(viii) The administrative time limits of the FOIA will begin only after the Activity has received a willingness to pay fees and satisfaction as to category determination, or fee payments (if appropriate); and

(ix) Activities may charge for time spent searching for records, even if that search fails to locate records responsive to the request. Activities may also charge search and review (in the case of commercial requesters) time if records located are determined to be exempt from disclosure. In practice, if the Activity estimates that search charges are likely to exceed $25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with Activity personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(2) *Commercial Requesters.* Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commercial use. Requesters must reasonably describe the records sought.

(i) The term ''commercial use'' request refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, Activities must determine the use to which a requester will put the documents requested. Moreover, where an Activity has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Activities should seek additional clarification before assigning the request to a specific category.

(ii) When Activities receive a request for documents for commercial use, they should assess charges, which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters (unlike other requesters) are not entitled to two hours of free search time, nor 100 free pages of reproduction of documents. Moreover, commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. However, because use is the exclusive determining criteria, it is possible to envision a commercial enterprise making a request that is not for commercial use. It is also possible that a non-profit organization could make a request that is for commercial use. Such situations must be addressed on a case-by-case basis.

(3) *Educational institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters must reasonably describe the records sought. The term ''educational institution'' refers to a pre-school, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. Fees shall be waived or reduced in the public interest if the criteria above have been met.

(4) *Non-Commercial Scientific Institution Requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. Requesters must reasonably describe the records sought. The term ''non-commercial scientific institution'' refers to an institution that is not operated on a ''commercial'' basis and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(5) *Activities shall provide documents to requesters for the cost of duplication alone, excluding charges for the first 100 pages.* To be eligible for inclusion in these categories, requesters must

show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly (from an educational institution) or scientific (from a non-commercial scientific institution) research.

(6) *Representatives of the news media.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought.

(i) The term ''representative of the news media'' refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (*e.g.*, electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of ''freelance'' journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but Activities may also look to the past publication record of a requester in making this determination.

(ii) To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (e) (6) (i) of this section, and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

(iii) ''Representative of the news media'' does not include private libraries, private repositories of Government records, information vendors, data brokers or similar marketers of information whether to industries and businesses, or other entities.

(7) *All Other Requesters.* Activities shall charge requesters who do not fit into any of the categories, fees which recover the full direct cost of searching for and duplicating records, except that the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought. Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for duplication. Activities are reminded that this category of requester may also be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest as defined in paragraph (6) (ii) in this section.

(f) *Aggregating requests.* Except for requests that are for a commercial use, an Activity may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When an Activity reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, the agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests made over a longer period, however, such a presumption becomes harder to sustain and Activities should have a solid basis for determining that aggregation is warranted in such cases. Activities are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may Activities aggregate multiple requests on unrelated subjects from one requester.

(g) *Debt Collection Act of 1982 (Pub. L. 97–365).* The Debt Collection Act provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Activities may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as prescribed in 31 U.S.C. 3717. Activities should verify the current interest rate with respective Finance and Accounting Offices. After one demand letter has been sent, and 30 calendar days have lapsed with no payment, Activities may submit the debt to respective Finance and Accounting Offices for collection pursuant to the Debt Collection Act.

(h) *Computation of fees.* The fee schedule shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. Costs shall be computed on time actually spent. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized. The appropriate fee category of the requester shall be applied before computing fees. DD Form 2086 (Record of Freedom of Information (FOI) Processing Cost) will be used to annotate fees for processing FOIA information.

(i) *Refunds.* In the event that an Activity discovers that it has overcharged a requester or a requester has overpaid, the Activity shall promptly refund the charge to the requester by reimbursement methods that are agreeable to the requester and the Activity.

§ 518.20 Collection of fees and fee rates.

(a) *Collection of fees.* Collection of fees will be made at the time of providing the documents to the requester or recipient when the requester specifically states that the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs. Collection of fees may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the Activity, or the Activity has determined that the fee will be in excess of $250.

(b) *Search time.*

(1) *Costs for manual searches.*

Type	Grade	Hourly rate ($)
Clerical	E9/GS 8 and below.	20
Professional	1–06/GS 9–GS 15.	44
Executive	07/ST/SL/SES–1 and above.	75
Contractor	.....	44

(2) *Computer Search.* Fee assessments for computer search consists of two parts; individual time (hereafter referred to as human time), and machine time.

(i) *Human time.* Human time is all the time spent by humans performing the necessary tasks to prepare the job for a machine to execute the run command. If execution of a run requires monitoring by a human, that human time may be also assessed as computer search. The terms ''programmer/operator'' shall not be limited to the traditional programmers or operators. Rather, the terms shall be interpreted in their broadest sense to incorporate any human involved in performing the computer job (e.g. technician, administrative support, operator, programmer, database administrator, or action officer).

(ii) *Machine time.* Machine time involves only direct costs of the Central Processing Unit (CPU), input/output devices, and memory capacity used in the actual computer configuration. Only this CPU rate shall be charged. No other machine related costs shall be charged. In situations where the capability does not exist to calculate CPU time, no machine costs can be passed on to the requester. When CPU calculations are not available, only human time costs shall be assessed to requesters. Should Army Activities lease computers, the services charged by the lesser shall not be passed to the requester under the FOIA.

(c) *Duplication Costs.*

Type	Cost per page (cents)
Pre-printed material	.02
Office Copy	.15
Microfiche	.25
Computer copies (tapes, discs or printouts).	Actual cost of duplicating the tape, disc or printout (includes operator's time and cost of the medium)

(d) Review Time Costs (in the case of commercial requesters).

Type	Grade	Hourly rate ($)
Clerical	E9/GS 8 and below.	20
Professional	01–06/GS 9–GS 15.	44
Executive	07/ST/SL/SES–1 and above.	75
Contractor	.....	44

(e) *Audiovisual Documentary Materials.* Search costs are computed as for any other record. Duplication cost is the actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality. Army audiovisual materials are referred to as ''visual information.''

(f) *Other Records.* Direct search and duplication cost for any record not described above shall be computed in the manner described for audiovisual documentary material.

(g) *Costs for Special Services.* Complying with requests for special services is at the discretion of the Activities. Neither the FOIA, nor its fee structure cover these kinds of services. Therefore, Activities may recover the costs of special services requested by the requester after agreement has been obtained in writing from the requester to pay for one or more of the following services:

(1) Certifying that records are true copies; and/or

(2) Sending records by special methods such as express mail, etc.

§ 518.21 Collection of fees and fee rates for technical data.

(a) *Fees for technical data.* Technical data, other than technical data that discloses critical technology with military or space application, if required to be released under the FOIA, shall be released after the person requesting such technical data pays all reasonable costs attributed to search, duplication and review of the records to be released. Technical data, as used in this section, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software, or data incidental to contract administration, such as financial and/or management information. Army Activities shall retain the amounts received by such a release, and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request. All reasonable costs as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full costs shall include all direct and indirect costs to conduct the search and to duplicate the records responsive to the request. This cost is to be differentiated from the direct costs allowable for other types of information released under the FOIA. DD Form 2086–1 will be used to annotate fees for technical data. The form is available through normal publication channels.

(b) *Waiver.* Activities shall waive the payment of costs described in paragraph (a) of this section, which are greater than the costs that would be required for release of this same information if the request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer, or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States. However, Activities may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

(1) The release of technical data is requested in order to comply with the terms of an international agreement; or,

(2) The Activity determines that such a waiver is in the interest of the United States.

(c) *Fee Rates.*

(1) Costs for a manual search of technical data.

Type	Grade	Hourly rate ($)
Clerical	E9/GS 8 and below.	13.25
Minimum Charge.	.....	8.30

Notes: Professional and Executive (To be established at actual hourly rate prior to search. A minimum charge will be established at ½ hourly rates.

(2) Computer search is based on the total cost of the cpu, input-output devices, and memory capacity of the actual computer configuration. The wage for the computer operator and/or programmer determining how to conduct, and subsequently executing the search will be recorded as part of the computer search.

(d) *Duplication Costs for technical data.*

Type	Cost ($)
Aerial photograph, maps, specifications, permits, charts, blueprints, and other technical engineering documents	2.50
Engineering data (microfilm).	

Type	Cost ($)
a. Aperture cards	
Silver duplicate negative, per card	.75
When key punched and verified, per card	.85
Diazo duplicate negative, per card	.65
When key punched and verified, per card	.75
b. 35 mm roll film, per frame	.50
c. 16 mm roll film, per frame	.45
d. Paper prints (engineering drawings), each	1.50
e. Paper reprints of microfilm indices, each	.10

(e) *Review time costs of technical data.*

Type	Grade	Hourly rate ($)
Clerical	E9/GS 8 and below.	13.25
Minimum Charge		8.30

Notes: Professional and Executive (To be established at actual hourly rate prior to search. A minimum charge will be established at ½ hourly rates.

(f) *Other Technical Data Records.* Charges for any additional services not specifically consistent with Volume 11A of DoD 7000.14–R, shall be made by Activities at the following rates:

Type	Cost ($)
1. Minimum charge for office copy (up to six images)	3.50
2. Each additional image	.10
3. Each typewritten page	3.50
4. Certification and validation with seal, each	5.20
5. Hand-drawn plots and sketches, each hour or fraction thereof	12.00

Subpart G—Reports

§ 518.22 Reports control.

(a) *General.* (1) The Annual FOIA Report is mandated by the statute and reported on a fiscal year basis. Due to the magnitude of the requested statistics and the need to ensure accuracy of reporting, Army Activities shall track this data as requests are processed. This will also facilitate a quick and accurate compilation of statistics. Army Activities shall forward their report to DA, FOIA/PA Office, no later than October 15 following the fiscal year's close. It may be submitted electronically and via hard copy accompanied by a computer diskette. In turn, DA and DoD will produce a consolidated report for a submission to the Attorney General and ensure that a copy of the consolidated report is placed on the Internet for public access.

(2) Existing Army standards and registered data elements are to be utilized to the greatest extent possible in accordance with the provisions of DoD 8320.1–M, ''Data Administration Procedures.''

(3) The reporting requirement outlined is assigned Report Control Symbol DD–DA&M(A)1365, FOIA Report to Congress.

(b) *Reporting time.* Each DA IDA shall prepare statistics and accumulate paperwork for the preceding fiscal year on those items prescribed for the annual report. The IDAs will follow guidelines below and submit the information to the DA, FOIA/PA Office, on or before the 15th day of each October.

(1) Each reporting activity will submit the information requested on the DD Form 2564, ''Annual Report Freedom of Information Act.'' The form is available through normal publication channels.

(2) Each IDA will submit the information requested on the DD Form 2564, excluding items 3, 4, and 9c.

(3) The Judge Advocate General (DAJA) and Chief of Engineers (COE) will submit the information requested on the Form DD 2564, item 9c.

(4) The General Counsel (SAGC) will submit the information requested on the DD Form 2564, items 3 and 4.

(5) The DA, FOIA/PA Office will compile the data submitted in the Army's Annual Report. This report will be submitted to the DoD Office for Freedom of Information and Security Review on or before the 30th day of each November.

§ 518.23 Annual report content.

The current edition of DD Form 2564 shall be used to submit Activity input. Instructions for completion follows:

(a) *ITEM 1 Initial Request Determinations.* Please note that initial PA requests, which are also processed as initial FOIA requests, are reported here.

(1) *Total requests processed.* Enter the total number of initial FOIA requests responded to (completed) during the fiscal year. This should include pending cases at the end of the prior fiscal year, Total Actions is the sum of Items 1b through 1e, on the DD Form 2564. This total may exceed Total Requests Processed.

(2) *Granted in full.* Enter the total number of initial FOIA requests responded to that were granted in full during the fiscal year. (This may include requests granted by your office, yet still requiring action by another office).

(3) *Denied in part.* Enter the total number of initial FOIA requests responded to and denied in part based on one or more of the FOIA exemptions. (Do not report ''Other Reason Responses'' as a partial denial here, unless a FOIA exemption is also used).

(4) *Denied in full.* Enter the total number of initial FOIA requests responded to and denied in full based on one or more of the FOIA exemptions. (Do not report ''Other Reason Responses'' as denials here, unless a FOIA exemption is also used).

(5) *''Other reason'' responses.* Enter the total number of initial FOIA requests in which you were unable to provide all or part of the requested information based on an ''Other Reason'' response.

(6) *Total actions.* Enter the total number of FOIA actions taken during the fiscal year. This number will be the sum of items 1b, through 1e. Total Actions must be equal to or greater than the number of Total Requests Processed.

(b) *ITEM 2 Initial Request Exemptions and Other Reasons.* (1) *Exemptions invoked on initial request determinations.* Enter the number of times an exemption was claimed for each request that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of (*3*) and (*4*), above. The (b)(7) exemption is reported by subcategories (A) through (F): (A) Interfere with Enforcement; (B) Fair Trial Right; (C) Invasion of Privacy; (D) Protect Confidential Source; (E) Disclose Techniques, and (F) Endanger Life or Safety.

(2) *''Other Reasons'' Cited on Initial Determinations.* Identify the ''Other Reason'' response cited when responding to a FOIA request and enter the number of times each was claimed.

(i) *No records.* Enter the number of times a reasonable search of files failed to identify records responsive to subject request.

(ii) *Referrals.* Enter the number of times a request was referred to another DoD Component or Federal Agency for action.

(iii) *Request withdrawn.* Enter the number of times a request and/or appeal was withdrawn by a requester.

(iv) *Fee-related reason.* Requester is unwilling to pay the fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with a fee estimate.

(v) *Records not reasonably described.* Enter the number of times a FOIA request could not be acted upon since the record had not been described with sufficient particularity to enable the Army Activity to locate it by conducting a reasonable search.

(vi) *Not a proper FOIA request for some other reason.* Enter the number of

times the requester has failed unreasonably to comply with procedural requirements, other than fee-related imposed by this part or an Army Activity's supplementing regulation.

(vii) *Not an agency record.* Enter the number of times a requester was provided a response indicating the requested information was not a record within the meaning of the FOIA and this part.

(viii) *Duplicate request.* Record number of duplicate requests closed for that reason (*e.g.*, request for the same information by the same requester). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, and courier) at the same or different times.

(ix) *Other (Specify).* Any other reason a requester does not comply with published rules, other than those reasons outlined in paragraphs (b)(2)(i) through (viii) of this section.

(x) *Total.* Enter the sum of paragraphs (b)(2)(i) through (ix) of this section, in the block provided on the form (total other reasons). This number will be equal to or greater than the number in item 1e on the report form, since more than one reason may be claimed for each ''Other Reason'' response.

(3) *(b)(3) Statutes invoked on initial determinations.* Identify the number of times you have used a specific statute to support each (b)(3) exemption. List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure you cite the specific sections of the acts invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 2a on the report form.

(c) *ITEM 3 Appeal determinations.* Please note that PA appeals, which are also processed as FOIA appeals, are reported here.

(1) *Total appeal responses.* Enter the total number of FOIA appeals responded to (completed) during the fiscal year.

(2) *Granted in full.* Enter the total number of FOIA appeals responded to and granted in full during the year.

(3) *Denied in part.* Enter the total number of FOIA appeals responded to and denied in part based on one or more of the FOIA exemptions. (Do not report ''Other Reason Responses'' as a partial denial here, unless a FOIA exemption is used also.)

(4) *Denied in full.* Enter the total number of FOIA appeals responded to and denied in full based on one or more of the FOIA exemptions. (Do not report ''Other Reason Responses'' as denials here, unless a FOIA exemption is used also).

(5) *''Other reason'' responses.* Enter the total number of FOIA appeals in which you were unable to provide the requested information based on an ''Other Reason'' response.

(6) *Total actions.* Enter the total number of FOIA appeal actions taken during the fiscal year. This number will be the sum of items 3b, through 3e, and should be equal to or greater than the number of Total Appeal Responses, item 3a on the report form.

(d) *ITEM 4 Appeal exemptions and other reasons.* (1) *Exemptions Invoked on Appeal Determinations.* Enter the number of times an exemption was claimed for each appeal that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of items 3c, and 3d on the report form. Note that the (b)(7) exemption is reported by subcategory (A) through (F): (A) Interfere with Enforcement; (B) Fair Trial Right; (C) Invasion of Privacy; (D) Protect Confidential Source; (E) Disclose Techniques, and (F) Endanger Life or Safety.

(2) *''Other reasons'' cited on appeal determinations.* Identify the ''Other Reason'' response cited when responding to a FOIA appeal and enter the number of times each was claimed. This number may be equal to or possibly greater than the number in item 3e on the report form, since more than one reason may be claimed for each ''Other Reason'' response.

(3) *(b)(3) Statutes invoked on appeal determinations.* Identify the number of times a specific statute has been used to support each (b)(3) exemption identified in item 4a on the report form DD 2564. List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure citation to the specific sections of the statute invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 4a on the report form.

(e) *ITEM 5 Number and median age of initial cases pending:*

(1) *Total initial cases pending:*

(i) *Beginning and ending report period:* Midnight, 2400 hours, September 30, of the Preceding Year—or—0001 hours, October 1, is the beginning of the report period. Midnight, 2400 hours, is the close of the reporting period.

(ii) The number for the beginning report period must be the same number reported as of the end of the report period from the previous report.

(2) *Median age of initial requests pending*: Report the median age in days (including holidays and weekends) of initial requests pending.

(3) *Examples of median calculation.*

(i) If given five cases aged 10, 25, 35, 65, and 100 days from date of receipt as of the previous September 30th, the total requests pending is five (5). The median age (days) of open requests is the middle, not average value, in this set of numbers (10, 25, 35, 65, and 100), 35 (the middle value in the set).

(ii) If given six pending cases, aged 10, 20, 30, 50, 120, and 200 days from date of receipt, as of the previous September 30th, the total requests pending is six (6). The median age (days) of open requests 40 days (the mean [average] of the two middle numbers in the set, in this case the average of middle values 30 and 50).

(4) *Accuracy of Calculations.* Activities must ensure the accuracy of calculations. As backup, the raw data used to perform calculations should be recorded and preserved. This will enable recalculation of median [and mean values] as necessary. Activities may require subordinate elements to forward raw data, as deemed necessary and appropriate.

(5) *Average.* If an Activity believes that ''average'' (mean) processing time is a better measure of performance, then report ''averages'' (means) as well as median values (e.g., with data reflected and plainly labeled on plain bond as an attachment to the report). However, ''average'' (mean) values will not be included in the consolidated Army report unless all Activities report it.

(f) *ITEM 6 Number of Initial Requests Received During the Fiscal Year.* Enter the total number of initial FOIA requests received during the reporting period (fiscal year being reported).

(g) *ITEM 7 Types of Requests Processed and Median Age.* Information is reported for three types of initial requests completed during the reporting period: Simple; Complex; and Expedited Processing. The following items of information are reported for these requests:

(1) *Total Number of Initial Requests.* Enter the total number of initial requests processed [completed] during the reporting period (fiscal year) by type (Simple, Complex and Expedited

Processing) in the appropriate row on the form.

(2) *Median Age (Days).* Enter the median number of days [calendar days including holidays and weekends] required to process each type of case (Simple, Complex and Expedited Processing) during the period in the appropriate row on the form.

(3) *Example.* Given seven initial requests, multitrack—simple completed during the fiscal year, aged 10, 25, 35, 65, 79, 90 and 400 days when completed. The total number of requests completed was seven (7). The median age (days) of completed requests is 65, the middle value in the set.

(h) *ITEM 8 Fees collected from the public.* Enter the total amount of fees collected from the public during the fiscal year. This includes search, review and reproduction costs only.

(i) *ITEM 9 FOIA program costs.* (1) *Number of full time staff.* Enter the number of personnel your agency had dedicated to working FOIA full time during the fiscal year. This will be expressed in work-years [man-years]. For example: ''5.1, 3.2, 1.0, 6.5, et al.''

TABLE 7–1.—SAMPLE COMPUTATION OF WORK YEARS FOR FULL TIME STAFF

Employee	Number of months worked	Work-years	Note
Smith, Jane	6	.50	Hired full time at middle of fiscal year
Public, John Q.	4	.34	Dedicated to full time FOIA processing last quarter of the fiscal year
Brown, Tom	12	1.00	Worked FOIA full time all fiscal year
Totals	22	1.84	

(2) *Number of part time staff.* Enter the number of personnel your agency had dedicated to working FOIA part time during the fiscal year. This will be expressed in work-years [man-years]. For example: ''5.1, 3.2, 1.0, 6.5, et al.''

TABLE 7–2.—COMPUTATION OF WORK YEARS FOR PART TIME STAFF

Employee	Number of months worked	Work-years	Note
Public, John Q.	200	.1	Amount of time devoted to part time FOIA processing before becoming full time FOIA processor in previous example
White, Sally	400	.2	Processed FOIAs part time while working as paralegal in General Counsel's Office
Peters, Ron	1,000	.5	Part time employee dedicated to FOIA processing
Totals	1,600/2,000 (hours worked in a year) equals 0.8 work-years		

(3) *Estimated Litigation Cost.* Report your best estimate of litigation costs for the FY. Include all direct and indirect expenses associated with FOIA litigation in U.S. District Courts, U.S. Circuit Courts of Appeals, and the U.S. Supreme Court.

(4) *Total Program Cost.* Report the total cost of FOIA program operation within your agency. Include your litigation costs in this total. While you do not have to report detailed cost information as in the past, you should be able to explain the techniques by which you derived you agency's total cost figures if the need arises.

(i) Before the close of each fiscal year, the DoD OFOISR will dispatch the latest OSD Composite Rate Chart for military personnel to DoD Components. This information may be used in computing military personnel costs.

(ii) Army Activities should compute their civilian personnel costs using rates from local Office of Personnel Management (OPM) Salary Tables and shall add 16% for benefits.

(iii) Data captured on DD Form 2086, and DD Form 2086–1, shall be summarized and used in computing total costs.

(iv) An overhead rate of 25% shall be added to all calculated costs for supervision, space, and administrative support.

(j) *ITEM 10 Authentication.* The official that approves the agency's report submission to DA will sign and date; enter typed name and duty title; and provide both the agency's name and phone number for questions about the report. The consolidated Annual FOIA Report will be made available to the public in electronic format by DoD.

APPENDIX A to Part 518—References

(a) *References.*

(1) AR 1–20 Legislative Liaison;

(2) AR 20–1 Inspector General Activities and Procedures;

(3) AR 25–1 The Army Information Management;

(4) AR 25–11 Record Communications and the Privacy Communications System;

(5) AR 25–400–2 The Army Records Information Management System (ARIMS);

(6) AR 27–20 Claims;

(7) AR 36–2 Audit Reports and Follow-up;

(8) AR 40–66 Medical Record Administration and Health Care Documentation;

(9) AR 40–68 Quality Assurance Administration;

(10) AR 40–400 Patient Administration;

(11) AR 195–2 Criminal Investigation Activities;

(12) AR 25–71 The Army Privacy Program;

(13) AR 360–1 The Army Public Affairs Program;

(14) AR 380–5 Department of the Army Information Security Program;

(15) AR 381–10 U.S. Army Intelligence Activities;

(16) AR 381–12 Subversion and Espionage Directed Against The U.S. Army (SAEDA);

(17) AR 381–20 The Army Counterintelligence Program;
(18) AR 530–1 Operations Security (OPSEC);
(19) AR 600–85 Army Substance Abuse Program; and
(20) AR 608–18 The Army Family Advocacy Program.
(b) *Related publications.* A related publication is merely a source of additional information. The user does not have to read it to understand this part.
(1) AR 10–5 Headquarters, Department of the Army;
(2) AR 27–10 Military Justice;
(3) AR 27–40 Litigation;
(4) AR 27–60 Intellectual Property;
(5) AR 60–20 Army and Air Force Exchange Service Operating Policies AFR 147–14;
(6) AR 70–31 Standards for Technical Reporting;
(7) AR 190–45 Law Enforcement Reporting;
(8) AR 380–10 Foreign Disclosure and Contacts with Foreign Representatives;
(9) AR 381–45 Investigative Records Repository;
(10) AR 385–40 Accident Reporting and Records;
(11) DA Pam 25–30 Consolidated Army Publications and Index Forms;
(12) DA Pam 25–51 The Army Privacy Program—System of Records Notices and Exemption Rules;
(13) DoD Directive 5100.3 Support of the Headquarters of Combatant and Subordinate Joint Commands, November 15, 1999;
(14) DoD Directive 5230.24 Distribution Statements on Technical Documents, March 18, 1987;
(15) DoD Directive 5230.25 Withholding of Unclassified Technical Data From Public Disclosure, November 6, 1984;
(16) DoD Directive 5230.9 Clearance of DoD Information for Public Release, April 9, 1996;
(17) DoD Directive 5400.4 Provision of Information to Congress, January 30, 1978;
(18) DoD Directive 5400.7 DoD Freedom of Information Act (FOIA) Program, September 29, 1997;
(19) DoD Directive 5400.11 DOD Privacy Program, December 13, 1999;
(20) DoD Directive 7650.1 Government Accountability Office (GAO) and Comptroller General Access to Records, September 11, 1997;
(21) DoD Directive 7650.2 Government Accountability Office Reviews and Reports, July 13, 2000;
(22) DoD Directive 8910.1 Management and Control of Information Requirements, June 11, 1993;
(23) DoD Federal Acquisition Regulation Supplement (DFARS), Part 227 Patents, Data, and Copyrights. See also 48 CFR part 227;
(24) Department of Defense Financial Management Regulation (Reimbursable Operations, Policy and Procedures) Volume 11A, April 2003 authorized by DoD Instruction 7000.14, DoD Financial Management Policy and Procedures, November 15, 1992;
(25) DoD Instruction 5400.10 OSD Implementation of DoD Freedom of Information Act Program, January 24, 1991;
(26) DoD 5200.1–R Information Security Program, January 1997, authorized by DoD Directive 5200.1, December 13, 1996, DoD Information Security Program;
(27) DoD 5400.7–R DoD Freedom of Information Act Program, September 4, 1998;
(28) DoD 5400.11–R Department of Defense Privacy Program, August 1983, authorized by DoD Directive 5400.11, December 13, 1999, DoD Privacy Program;
(29) Executive Order 12600 Predisclosure Notification Procedures for Confidential Commercial Information, June 23, 1987, 52 FR 23781;
(30) Public Law 86–36 National Security Information Exemption, Codified at 50 U.S.C. 402, as amended;
(31) Public Law 104–191 Health Insurance Portability and Accountability Act of 1996, Codified at 42 U.S.C. 1171–1179, as amended;
(32) Section 822 of the National Defense Authorization Act for FY 90 and 91 (Pub. L. 101–189, November 29, 1989: 103 Stat. 1382, 1503);
(33) 5 U.S.C. 551–559, Administrative Procedures Act;
(34) 5 U.S.C. 552, as amended: public information; agency rules, opinions, orders, records, and proceedings. (FOIA);
(35) 5 U.S.C. 552a, as amended: records about individuals, (PA of 1974);
(36) 10 U.S.C. 128, Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information;
(37) 10 U.S.C. 130, Authority to Withhold from Public Disclosure Certain Technical Data;
(38) 10 U.S.C. 130(b), Personnel in Overseas, Sensitive, or Routinely Deployable Units: nondisclosure of personally identifying information;
(39) 10 U.S.C. 1102(f), Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants;
(40) 10 U.S.C. 2305(g) Prohibition on Release of Contractor Proposals;
(41) 10 U.S.C. 2320–2321, Rights in Technical Data;
(42) 10 U.S.C. 2328, Release of Technical Data under Freedom of Information Act: Recovery of Costs;
(43) 17 U.S.C. 106, Exclusive Rights in Copyrighted Works;
(44) 18 U.S.C. 798, Disclosure of Classified Information;
(45) 18 U.S.C. 3500, The Demands for Production of Statements and Reports of Witnesses (The Jencks Act);
(46) 31 U.S.C. 3717, Interest and Penalty on Claims;
(47) 32 CFR part 518, The Army FOIA Program;
(48) 35 U.S.C. 181–188, Secrecy of Certain Inventions and Filing of Application in Foreign Country;
(49) 41 U.S.C. 423, Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information;
(50) 42 U.S.C. 2162, Classification and Declassification of Restricted Data;
(51) 44 U.S.C. 3301–3324, Disposal of Records;
(52) 45 CFR part 164, Security and Privacy of Individually Identifiable Health Information; and
(53) 50 U.S.C. 403–3, War and National Defense, Protection of Intelligence Sources and Methods.

APPENDIX B to Part 518—Addressing FOIA Requests

(a) *General.* Army records may be requested from those Army officials who are listed in 32 CFR part 518 (see appendix A). Contact the DA FOIA/PA Office, to coordinate the referral of requests if there is uncertainty as to which Army activity may have the records. Send requests to particular installations or organizations as follows:
(1) Current publications and records of DA field commands, installations, and organizations. See also: *http://books.army.mil/.*
(2) Send the request to the commander of the command, installation, or organization, to the attention of the FOIA Official.
(3) Consult AR 25–400–2 (ARIMS) for more detailed listings of all record categories kept in DA offices.
(4) Contact the installation or organization public affairs officer for help if you cannot determine the official within a specific organization to whom your request should be addressed.
(b) *Department of the Army publications.* Send requests for current administrative, training, technical, and supply publications to the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161. NTIS handles general public requests for unclassified, uncopyrighted, and nondistribution-restricted Army publications not sold through the Superintendent of Documents.
(c) *Military personnel records.* Send requests for military personnel records of information as follows:
(1) Army Reserve personnel not on active duty and retired personnel—Commander, U.S. Army Human Resources Command, St. Louis, 1 Reserve Way, St. Louis, MO 63132–5200.
(2) Army officer personnel discharged or deceased after July 1, 1917 and Army enlisted personnel discharged or deceased after November 1, 1912—Director, National Personnel Records Center, 9700 Page Ave., St. Louis, MO 63132–5100.
(3) Army personnel separated before the dates specified in paragraph (2), above—Old Military and Civilian Records Unit (Archives 1), National Archives and Records Administration, Washington, DC 20408–0001.
(4) Army National Guard officer personnel—Chief, National Guard Bureau. Army National Guard enlisted personnel—Adjutant General of the proper State.
(5) Active duty commissioned and warrant officer personnel—Commander, U.S. Army Human Resources Command, ATTN: AHRC–FOI, Alexandria, VA 22332–0404. Active duty enlisted personnel—Commander, U.S. Army Enlisted Records and Evaluation Center, ATTN: PCRE–RP, 8899 East 56th Street, Indianapolis, IN 46249–5301.
(d) *Medical records.*
(1) Medical records of non-active duty military personnel. Use the same addresses as for military personnel records.

(2) Medical records of military personnel on active duty. Address the medical treatment facility where the records are kept. If necessary request locator service.

(3) Medical records of civilian employees and all dependents. Address the medical treatment facility where the records are kept. If the records have been retired, send requests to the Director, National Personnel Records Center, Civilian Records Facility, 111 Winnebago St., St. Louis, MO 63118–4199.

(e) *Legal records.*

(1) Records of general courts-martial and special courts-martial in which bad conduct discharge was approved. For cases not yet forwarded for appellate review, apply to the staff judge advocate of the command having jurisdiction over the case. For cases forwarded for appellate review and for old cases, apply to the U.S. Army Legal Services Agency, ATTN: JALS–CCO, 901 North Stuart Street, Arlington, VA 22203.

(2) Records of special courts-martial not involving a bad conduct discharge. These records are kept for 10 years after completion of the case. If the case was completed within the past three years, apply to the staff judge advocate of the headquarters where it was reviewed. If the case was completed from 3 to 10 years ago, apply to the National Personnel Records Center (Military Records), 9700 Page Ave., St. Louis, MO 63132–5100. If the case was completed more than 10 years ago, the only evidence of conviction is the special courts-martial order in the person's permanent records.

(3) Records of summary courts-martial. Locally maintained records are retired 3 years after action of the supervisory authority. Request records of cases less than 3 years old from the staff judge advocate of the headquarters where the case was reviewed. After 10 years, the only evidence of conviction is the summary courts-martial order in the person's permanent records.

(4) Requests submitted under paragraphs (e) (2) and (3), of this appendix. These requests will be processed in accordance with subpart E of this part. The IDA is The Judge Advocate General, HQDA (DAJA–CL), Washington, DC 20310–2200.

(5) Administrative settlement of claims. Apply to the Chief, U.S. Army Claims Service, ATTN: JACS–TC, Building 4411, Llewellyn Avenue, Fort George G. Meade, MD 20755–5360.

(6) Records involving debarred or suspended contractors. Apply to U.S. Army Legal Services Agency (JALS–PF), 901 North Stewart Street, Arlington, VA 22203.

(7) Records of all other legal matters (other than records kept by a command, installation, or organization staff judge advocate). Apply to HQDA (DAJA–AL), Washington, DC 20310–2200.

(f) *Civil works program records.* Civil works records include those relating to construction, operation, and maintenance for the improvement of rivers, harbors, and waterways for navigation, flood control, and related purposes, including shore protection work by the Army. Apply to the proper division or district office of the Corps of Engineers. If necessary to determine the proper office, contact the Commander, U.S. Army Corps of Engineers, 20 Massachusetts Avenue, ATTN: CECC–K, Washington, DC 20314–1000.

(g) *Civilian personnel records.* Send requests for personnel records of current civilian employees to the employing installation. Send requests for personnel records of former civilian employees to the Director, National Personnel Records Center, Civilian Records Facility, 111 Winnebago St., St. Louis, MO 63118–4199.

(h) *Procurement records.* Send requests for information about procurement activities to the contracting officer concerned or, if not feasible, to the procuring activity. If the contracting officer or procuring activity is not known, send inquiries as follows:

(1) Army Materiel Command procurement: Commander, U.S. Army Materiel Command, ATTN: AMCID–F, 5001 Eisenhower Ave., Alexandria, VA 22333–0001.

(2) Corps of Engineers procurement: Commander, U.S. Army Corps of Engineers, 20 Massachusetts Avenue, ATTN: CECC–K, Washington, DC 20314–1000.

(3) All other procurement: HQDA (DAJA–KL), 2200 Army Pentagon, Washington, DC 20310–2200.

(i) *Criminal investigation files.* Send requests involving criminal investigation files to the Commander, U.S. Army Criminal Investigation Command, ATTN: CICR–FP, 6010 6th St., Bldg. #1465, Ft. Belvoir, VA 22060–5585. Only the Commanding General, USACIDC, can release any USACIDC-originated criminal investigation file.

(j) *Personnel security investigation files and general Army intelligence records.* Send requests for personnel security investigation files, intelligence investigation and security records, and records of other Army intelligence matters to the Commander, U.S. Army Intelligence and Security Command, ATTN: IAMG–CIC–FOI/PO, 4552 Pike Road, Fort George G. Meade, MD 20755–5995.

(k) *Inspector General records.* Send requests involving records within the Inspector General system to HQDA (SAIG–ZXL), 1700 Army Pentagon, Washington, DC 20310–1700. AR 20–1 governs such records.

(l) *Army records in Government records depositories.* Non-current Army records are in the National Archives of the United States, Washington, DC 20408–0001; in Federal Records Centers of NARA; and in other records depositories. Requesters must write directly to the heads of these depositories for copies of such records. A list of pertinent records depositories is published in AR 25–400–2, table 10–1.

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Making supplemental appropriations for fiscal year 2006 for the Small Business Administration's disaster loans program, and for other purposes. (Feb. 18, 2006; 120 Stat. 189)

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